PETITIONER:
GULAM ABBAS & ORS.

Vs.

RESPONDENT:
STATE Of U.P. & ORS.

DATE OF JUDGMENT03/11/1981

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
DESAI, D.A.
SEN, A.P. (J)

CITATION:
1981 AIR 2198 1982 SCR (1)1077
1982 SCC (1) 71 1981 SCALE (3)1707
CITATOR INFO :
R 1984 SC 51 (15)
R 1988 SC 93 (1)

ACT:
Constitution of India, 1950, Articles 25 and 26-Right in enjoy the religious faith and performance of religious rites, practices and observances on certain plots and properties belonging to Shia community, which have already been adjudicated, determined and declared in their earlier litigation-Whether such a right is enforceable through a petition under Article 32 of the Constitution-Scope of Article 32.
Res judicata, bar of-Civil Procedure Code, section 11, explained.

HEADNOTE:
Uttar Pradesh Muslim Wakf Act, 1960 (Act XVI of 1960) repealing Uttar Pradesh Muslim Wakf Act, 1936 (Act XIII of 1936-Legal position as to the finality of Survey Reports and effect of registration of Wakfs already made under the earlier Act long before it was repealed-Words and phrases "Every other Wakf " in section 29 of the 1960 Act, meaning of.
Criminal Procedure Code, 1973, section 144-Whether an order made under section 144 Criminal Procedure Code is judicial or quasi-judicial order or whether it is passed in exercise of an executive power in performance of executive function amenable to writ jurisdiction under Article 32 of the Constitution-Nature and power under the section and what it authorises the executive magistracy to do and in what circumstances, explained.
In Mohalla Doshipura of Varanasi city, there are two sects of Mohamedans-the Shias and the Sunnis. Both the sects revere the martyrdom of Hazrat Imam Hasan and Hazrat Imam Hussain, grand-sons of Prophet Mohammed, during the Moharram but in a different manner. Nine plots bearing Nos. 245, 246, 247, 248/23/72, 602, 603, 602/1133, 246/1134 and 247/1130 in the said Mohalla and buildings and structures thereon belong to the Shia Waqf of Mohalla Doshipura. Shias of that Mohalla numbering about 4000 constitute a religious denomination having a common faith and they observe Moharram for two

months and eight days in a year in memory of Hazrat Imam Hussain who along with his 72 followers attained martyrdom at Karbala in Iraq. The said religious belief is practised by the men-folk and the women-folk of the Shia community by holding Majlises (religious discourses), Recitations, Nowhas, Marsia, doing
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Matam (wailing) and taking out processions with Tabut Tazia, Alams, Zukinha, etc. For performing these religious rites, practices and observances the Shia community has been customarily using from time immemorial the nine plots in Mohalla Doshipura and the structures thereon. The entire period of Moharram is a period of mourning for the Shias whose staunch belief is that the whole purpose of their life is to carry out these religious practices and functions during the Moharram and that in case they do not perform all these rites, practices, observances and functions, including those relating to the Tazia, they will never be delivered and till these are performed the whole community will be in mourning and in none of their families any marriage or other happy function can take place.

The petitioners, in the writ petition, and through them the Shia community, contended as follows: (i) that their customary rights to perform several religious rites, practices, observances and functions on the said nine plots and the structures thereon having been already determined in their favour by decisions of competent civil courts ending with the Review Petition 36177 in Civil Appeal 941176 in the Supreme Court, the respondents must be commanded by a mandamus not to prohibit or restrain the Shias from performing their religious rites etc. On the said plots; (ii) that the registration of Shia Waqfs concerning the plots and structures for performance of these practices and functions under sections 5 and 38 of the Uttar Pradesh Muslim Wakfs Act, 1936, which had become final as no suit challenging the Commissioner's report and registration was filed within two years by any member of Sunni Community or the Sunni Central Wakf Board, also concluded the said rights in their favour; and (iii) that the power under section 144 Criminal Procedure Code is being invariably exercised perversely and in utter disregard of the lawful exercise of Shias' legal rights to perform their religious ceremonies and functions and instead of being exercised in aid of such lawful exercise it is exercised in favour of those who unlawfully and illegally interfere with such lawful exercise under the facile ground of apprehension of imminent danger to peace and tranquility of the locality.

The respondents contested and contended as follows: (i) that a Writ Petition under Article 32 for such a relief of declaration is not maintainable in as much as the basic purpose of a petition under Article 32 is to enforce existing or established fundamental rights and not to adjudicate and seek a declaration of such rights or entitlement thereto; (ii) that no mandamus under Article 32 is competent inasmuch as orders under s. 144 Cr. P.C. these are judicial or quasijudicial; alternatively even if it were assumed that these orders are administrative or executive orders passed by the Executive Magistrates, they cannot be challenged unless the Magistrate has exceeded his powers or acted in disregard to the provisions of the law or perversely; and (iii) that the writ petition was barred by res judicata or principles analogous to res judicata by reason of the Supreme Court's decisions in (a) Civil Appeal 941/1976. (b) Review Petition 36 of 1977 and (c) order permitting withdrawal of S.L.P. 6226 of 1978 on 4-12-1978.

Allowing the petition, the Court
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HELD: 1: 1. The petitioners and through them the Shia community of Mohalla Doshipura, Varanasi, have established their customary rights to perform
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their religious rites, practices, observances, ceremonies and functions minus the A recitation and utterance of Tabura over the plots in question. [1136 B-C]

1: 2. The litigation arising out of Suit No. 849 of 1878 (Sheik Sahib and ors. v. Rahtnatu and ors.) declared the mosque in plot No. 246 to be a public mosque at which every mohammedan became entitled to worship and further declared the Shias' right to keep their Tazia in the apartment attached to the mosque and repair it in the verandah thereof and to hold their majlises on 9th and 12th of Moharram on or near the platform on the surrounding ground of the mosque as early as on 29th March, 1879. [1098 B, G-H]

The alleged customary rights of Sunnis in the matter of burial of their dead on the plot No. 60211133 was decided against them, in the Suit No. 42411931 filed by the then Maharaja of Banaras in the Court of Addl. Munsiff, Banaras. [1099 A-B, G]

The third and most important Suit No. 232/1934 filed in the court of City Munsiff, Banaras (Fathey Ullah and Ors. (Sunnis) v. Nazir Hussain and Ors. (Shias) in respect of all the plots in Khasra Nos 245, 246, 247, 248/23/72, 602, 603, 602/1133, 246/1134 and 247/1130 which were claimed to be Sunni Wakfs by long user, also went against the Sunnis and in favour of the Shias, clearly establishing the title or ownership of Shias over at least two main structures Zanana Imambara on plot No. 245 and Baradari on plot No. 247/1130 and to the land below the structures and what is more substantially the customary rights claimed by the Shia Muslims over the plots and structures were upheld. [1100 H, 1101 A-B, 1102 F-G]

The said suit 232/34 had been filed in the representative capacity both as regards the Sunni-plaintiffs and Shia-defeadants and all the formalities under order I rule 8 of the Civil Procedure Code had been complied with and as such he final decision in that litigation is binding on both the communities. [1104 B-C, G-H]

2 :1. Ordinarily adjudication of questions of title or rights and granting declaratory relief consequent upon such adjudication are not undertaken in a Writ Petition under Article 32 of the Constitution and such a petition is usually entertained by the Supreme Court for enforcement of existing or established title or lights for preventing infringement or encroachment thereof by granting appropriate reliefs in that behalf. Here, what Shia community is seeking by the Writ Petition is enforcement of their customary rights to perform their religious rites, practices, observances and functions on the concerned nine plots and structures thereon which have already been adjudicated, determined and declared in their favour by decisions of competent Civil Courts in the earlier litigations and that the declaration sought in the prayer clause is really incidental. [1097 A-C]

2: 2. It is true that title and ownership of the plots of land in question is distinct from title and ownership of structures standing thereon and both these are again distinct from the customary rights claimed by the members of the Shia community to perform their religious ceremonies and functions on the plots and the structures thereon. However,

even if the petitioners and through them the Shia community are unable to prove their existing or established title either to the concerned plots or to the structures standing thereon but they are able to
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prove that they have existing or established customary rights to perform their religious ceremonies and functions on the plots and the structures thereon simultaneously complaining of illegal deprivation or encroachment by executive officers at the behest of the respondents or the Sunni community the reliefs sought by them by way of enforcement of such customary rights will have to be entertained and considered on merits and whatever relief they may be found legally and properly entitled to may have to be granted to them. [1097 C-F]

3: 1. It is well settled that section 11 of the Civil Procedure Code is not exhaustive of the general doctrine of res judicata and though the rule of res judicata as enacted in section 11 has some technical aspects the general doctrine is founded on considerations of high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. The technical aspects of section 11 of Civil Procedure Code, as for instance, pecuniary or subject-wise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicata is to be invoked. Even under section 11 of the Civil Procedure Code the position has been clarified by inserting a new Explanation VIII in 1976 [1105 C-D, 1107 A-B]

3: 2. In the instant case; (a) it was not disputed that the Munsif's Court at Banaras was competent to decide the issues that arose for determination before it in earlier litigation and, therefore, the decision of such competent court on the concerned issues must operate as a bar to any subsequent agitation of the same issues between the same parties on general principles of res judicata; (b) not only were the Sunnis' customary rights over the plots and structures in question put in issue during the trial but the customary rights to perform their religious ceremonies and functions on the plots and structures thereon claimed by the Shias were also directly and substantially put in issue inasmuch as the plaintiffs (Sunni Muslims) has sought an injunction restraining the Shias from exercising their customary rights. Therefore, the decision in this litigation which bore a representative character not merely negatived the Sunnis' customary rights claimed by them over the plots and structures but adjudicated, determined and declared the Shias' entitlement to their customary rights to perform their religious ceremonies and functions on the plots and structures thereon in question and this decision is binding on both the communities of Mohalla Doshipura; (c) there is no question of there being any gap or inadequacy of the material on record in the matter of proof of Shias' entitlement to customary rights over the plots and structures in question, whatever be the position as regards their title to the plots or structures; and (d) a clear case has been made out of an existing or established entitlement to the customary rights in favour of the Shias' community to perform their religious ceremonies and functions over the plots and structures in question under the decrees of competent Civil Court for the enforcement of which the instant Writ Petition has been filed. [1107 B-H, 1108 A]

Rajah Run Bahadoor Singh v. Musumut Lachoo Koer, XII I.

A. 23: Mst. Gulab Bai v. Manphool Bai, [1962] 3 SCR 483; Daryao and others v. State of U.P. [1962] 1 SCR 574; Gulabchand Chhotalal parikh v. State of Bombay (now
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Gujarat), [1965] 2 SCR 547 and Union of India v. Nanak Singh, [1968] 2 SCR 887, referred to.

4:1. Broadly speaking, while repealing the 1936 Act, the 1960 Act maintains and preserves the finality and conclusiveness accorded to the Survey Reports completed and submitted by the Wakfs Commissioners under the former Act and the registration of Wakfs under the 1936 Act has been kept alive and effective as if such registration has taken place under the latter Act and registration of Wakfs under the latter Act has been permitted only in respect of Wakfs other then those which have already been registered under the former Act. A perusal of sections 6, 9, 28 and 29 of the 1960 Act and sections 4(3), 4(5), 5(1), (2), (3) and 39 of the 1936 Act clearly show that the finality and conclusiveness accorded to the Commissioner's report under section 5(3) of the 1936 Act has been preserved and the registration of Wakfs under the 1936 Act has been maintained under the 1960 Act notwithstanding the repeal of the former Act by the latter. In other words any Survey Report submitted under the 1960 Act and any registration made under the 1960 Act will be futile and of no avail in regard to Wakf properties respecting which the Commissioner's Report under the 1936 Act has become final and registration has been effected under the 1936 Act.[1108H, 1109A, 1110 F-G]

4:2. In the instant case; (a) having regard to the six properties being specifically asked to be entered in the list of Shia waqfs by Imam Ali Mahto in his application and the order made thereon, all the properties mentioned in the application must be regarded as having been entered in the list of Shia wakfs by the Chief or Provincial Commissioner for Wakfs and the Notification under section 5(1) related to all those properties as having been notified to be Shia Wakfs particulars whereof were stated to be available in the Board's office. The Nota Bena at the foot of the Notification amounted to sufficient particularisation of the properties notified as Shia Wakfs. Non-mentioning of those properties as Sunni Wakfs in Appendices VIII and IX sent to the Sunni Central Wakfs Board must amount to a notice to the Sunni Board and the Sunni Muslims that these had been enlisted as Shia Wakfs. Admittedly, no suit was filed either by the Sunni Central Board or any other person interested in those Wakfs challenging the decision recorded in his Report by the Chief or Provincial Commissioner for Wakfs within the time prescribed under section 5(2) of the Act and, therefore, the Chief Commissioner's Report together with the appendices X and XI thereto dated 28th/31st October, 1938, on the basis of which the Notification dated 15th January, 1954 was issued and published in Official Gazette on 23rd January, 1954, must be held to have become final and conclusive as between the members of the two communities; (b) the Notification dated 26-2-1944 issued by the Sunni Wakf Board on the basis of material which did not form part of the Chief Commissioner's Report would be in violation of section 5(1) of the 1936 Act; (c) Notice issued by the Shia Board under section 53 of the 1936 Act complaining about the entry at Serial No. 224 must be regarded as having been issued ex majori cautela; and (d) even if it were assumed for the purposes of argument that entry at Serial 224 in the Notification dated 26th February, 1944 refers to the mosque in question it cannot affect the customary rights of the petitioners and through them the Shia community to perform

their religious ceremonies and functions over the other 8 plots and structures thereon which had been listed as Shia Wakfs under the Notification dated 15th January, 1954, especially when it is now common ground
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that the mosque on Plot No. 246 is a public mosque constructed by general subscriptions and is accessible to members of both the sects for offering prayers and doing worship therein; (e) the registration under section 38 of the 1936 Act would be available to the petitioners and must prevail over the subsequent registration, if any, obtained by the Sunnis in respect of some of the properties under the 1960 Act; really speaking such latter registration would be non est in the eye of law. Even on the second foundational basis the Shias have proved their existing or established entitlement to their customary rights to perform their religious ceremonies and functions on the concerned plots and structures thereon.[1113 B-G, 1115 A-B, 1116 E-A, 1117 A-B]

4:3. Shias are claiming the right to perform their religious ceremonies and functions on the plots and structures in question not so much on the basis of any title or ownership thereof but on the basis of customary exercise since time immemorial and they have been claiming such customary rights by prescription over the plots belonging to the Maharaja of Banaras as Zamindar and superior title-holder and the prescriptive rights have enured for the benefit of all the Shias notwithstanding such superior title in the Maharaja and if that be so they will also enure for their benefit as against any derivative title claimed by anyone under the Maharaja. Moreover when these plots and structures, particularly these three plots were being registered as Shia Wakfs under the U.P. Wakfs under the U.P. Muslims Wakfs Act 1936 by the Shia Board and Sanads or Certificates of Registration in respect thereof were being issued in December 1952, the two Sunni Lessees who are said to have obtained a lease on 20.4.1952 did not raise any objection to such registration. The Shias' customary rights acquired by prescription over these plots cannot thus be defeated by such derivative title. [1119 C-G]

5:1. Having regard to such implementation of the concept of separation of judicial functions from executive or administrative functions and allocation of the former to the Judicial Magistrate and the later to the Executive Magistrates under the Code of 1973, the order passed by a District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate under the present section 144 is not a judicial order or quasi-judicial order, the function thereunder being essentially an executive (police) function. [1125 E-G]

5:2. It is true that before passing the order the District Magistrate, Sub-Divisional Magistrate or the Executive Magistrate gives a hearing to parties except in cases of emergency when exparte order can be made under section 144(2) by him without notice to the person or persons against whom it is directed, but in which cases on an application made by any aggrieved person he has to give hearing to such person under section 144(5) and thereupon he may rescind or alter his earlier order. It is also true that such an order made by the Executive Magistrate is revisable under section 397 of the Code because under the Explanation to that section all Magistrates, whether executive or judicial or whether exercising appellate or original jurisdiction, are deemed to be inferior Courts for purposes of the revisional power of the High Court or Court of

Sessions. But the fact that the parties and particularly the aggrieved party are heard before such an order is made merely ensures fair play and observance of audi alterem partem rule which are regarded as essential in the performance of any executive or administrative function and the further fact that a revision lies against the order of the executive magistrate either to the Sessions Court or to the High Court
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removes the vice of arbitrariness, if any, pertaining to the section. In fact, in the three decisions of the Supreme Court which were relied upon by counsel for respondents 5 and 6, namely, Babu Parate's case, K.K. Mishra's case and Madhu Limaye's case where the constitutionality of section 144 of the old Code was challenged on the ground that it amounted to unreasonable restriction on the fundamental right of a citizen under Article 19(1) of the Constitution, the challenge was repelled by relying upon these aspects to be found in the provision. However, these aspects cannot make the order a judicial or quasi-judicial order and such an order issued under section 144 of the present code will have to be regarded as an executive order passed in performance of an executive function where no lis as to any rights between rival parties is adjudicated but merely an order for preserving public peace is made and as such it will be amenable to writ jurisdiction under Article 32 of the Constitution.[1125H, 1126-F]

5:3. The power conferred under section 144 Criminal Procedure Code 1973 is comparable to the power conferred on the Bombay Police under section 37 of the Bombay Police Act, 1951-both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder and it has never been disputed that any order passed under section 37 of the Bombay Police Act is subject to writ jurisdiction of the High Court under Article 226 of the Constitution on the ground that it has the effect of violating or infringing a fundamental right of a citizen. The nature of the power under both the provisions and the nature of function performed under both being the same by parity of reasoning an order made under section 144 Criminal Procedure Code, 1973 is amenable to writ jurisdiction either under Article 32 or under 226 of the Constitution if it violates or infringes any fundamental right. [1126 F-H, 1127 A-B]

5:4. In urgent cases of nuisance or apprehended danger, where immediate prevention or speedy remedy is desirable, a District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf may, by a written order stating the material facts of the case, direct a particular individual, or persons residing in a particular place or area, or the public generally when frequenting or visiting a particular place or area, (i) to abstain from a certain act or (ii) to take certain order with respect to certain property in his possession or under his management, if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury to any other person lawfully employed, or danger to human life, health or safety, or a disturbance of public tranquility, or a riot or an affray. Sub-section (2) authorises the issuance of such an order ex-parte in cases of emergency or in cases where circumstances do not admit of the serving in due time of a notice upon the person or persons against whom the order is directed but in such cases under subsection (5) the executive magistrate, either on his own motion or on the

application of the person aggrieved after giving him a hearing, may rescind or alter his original order. Under Sub-section (4) no order under this section shall remain in force for more than two months from the making thereof unless under the proviso thereto the State Government by Notification directs that such order shall remain in force for a further period not exceeding six months.[1127 H, 1128 A-E]

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The entire basis of action under section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility. Preservation of the public peace and tranquility is the primary function of the Government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to over-ride temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. The section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of Civil nature or questions of title to properties or entitlements to rights but at the same time in cases where such disputes or titles or entitlement to rights have already been adjudicated and have become the subject-matter of judicial pronouncements and decrees of Civil Courts of competent jurisdiction then in the exercise of his power under section 144 he must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquility the exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong-doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would effect only a minor section of the community rather than prevent a larger section more vociferous and militant. Legal rights should be regulated and not prohibited all together for avoiding breach of peace or disturbance or public tranquility. The key-note of the power in section 144 is to free the society from menace of serious disturbances of a grave character and the section is directed against those who attempt to prevent the exercise of legal rights or others or imperil the public safety and health.[1128 E-H, 1129 A-D, 1138B]

Muthialu Chetti v. Bapun Sahib, ILR 2 Mad. 140; Parthasaradi Ayyangar v. Chinna Krishna Ayyangar, ILR 5 Mad. 304 and Sundram Chetti and Ors. v. The Queen, ILR 6 Mad. 203, approved.

Hasan and Ors. v. Muhammad Zaman and Ors. 52 I.A. 61

and Haji Mohammad Ismail v. Munshi Barkat Ali and Ors.,24 Cr. L.J. 154, applied.

Madhu Limaye's case, [1971] 2 SCR 711, followed.

D.V. Belvi v. Emperor, AIR 1931 Bom. 325; Queen Empress v. Tirunarasimha Chari, I.L.R. 19 Mad. 18; Muthuswami Servaigram and Anr. v. Thangammal Ayiyar, AIR 30 Mad. 242; Bondalpati Thatayya v. Gollapuri Basavayya and Ors., AIR 1953 Mad. 956; Babulal Parate's case [1963] 3 SCR 432; K.K. Misra's case.

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[1970] 3 SCR 181; Sahibzada Saiyed Muhammed Amirabbas Abbasi and Ors. v. The State of Madhya Bharat and Ors., [1963] 3 SCR 18, The Parbhani Transport Co-operative Society Ltd. v. The Regional Transport Authority, [1960] 3 SCR 177, Smt. Ujjam Bai's case, [1963] 1 SCR 778, N. S. Mirajkar's case, [1966] 3 SCR 744, explained and distinguished.

6:1. After all the customary rights claimed by the petitioners partake of the character of the fundamental rights guaranteed under Articles 25 and 26 of the Constitution to the religious denomination of Shia Muslims of Varanasi, a religious minority, who are desirous of freely practising, their religious faith and perform their rites, practices, observances and functions without let or hindrance by members belonging to the majority sect of the community, namely, Sunni Muslims and as such a positive approach is called for on the part of the local authorities. It is only in an extremely extraordinary situation, when other measures are bound to fail, that a total prohibition or suspension of their rights may be resorted to as a last measure.[1133F-H.1134A]

6:2. In the instant case, the earlier litigations which was fought right up to the Supreme Court cannot be regarded as between the same parties, in as much as the same was not fought in representative character while the present writ petition is litigated between the petitioners and the respondents representing their respective sects; further, it was felt by the Supreme Court that proper adjudication would not be possible without impleading the two Boards (Shia Central Wakf Board and Sunni Central Wakf Board) notices were issued to them and they were also impleaded as parties to the petition who have filed their respective affidavits in the matter and have been heard through respective counsel. Moreover the earlier decision of the Supreme Court in Civil Appeal No. 941 of 1976 did not record any decision on the rights of the parties on merits but the Court took the view that the parties should be relegated to a civil suit on the assumption that the petitioners before the Allahabad High Court (i.e. W.P. No.2397 of 1978) had raised disputed questions of title and the Allahabad High Court had decided them for the first time in the writ petition; irrespective of whether the assumption made by the Supreme Court was right or wrong; the fact remains that there was no adjudication or decision on the petitioners' right on merits as a result of the final order passed by the Supreme Court in the appeal, which was confirmed in the Review Petition; all that could be said to have been decided by the Supreme Court in Civil Appeal No. 941 of 1976 and Review Petition No. 36 of 1977 was that parties should get their rights adjudicated in Civil Suit. For these reasons it is obvious that neither res judicata nor principle analogous to res judicata would bar the present writ petition. [1134 G-H, 1135 A-D]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 4675 of 1978.

(Under article 32 of the Constitution of India)

M.C. Bhandare, Mrs. Urmila Kapoor, Mrs. Shobha Dikshit, Hasan Imam, Shanker Saran Lal and Miss Kamlesh Bansal for the Petitioners.

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O.P. Rana and S. Markandeya for Respondents Nos. 1-4.

Anil B. Dewan, K.L. Hathi, P. Parmeswaran, P.C. Kapoor and M.A. Quadeer for Respondents Nos. 5-6.

Haider Abbas and Miss Kamini Jaiswal for Respondent No. 8 (Shia Waqf Board, U.P.)

F.S. Nariman, M. Qamaruddin, Mrs. M. Qamaruddin, Z. Jilani and Mrs. Sahkil Ahmed for Respondent No. 7 (U.P. Sunni Central Board of Waqf)

M.C. Dhingra for Intervenor-Institute for Re-writing History.

The Judgment of the Court was delivered by

TULZAPURKAR, J. By this writ petition filed under Art. 32 of the Constitution of India the petitioners and through them the Shia community of Mohalla Doshipura, Varanasi are complaining against the various actions of the respondents (including respondents 5 and 6 as representing the Sunni community of Mohalla Doshipura) which constitute serious infraction and/or infringement of their fundamental rights guaranteed to them under Arts. 25 and 26 of the Constitution in the matter of enjoying their religious faith and performance of religious rites, practices and observances on certain plots and properties situated in the said Mohalla of Doshipura, Police Station Jaitpura (formerly Adampur) in the city of Varanasi and in particular are seeking a declaration that the 9 plots of land bearing plot Nos. 245, 246, 247, 248/23/72, 602, 603, 602/1133, 246/1134 and 247/1130 in the said Mohalla and buildings and structures thereon belong to the Shia Waqf of Mohalla Doshipura and that the members of Shia community of that Mohalla have a right to perform their religious functions and practices on the said plots and structures thereon as also an appropriate writ, direction or order in the nature of mandamus commanding respondents 1 to 4 not to prohibit or restrain the Shias of the Mohalla from performing their religious functions and practices thereon. It may be stated that this Court by its order dated December 12, 1978 not merely granted permission to the petitioners under Order I Rule 8 C.P.C. to institute this action qua themselves as representing the Shia community and respondents 5 and 6 as representing Sunni community, but directed at certain stage of the hearing that the two Waqf Boards in U.P. State, namely, Shia

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Central Waqf Board and Sunni Central Waqf Board be impleaded as parties to the petition as their presence was felt necessary for complete adjudication of the controversy and even otherwise under the U.P. Muslim Waqf Act, 1960, which has been done and both the Waqf Boards have also been heard through their counsel in the matter.

In Mohalla Doshipura of Varanasi City there are two seats of mohammedan-the Shias and the Sunnis. Both the sects revere the martyrdom of Hazrat Imam Hasan and Hazrat Imam Hussain, grand-sons of Prophet Mohammed, during the MOHARRAM but in a different manner. The case of the petitioners and through them of the Shias of Mohalla Doshipura is that the members of their sect numbering about 4000 constitute a religious denomination having a common faith and they observe MOHARRAM for two months and eight days in a year in memory of Hazrat Imam Hussain who alongwith his 72 followers

attained martyrdom at Karbala in Iraq. The said religious belief is practised by the men-folk and the women-folk of the Shia community by holding Majlises (religious discourses), Recitations, Nowhas, Marsia, doing Matam (wailing) and taking out processions with Tabut Tazia, Alama, Zuljinha, etc. For performing these religious rites, practices and observances the Shia community has been customarily using from time immemorial the nine plots in Mohalla Doshipura and the structures on some of them, particulars whereof are as under:-

Plot No. 246: on which stands a Mosque which, it is common ground, belongs to both the sects as it was constructed out of general subscription from members of both the sects and every Mohammedan is entitled to go in and perform his devotions according to the ritual of his own sect or school.

Plot No. 247/1130: on which stands the Baradari (Mardana Imambara-structure of white stone having 12 pillars) constructed by Shias in 1893 used for holding Majlises, Recitations, Marsia and doing other performances.

Plot No. 245: on which there is a Zanana Imambara used by Shias ladies for mourning purposes and holding Majlises etc.

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Plot No. 247: on which there is Imam Chowk used for placing the Tazia thereon (said to have been demolished by the Sunnis during the pendency of the instant proceeding).

Plot No. 248/23/72: a plot belonging to one Asadullah, a Shia Muslim, with his house standing thereon.

Plot No. 246/1134: on which stands a Sabil Chabutra (platform for distributing drinking water) belonging to one Nazir Hussain, a Shia Muslim.

Plots Nos. 602/1133, 602 and 603: being vacant plots appurtenant to the Baradari in plot No. 247/1130 used for accommodating the congregation assembled for Majlises etc. when it over-flows the Baradari.

Particulars of the religious rites, practices and functions performed by the members of the Shia community on the occasion of the observance of MOHARRAM RE:

(a) the Tazia (representing and signifying the dead body of Hazrat Imam Hussain) is kept in the Baradari on plot No. 247/1130 and for the first 12 days of MOHARRAM Majlises (religious discourses) of men-folk and women-folk is held daily-by the men folk in the Baradari and on the adjoining plot Nos 602/ 1133, 603 and 602 and by the women-folk in the Zanana Imam Bara on Plot No. 245.

(b) On the 6th day of MOHARRAM the Zuljana procession (a procession of the replica of the horse of Prophet Mohammed, which was also killed at the Karbala at the time of martyrdom of Hazarat Imam Hussain) of not less than 5000 Shias from all over Banaras City is brought to the Baradari in which the Tazia is placed and after visiting the Tazia there the horse procession moves in the whole city of Varanasi non-stop for another 36 hours and terminates at the place of its origin. Offerings to the horse are made not only by the Shias

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but also by persons of other communities during the procession under the religious belief that such offerings bring in good fortune.

(c) On the 10th day of MOHARRAM, the Tazia bedecked with flowers is taken out in huge procession to Karbala situated near Lord Bharon, 3 miles from Doshipura (the place signifying the Karbala in Iraq where martyrdom occurred), where the flowers of the Tazia are buried and then Majlis is held at that place.

(d) On the 11th and 12th day of MOHARRAM Majlis (religious discourse) is held and the Qurankhani and Tajia are performed in the Baradari and the adjoining plots which consist of offering of prayers, recitations of Quran Sharif, Nowhaz (short melancholic poems) and Marsias (poems of grief and sorrow)-these being performed both by men-folk and women-folk, the latter at Zanana Imam Bara.

(e) On the 25th day of MOHARRAM, being the death anniversary of Hazarat Zanulabadin s/o Hazrat Imam Hussain, again Majlis, Matam (wailing accompanied by breast-beating), Nawhaz and Marsias are held and performed in the Baradari and the adjoining plots by men and in Zanana Imambara by women.

(f) On the 40th day of the MOHARRAM Chehalum ceremony of Hazrat Imam Hussain is performed when Majlis, Matam, Nawhaz and Marsia are held, the Tazia bedecked with flowers is taken out in procession up to Karbala near Lord Bhairon where again the flowers are buried with religious ceremonies and the Tazia is brought back to the Baradari in Doshipura.

(g) On the 50th day of the MOHARRAM i.e. 50th day of the martyrdom of Hazrat Imam Hussain Pachesa is performed by taking out the Tazia again in procession to the Karbala and after burial of flowers it is brought back to the Baradari. On both these days i.e. Chehalum and Pachesa, Majlis, Qurankhani, Nawhaz, Marsias and Matam are performed on the Baradari,

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adjoining plots and the Zanana Imam Bara in Doshipura.

(h) Four days after the Moharram period the Shias observe the Barawafat which according to them is the death anniversary of Prophet Mohammad and on this day again on the Baradari, adjoining plots and Zanana Imambara Majlis is held which is accompanied by Qurankhani, Nawhaz and Marsias in which menfolk and women-folk participate.

It is the case of petitioners that the Tazia at Doshipura is a unique Tazia in the whole country, being made of fine wood carvings, about 15 ft. in height, having five storeys, and decorated with gold and silver and would be of the value of not less than Rs. 3 lakhs. According to the petitioners the entire period of Moharram is a period of mourning for the Shias whose staunch belief is that the whole purpose of their life is to carry out these religious practices and functions during the MOHARRAM and that in case they do not perform all these rites, practices, observances and functions, including those relating to the Tazia, they will never be delivered and till these are performed the whole community will be in mourning and in none of their families any marriage or other happy function can take place. The aforesaid religious faith and the performance of the rites, practices, observances and functions detailed above constitute their fundamental rights guaranteed to them under

Arts. 25 and 26 of the Constitution and the members of the Shia community of Mohalla Doshipura have a customary right to perform these on the said nine plots and in or about the structures standing thereon from time immemorial.

The Petitioners and through them the Shia community of Mohalla Doshipura are basing their customary rights to perform the aforesaid religious rites, practices, observances and functions on the said nine plots and the structures thereon on two foundations: (1) Decisions of competent civil courts adjudicating these rights in their favour in earlier litigations and (2) Registration of Shia Wakfs concerning the plots and structures for performance of these practices and functions under secs. 5 and 38 of the U.P. Muslim Wakfs Act, 1936 which has become final as no suit challenging the Commissioner's Report and registration was filed within two years by any member of Sunni community or the Sunni Central Wakf Board. In other words previous decisions of Civil Courts and registration of their Shia Wakfs under the U.P. Muslim

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Wakfs Act. 1936 have concluded the said rights in their favour and therefore Counsel for the Petitioners pointed out that the prayer for declaration in the Writ Petition was really incidental, the rights in favour of the Shia community having been already determined and the real grievance was regarding the infringement of their said rights and their enforcement and hence the substantial prayer was for mandamus commanding the respondents not to prohibit or restrain the Shias from performing their religious rites, practices, observances and functions on the plots and the structures standing thereon.

The Petitioners' case further is that after the final declaration by the court of law in regard to their rights in their favour and the rejection of the false claims of the Sunnis the position in Mohalla Doshipura remained satisfactory for nearly two decades and the Shias could perform their religious functions and ceremonies without any let or hindrance but from the year 1960 onwards the Sunnis, who were in majority and were able to muster support of local politicians and the police, started creating trouble and interference by indulging in violence with a result that the Executive Authorities of Varanasi acting under sec. 144 Cr. P.C.. but in abuse of the power thereunder started placing undue restrictions on the members of the Shia community in the performance of their religious functions and ceremonies. Thus during the period 1960-66 the Executive power under sec. 144 Cr. P.C. came to be used each year to curtail the rights of the Shias to perform their religious practices and functions at the Baradari, other structures and the appurtenant plots on the occasion of the Barawafat; sometimes restraints were also placed on the Sunnis. During the years 1967 to 1969 similar orders depriving the Shias of their legitimate rights on the occasion of MOHARRAM, Chehulam, Pachesa and Barawafats u./sec. 144 were issued by the District authorities. In subsequent years also similar orders were passed sometimes placing restrictions on one community and sometimes on the other, sometimes permitting certain observances on terms and conditions during the stated hours. More often than not under the pretext of imminent danger to peace and tranquility both the communities were completely prohibited from carrying out their religious functions and ceremonies under such orders but since members of the Sunni community had very little to lose in relation to the plots and structures in question it was the Shia community that suffered most. According to the

Petitioners the aggrieved party-and mostly Shias were aggrieved-was required to approach
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the superior Courts by way of appeal or revision but usually before the matter could be decided on merits the impugned orders exhausted themselves by influx of time and the remedy by way of appeal or revision was rendered infructuous and the controversy remained undecided. However, when in the year 1973 on the occasion of Barawafat the City Magistrate, Varanasi by his order dated 12th April, 1973 prohibited the Shias from performing Barawafat on the Baradari and its adjoining plots and Sunnis were illegally permitted to observe Barawafat on Plot No. 602/1133 by reciting Qurankhani, Milad and Fathiha on 16th April, 1963 from 9 A.M. to 12 Noon Gulam Abbas and other Shia Muslims filed a Writ Petition No. 2397 of 1973 in the Allahabad High Court for quashing the order of the City Magistrate and for prohibiting the City Magistrate and local authorities from passing or promulgating any order depriving the Shia of peaceful use and enjoyment of the Baradari and the adjoining plots appurtenant to it and also prohibiting them from permitting the Sunnis to make use of the Baradari and its adjoining plots. This Writ Petition and the connected criminal cases (being Criminal Revision and a Criminal Reference against similar earlier orders u./sec. 144 Cr.P.C.) were heard and disposed of by the High Court by a common judgment delivered on August 8, 1975. Notwithstanding the fact that the various impugned orders had exhausted themselves by efflux of time the High Court felt that where a situation arose year after year making it necessary to take action u./sec. 144 Cr.P.C. it would be proper exercise of its discretion to interfere with the impugned order, if found to be illegal or improper, so that the Magistrate may not be encouraged to use his powers in the same manner again when the similar situation arose and that if a repetition of successive orders under sec. 144 resulted in a permanent interference with private legal rights it had to be deprecated and the High Court went on to give guide-lines to the Magistrates in the exercise of their discretionary power under sec. 144 by observing that though the section does not empower a Magistrate to decide a dispute of a civil nature between the private individuals, he must, before passing his order, take into consideration the nature of the claims set-up by the rival parties in order to judge whether or not it was possible to afford protection to those who seek only the lawful exercise of the legal and natural rights, that the authority of a Magistrate under this section should ordinarily be exercised in defence of legal rights and lawful performance of duties rather than in suppressing them and that this power is not to be used in a manner that would either give material advantage to one
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party to the dispute over the other or interdict the doing of an act by a party in the exercise of its right or power declared or sanctioned under the decree of a competent Court. On merits the High Court recorded its findings on the rights of the Shias in their favour in view of Civil Court's decision in earlier litigation and quashed the City Magistrate's order dated 12-4-1973 allowing the Sunnis and restraining the Shias from holding various religious functions on the occasion of Barawafat on the Baradari and the adjoining plots in question in Mohalla Doshipura and also passed appropriate orders in the connected criminal cases. Against this common judgment rendered by the High Court on August 8, 1975, Civil Appeal No. 941 of 1976 and

Crl. As. Nos. 432 to 436 of 1976 were preferred by Mohammad Ibrahim, a Sunni Muslim, all of which were disposed of by this Court by a Common judgment dated 6-12-1976 and this Court held that the High Court should not have pronounced any view on the impugned orders under sec.144 when those orders had ceased to be operative and that the High Court should not have given findings on rights, title and property depending on disputed questions of facts in a writ petition the judgment and findings of the High Court were set aside and parties were relegated to have their rights agitated or settled in a civil suit. Feeling aggrieved by the said judgment, Gulam Abbas and others filed a Review Petition No. 36 of 1977 in Civil Appeal No.941 of 1976 which was dismissed by this Court on 16th December, 1977 after making some observations: "Questions of title cannot be decided here (under sec. 144) but previous judgment on them may have a bearing on the question whether and if so, what order could be passed under sec. 144 Cr.P.C.....It was asserted on behalf of the Petitioners (Gulam Abbas and others) that in a representative suit between Shia and Sunni sects of Muslims question of title to properties or places to which the Magistrates' orders under sec. 144 Cr P.C. related has already been decided. If that be so, we have no doubt that the Magistrate will respect that decision in making an order under sec. 144 Cr. P.C. in the future."

According to the Petitioners even after the aforesaid decision of this Court the city Magistrate, Varanasi, who had passed an order on 15-12-1977 under sec. 144 directing both the communities of Mohalla Doshipura to follow the terms and conditions laid down in this said order, on the representation being made by the Shias on 17-12-1977 bringing to his notice this Court's order dated 16-12-1977 in the Review Petition modified his earlier order on 19-12-1977

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permitting holding of Majlis only at the house of Shamsher Ali but in respect of other properties postponed the passing of his order till 21-1-1978 but on that day he merely passed an order stating that his initial prohibitory order dated 15th December, 1977 as modified on 19th December, 1977 has exhausted itself as Moharram had passed off and further observed that while passing orders on the occasion of Moharram, Chehalum and Pachesa etc. in the coming years due regard will be given to the judgment of this Court dated 16-12-1977 in Review Petition along with the decisions rendered in earlier civil litigation in representative character between the parties including the Allahabad High Court's decision in second Appeal No. 1726 of 1935. But one week later the same City Magistrate passed another order under sec. 144 Cr. P. C. on 28th January, 1978 on the occasion of Chehalum and Pachesa to be observed on the Baradari and the adjoining plots which was quite contrary to his earlier order dated 21-1-1978 and in utter disregard of the judgment of this Court in Review Petition No. 36 of 1977 and all other earlier judicial pronouncements in favour of the Shias; in fact by that order the City Magistrate completely prohibited every person from holding any Majlis either on the Baradari or on any portion of the adjoining plots in Mohalla Doshipura. This order dated 28-1-1978 was challenged by way of revision in the High Court but the Revisional application was dismissed on 13-2-1978 on the ground that the impugned order had ceased to be operative by then and Revision had become infructuous. Subsequent to this on several occasions requests were made by Shias of Mohalla Doshipura seeking permission for doing ceremonies and taking

out Tazia Procession but on every occasion the City Magistrate refused permission. In the circumstances a Writ Petition No. 3906 of 1978 was filed by Gulam Abbas and other Shia Muslims in the Allahabad High Court praying for mandamus against the State of U. P. and its Magisterial officers, Varanasi, directing them to grant permission for performing some ceremonies and taking out Tazias but the same was dismissed by the High Court in limini on 22.9.1978 principally relying on the earlier judgment dated 6.12.1976 of this Court in Civil Appeal No. 941 of 1976; Special Leave Petition No. 6226 of 1978 against the same was filed by Gulam Abbas and others but it was withdrawn on 4-12-1978 as they were advised to file the present Writ Petition. During the hearing the Petitioners have amended their Petition by challenging the latest order passed by the City Magistrate, Varanasi on 24th November, 1979 under sec. 144 Cr. P. C. prohibiting both Shia and Sunni communities from holding their Majlises and imposing other
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restrictions (the restriction on Recitation of Tabarra by Shias is not challenged) on the occasion of celebration of Moharram Festival at the Baradari and the adjoining plots in question in Mohalla Doshipura. The Petitioners have pointed out that Shias do not utter Tabarra (a ritual regarded as a filthy abuse of the elected Imams hurting the feelings of Sunnis) but have fairly conceded the justness of the prohibition against uttering Tabarra. Petitioners have contended that the exercise of the power under sec. 144 Cr. P. C. has invariably been perverse and in utter disregard of the lawful exercise of their legal rights to perform their religious ceremonies and functions and in stead of being in aid of such lawful exercise it is in favour of those who unlawfully and illegally interfere with such lawful exercise under the facile ground of apprehension of imminent danger to peace and tranquility of the locality.

By their counter affidavit filed in reply Respondents 5 and 6 on behalf of themselves and the Sunni community have resisted the reliefs claimed by the Petitioners in the Writ Petition principally on three or four grounds. On merits they have denied that there is clear on decisive material on record either in the form of judicial pronouncements or the registration of the Shia Wakfs of Mohalla Doshipura under the U. P. Muslim Wakfs Act, 1936 concluding in favour of Shias' title to the concerned plots or structures thereon or their entitlement to the performance of the religious rites, practices, observances and functions on the property in question as claimed; it is contended that a clear and sharp distinction must be made between title and ownership of the concerned plots of land, title and ownership of the structures on those plots and the rights exercisable by the Shia community over the concerned plots and structures thereon and there are considerable gaps and inadequacies in the documents and the material before the Court in that behalf which can only be filled in by trial and by recording evidence and in the absence of adequate material no declaration as to the title to the plots or the structures or even as to the rights in or over the plots and structures thereon could be granted in favour of the Shia community. In other words the contention is that a Writ Petition under Article 32 for such a relief of declaration is not maintainable in as much as the basic purpose of a Petition under Article 32 is to enforce existing or established fundamental rights and not to adjudicate and seek a declaration of such rights or entitlement thereto. In this behalf respondents 5 and 6 have doubted and disputed the

effect and binding nature of the earlier court decisions, particularly of the judgments rendered by the Munsif's Court, Vanarasi in Suit No. 232 of 1934
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(Fathey Ullah & Ors. v. Nazir Hussain and Ors.) and by the Appellate Courts in appeals therefrom, on the entire Sunni community and as regards registration of the Shia Wakfs they have contended that the position arising out of the U. P. Muslim Wakfs Act, 1936 and the U. P. Muslim Wakfs Act, 1960 in the context of the Sunni Wakfs in regard to the properties in dispute under the latter Act requires serious consideration. As regards reliefs sought against the orders passed by a City Magistrate or Sub-Divisional Magistrate under sec. 144 Cr. P. C. it is contended that no mandamus under Art. 32 is competent in as much as these are judicial or quasi-judicial orders passed by a Court under sec. 144 Cr. P. C. and no fundamental right can be said to be infringed by any judicial or quasi judicial orders; alternatively are administrative even if it were assumed that these orders are administrative or executive orders passed by Executive Magistrates these cannot be challenged unless the Magistrate has exceeded his powers or acted in disregard to the provisions of the law or perversely and in the instant case the impugned orders subsequent to this Court's decision dated 16-12-1977 in Review Petition No. 36 of 1977 have been passed by keeping in mind the observations or the guide lines contained in that decision and in light of the emergent situation then obtaining in the locality. In the circumstances, the Petitioners are not entitled to any of the reliefs sought by them in the Writ Petition: Lastly, it has been contended that the present Writ Petition is barred by res-judicata or principles analogous to res-judicata by reason of this Court's decisions in (a) Civil Appeal No. 941 of 1976, (b) Review Petition No. 36 of 1977 and (c) Order permitting withdrawal of SLP No. 6226 of 1978 on 4.12.1978. In any case the view taken by a Bench of three judges of this Court in their judgment dt. 6-12-1976 and reiterated in the order dt. 16-12-1977 on the-Review Petition, however wrong it may appear to be, should not be disturbed.

The two Boards, Shia Central Wakfs Board and Sunni Central Wakfs Boards impleaded as parties to the Writ Petition under this Court's Order dated 28th March, 1980 have supported the respective cases of each community represented by the Petitioners on the one hand and respondents 5 and 6 on the other respectively and each one has placed such additional material before the court as was in its possession touching the registration of Shia Wakfs and Sunni Wakfs under the two enactments U.P. Muslim Wakfs Act, 1936 and U.P. Muslim Wakfs Act, 1960.
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It cannot be disputed that ordinarily adjudication of questions of title or rights and granting declaratory relief consequent upon such adjudication are not undertaken in a Writ Petition under Art. 32 of the Constitution and such a petition is usually entertained by this Court for enforcement of existing or established title or rights or infringement or encroachment thereof complained by granting appropriate reliefs in that behalf. But as stated earlier, counsel for the Petitioners contended before us and in our view rightly that all that the Shia community is seeking by this Petition is enforcement of their customary rights to perform their religious rites, practices, observances and functions on the concerned nine plots and structures thereon which have already been adjudicated, determined and declared

in their favour by decisions of competent Civil Courts in the earlier litigations and that the declaration sought in the prayer clause is really incidental. It is true that title and ownership of the plots of land in question is distinct from title and ownership of structures standing thereon and both these are again distinct from the customary rights claimed by the members of the Shia community to perform their religious ceremonies and functions on the plots and the structures thereon. However, it is clear that even if the Petitioners and through them the Shia community are unable to prove their existing or established title either to the concerned plots or to the structures standing thereon but they are able to prove that they have existing or established customary rights to perform their religious ceremonies and functions on the plots and the structures thereon simultaneously complaining of illegal deprivation or encroachment by executive officers at the behest of respondents 5 and 6 or the Sunni community the reliefs sought by them by way of enforcement of such customary rights will have to be entertained and considered on merits and whatever relief they may be found legally and properly entitled to may have to be granted to them. This is not to suggest that the petitioners or the Shia community have failed to prove that they have existing or established title and ownership over the plots and/or over the structures thereon-an aspect which will have to be considered on merits though secondarily, the primary question being whether they have succeeded in proving their subsisting entitlement to the customary rights claimed by them. In this behalf, as stated earlier, they are basing their customary rights on two foundations, namely, decisions of competent Civil Courts adjudicating these rights in their favour and registration of Shia Wakfs concerning the plots and structures for performance of these practices and functions under secs. 5 and
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38 of the U.P. Muslim Wakfs Act, 1936 and we proceed to examine critically these two foundational basis.

Dealing first with Civil Court's decisions in earlier litigations it would be necessary to refer to two or three earlier litigations and to state accurately the result in each which will have a bearing on the rival contentions of the parties hereto.

In Suit No. 849 of 1878 filed by Sheikh Sahib and Ors. (Shia Muslims) against Sheikh Rahmatu and Ors. (Sunni Muslims) in the Munsif's Court at Benaras the dispute pertained to the mosque in Plot No. 246 and the Plaintiffs' rights to hold their Majlises on 9th and 12th of MOHARRAM inside the mosque and to keep and repair their Tazia in that mosque, and the learned Munsif Shri Pramode Charan Banerji by his judgment dated 29th March, 1879 held : (a) that the disputed mosque was built by general subscription, that it belonged to members of both the sects and that every Mohammedan had a right to worship in it; (b) that the plaintiffs failed to establish their claims about the holding of the Majlises and the cooking and distribution of food in the mosque but the probabilities were that the Majlises of 9th and 12th MOHARRAM were held by them on or close to the platform on the surrounding ground and (c) that the plaintiffs had acquired by a long user a right to keep their Tazia in the Hujra (apartment) of the mosque and to repair the same in the tiled Saeban (Varandah) of the mosque and the defendants were restrained from interfering with plaintiff's rights in respect of the above matter; the rest of the plaintiffs' claim was dismissed. Civil Appeal No. 73

of 1879 was preferred by the plaintiffs against that part of the decision which went against them and cross-objections were filed by the defendants against declaratory relief and injunction passed against them but both the appeal as well as the cross-objections were dismissed by Shri Ram Kali Choudhary, Subordinate Judge, Banaras on 16th December, 1879 and the trial court's decree was confirmed. In other words this litigation declared the mosque in plot No. 246 to be a public mosque at which every Mohammedan became entitled to worship and further declared the plaintiffs right to keep their Tazia in the apartment attached to the mosque and repair it in the Varandah thereof and to hold their Majlises on 9th and 12 of MOHARRAM on or near the platform on the surrounding ground of the mosque as early as on 29th March, 1879.

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It appears that the Sunni Muslims of Mohalla Doshipura, Varanasi repeatedly tried to put forward their false claims and rights over some of the Plots in question and in particular attempted to encroach upon plot No. 602/1133, which had been recorded as Banjar Qadim (barren land) in the revenue records, by falsely alleging that it was a grave-yard where they had buried their dead. The then Maharaja of Banaras (plaintiff No. 1) filed Suit No. 424 of 1931 in the Court of Additional Munsif, Banaras against Shamshuddin and Ors. representing all Muslims residing in Banaras under O. 1, R. 8 C.P.C. (though the nominee defendants were Sunni Muslims) praying for a declaration of his rights as owner and Zamindar and for a permanent injunction restraining the defendants from interfering with his rights and also for removal of fictitious graves if any on that plot. It may be stated that Shias of Varanasi had never claimed the plot to be a grave yard, though they were claiming other rights to perform their religious ceremonies and functions thereon, but only Sunnis were claiming the plot as their grave yard and therefore the suit and the reliefs were virtually directed against the Sunni Muslims residing in Banaras. It appears that since a portion of the plot No. 602/1133 to the extent of two Biswas had been taken by one Abdul Hamid (also a Sunni) under Qabuliyat dated 7th January, 1907 on payment of Rs. 1/4/- as Parjat from the Maharaja for construction of a house and since even after his death plaintiffs Nos. 2 to 5, though in continuous possession of the said portion as Abdul Hamid's heir's could not construct a house over that portion because of defendants' interference, they were also joined as co-plaintiffs in the suit. It was alleged that the defendants had interfered with the plaintiffs' rights by claiming plot No. 602/1133 to be a grave yard and they had built some bogus graves since one year back to support their illegal stand. The suit was contested primarily on the ground that the plot in question was an old grave-yard and that the defendants (representing Sunni Muslims) had acquired a right to bury their dead in the said plot. The suit was dismissed by the trial court, the learned Munsif holding that the plot in question was an old grave yard and the defendants had acquired customary right to bury their dead. All the plaintiffs filed an appeal being Civil Appeal No. 134 of 1932 but subsequently plaintiffs Nos. 2 to 5 retired leaving plaintiff No. 1 (the Maharaja) alone to fight out the case. Shri Kanhaiya Lal Nagar the learned Subordinate Judge by his judgment dated 6th February, 1933 allowed the appeal and decreed the suit in favour of the Maharaja. In the course of his judgment he made a reference to the fact that

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the plot in question had become an apple of discord between the two rival Muslim communities of Shias and Sunnis, that the former was using it for holding their religious meetings on occasions of festivals, marriages and for Taziadari, with structures on adjoining places while she latter wanted to make their encroachments by burying their dead just in close proximity with the above sacred places in order to wound the former's religious feelings but one had to look to the proprietory title and possession of His Highness the Maharaja. On appreciation of oral and documentary evidence on record the learned Sub-Judge held: (a) that the plot in question was not a grave-yard but that between 1929 and 1931 attempts had been made by the Sunni Muslims to manufacture and fabricate evidence indicating that it was a grave yard; (b) that the Sunni Muslims had acquired no customary rights in the matter of burial of their dead over the plot in question; and (c) by permanent injunction he restrained the defendants and through them the Muslims of Banaras (in effect Sunni Muslims) from using the said plot in the future as a burial ground. However, as regards the prayer for actual removal of graves he took the view that it would be a bit improper that the soul of the dead be stirred and the defendants be ordered to remove them and they were given liberty to read Fathia or attend to the graves if any (there was clear evidence of only one old grave that of one Hakim Badruddin situate on the southern side of the plot in suit as shown in Map Paper No. 3A existing since 1307 H or 45 years) with due regard to the rights of the Maharaja. This decree was upheld by the High Court and it thus became final. Two things become clear from the aforesaid decision. In the first place though the suit was directed against all muslims residing in Banaras (defendants representing them under O.1, R.8 P. C.) the customary rights of Shias to perform their religious ceremonies and functions on plot No. 62/1133 or on adjoining plots were not but the customary rights of Sunnis in the matter of the burial of their dead on the plot were the subject matter of litigation and secondly the decision was virtually against all Sunni Muslims residing in Banaras to the effect that the plot in question was neither a grave yard nor had they any customary right to bury their dead in the said plot and such rejection of their claim must be held to be binding on the entire Sunni community not only of Doshipura but all those residing in the city of Banaras, albeit as against the Maharaja.

Then comes the third and the most important litigation which was between the two rival sects of Muslims of Mohalla Doshipura,

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Varanasi and that is Suit No. 232 of 1934 filed in the Court of City Munsif, Banaras by Fathey Ullah and Ors. (Sunni Muslims against Nazir Hussain and Ors. (Shia Muslims). The plots in dispute were Khasra Nos. 245, 246, 247, 248/23/72, 602, 603, 602/1133, 246/1134 and 247/1130 (same as are involved in the instant Writ Petition) which were claimed to be Sunni Wakfs by long user. The plaintiffs asserted their customary rights (specified in para 4 of the plaint) over the said plots and structures thereon. It was alleged that the defendants' ancestors had no rights in these plots except for placing their Tazia in a Huzra (apartment) on the mosque and repairing the same and holding their Majlises on the 9th and the 12th of the MOHARRAM (apparently accepting the decision of Pramode Charan Banerji in the earlier litigation being Suit No. 849 of 1878 as affirmed in Civil Appeal No. 73 of 1879) but they had made unauthorised constructions on some of the plots. The plaintiffs prayed

that the defendants be directed to remove their unauthorised constructions and that a perpetual injunction be issued against them restraining them from holding their majlises near the mosque or Imam Chowk. Or on any other plot in suit except on 9th and 12th of MOHARRAM. The defendants contested the suit and denied that the plots were Sunni Wakfs and further denied that the plaintiffs had acquired any customary right over them. They asserted their exclusive rights to perform their religious ceremonies and functions over the plots and averred that existing constructions (details whereof were specified) had been put up long ago exclusively by the Shias and were used for their religious ceremonies and functions. The trial court (Shri Shah Ghayas Alam Sahib, the Additional Munsif) partly decreed the suit on 2nd February, 1935. He ordered the demolition of the construction on plot No. 245 (being Zanana Imambara) and issued a perpetual injunction restraining the defendants from holding their Majlises in the Baradari (being Mardana Imambara on plot No.247/1130) except on the 9th and 12th of MOHARRAM but he dismissed the suit so far as it related to the demolition of Chabutra (platform) of Asadullah's house in plot No. 248/23/72. The Shias went up in appeal being Civil Appeal No. 65 of 1935 while the Sunnis filed a cross-objection regarding that part of the relief which was denied. Shri Brij Narain the learned second Additional Sub-Judge of Banaras on 18th September, 1935 allowed the defendants' appeal, set aside the decree of the trial Court and dismissed the plaintiffs' suit with costs through out; the cross objection was also dismissed with costs. It was admitted by both the parties before the appellate Court that His Highness the Maharaja of Banaras was the Zamidar of the plots

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in question and the Khasras of 1291 Fasli (1884 A.D.) also showed the same thing. The appellate Court held: (a) that in plot No. 246 there was a Pokhta mosque which was wakf property but that none of the other plots in suit were appurtenant to that mosque in 246 as was claimed by plaintiffs and that neither the plaintiffs nor members of Sunni community were owners of any of the plots in question; (b) that the plaintiffs had failed to prove that the other plots were wakfs in their favour: (c) that the plaintiffs had failed to prove that they had been exercising customary rights specified in para 4 of the plaint over the plots in suit except in the mosque in plot No. 246; (d) that the boundary walls on plot No. 245 described in settlement papers to be Chabutra Imam Sahib (Zanana Imambara) had been built by Shias about 25 years ago and that this plot had all along been used by Shia ladies for mourning purposes during the MOHARRAM; (e) that the Baradari (Mardana Imambara) was built by the Shias in the year 1893 A.D. (1311 Hizri) on plot No.247/1130 which had been in their possession all along and it was a Wakf; (f) that the defendants and the Shia Muslims were entitled to use plots Nos.246/1134,(containing Sabil Chabutra) and 247/1130 (the Baradari i.e. Mardana Imambara) for holding their majlises on all the days during the MOHARRAM but were not entitled to hold Majlises an Thursday of the remaining portion of the year; (g) that on plot No. 248/23/72 there existed the house of Asadullah, a Shia Muslim being defendant No. 5 to the suit and the construction (Chabutra) that appertained to the house had been rightly directed not to be demolished. As regards the two plots namely plot No. 602 (Two Biswas and ten Dhoors) which was taken on lease by one Sheikh Fazil, a Sunni barber from the Maharaja of Banaras under a Patta

dated 26th June, 1927 and plot No. 603 (Two Biswas Three Dhoors) which was taken on lease by one Mahomad Niamat-Ullah a Sunni weaver from the Maharaja under a Patta dated 15th September, 1930 the appellate Court observed that these did not appear to have remained in the possession of the plaintiffs (Sunni Muslims). The decision clearly establishes the title or ownership of Shias over at least two main structures Zanana Imambara on plot No. 245 and Baradari on plot No. 247/1130 and the land below the structures and what is more substantially the customary rights claimed by the Shia Muslims over the plots and structures were upheld and those claimed by the Sunni Muslims were rejected and the plaintiffs' suit stood wholly dismissed. The Sunnis preferred an appeal to the High Court being Second Appeal No. 1726 of 1935 but the same was dismissed by the High Court by its judgment
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dated 9th December, 1938. Dealing with the question of the Shias' right to hold their Majlises in the Baradari in the context of the position that the Baradari had been built by the Shias for that purpose the High Court observed: "the plaintiffs in the present suit have claimed that the Shias-defendants are not entitled to hold their Majlises in the Baradari which the Shias have built. This appears to us to be a very strange proposition. Where a community has made a building for the purpose of its own religious services it appears to us contrary to law that any one can question the right of that community to hold its services." The clear implication is no restriction could be imposed on Shias in the matter of holding their Majlises and other services in the Baradari built by them as was done by the lower appellate Court.

Counsel for respondents 4 and 5 strenuously contended that the aforesaid litigation was not a representative one so as to bind the entire Sunni community of Mohalla Doshipura, Banaras by the result thereof and in that behalf counsel pointed out that neither the title of the plaint showed that the suit had been filed by the plaintiffs as representing all the members of Sunni community of Mohalla Doshipura, Varanasi nor was any copy of the Order passed by the trial Court granting leave to the plaintiffs to file the suit in representative capacity produced and there was no statement in any of the judgments indicating the representative character of the suit. It is not possible to accept this contention for more than one reason. In the first place besides reciting in para 1 of the plaint that the plaintiffs were Muslims of Sunni sect and defendants were Muslims of Shia sect, both settled in Mohalla Doshipura of Banaras City, in para 11 there was an express averment that the suit was filed under Order 1 r. 8 C.P.C. and that a proclamation be issued by the Court in the interest of justice so that those from Sunni sect and Shia sect of Muslims who desired to contest the suit may get themselves impleaded to the suit, secondly a public notice under Order 1 r. 8 of the C.P.C. with the Court's seal was actually published in Urdu language in the issue of Oudh Panch dated 19th August, 1934 (English translation whereof has been annexed as Annexure VI to the Writ Petition and the original issue of Oudh Panch, Lucknow dated 19th August 1934 was produced during the hearing) setting out in brief the averments and the reliefs contained in the plaint and inviting members of both Sunni and Shia sects to get them impleaded as party to the suit if they so desired; thirdly the expenses of such publication of the notice amounting to Rs. 7 have been shown as an item of costs

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incurred by the plaintiffs in the Bill of costs appearing at the foot of the preliminary decree passed by the trial Court in the suit (certified copy whereof was produced by respondents 5 and 6) and lastly the suit Register (general Index) of the Court of Additional Munsif (Extract copy whereof has been produced) shows that public notice was published in Oudh Panch and the copy of the newspaper issue was filed in the Court on 21st August, 1934 and the bill received from that Newspaper was also filed on 25th Sept. 1934. From this material which is available on the record it seems to us clear that the Suit No. 232 of 1934 had been filed in the representative capacity both as regards the plaintiffs as well as the defendants and all the formalities under Order 1 r. 8 of the C.P.C. had been complied with. A crude attempt was made at a belated stage of hearing by respondents 5 and 6 to get over the effect of the aforesaid material by producing a document which purports to be a certified copy of a purported Order said to have been passed by the Additional Munsif, Banaras rejecting the plaintiffs' application to file the suit in a representative character. To say the least the document is of a spurious character, reciting a dubious order. Apart from the fact that this document is seeing the light of the day nearly fifty years after the expiry of litigation, the copy does not bear any seal of the court; the order recites that the defendants have denied the plaintiffs' status and capacity as being representatives of their (Sunni) sect and have also denied their status as representatives of Shias whereas there is no such denial to be found at all in the written statement, and what is more it passes one's comprehension how such an order rejecting the plaintiffs' application for leave under O. 1 r. 8 came to be passed on 24th August, 1934-5 days after the publication of the public notice in the issue of Oudh Panch on 19th Aug. 1934; and if the order dt. 24th August, 1934 was genuine how could expenses of such publication be shown as an item of plaintiffs costs in the preliminary decree passed on 2nd Feb. 1935 and why were the issue of Oudh Panch and the Bill from the Newspaper filed in the Court on 21st August, 1934 and 25th Sept. 1934 respectively. In our view the three or four circumstances which we have indicated above conclusively establish that the suit was filed by the plaintiffs as representing entire Sunni community of Mohalla Doshipura, Varanasi against the defendants who represented the Shia community and as such the final decision in that litigation is binding on members of both the communities.

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Counsel for respondents 5 and 6 next contended that the decision in this litigation (Suit No. 242 of 1934) would not operate res judicata against them or the Sunni community of Mohalla Doshipura inasmuch as Munsif's Court at Banaras did not have either pecuniary or subject-wise jurisdiction to grant the reliefs claimed in the instant writ petition; in other words that Court was not competent to decide the present subject-matter and such the bar of res judicata under s. 11 of the Civil Procedure Code 1908 was not attracted, and it would be open to the respondents 5 and 6 and the members of the Sunni community to agitate question of title either to the plots or to the structures thereon or even the Shias' entitlement to their customary rights over them. In support of this contention counsel relied on two decisions namely, Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer and Mst. Gulab Bai v. Manphool Bai. It is not possible to accept this contention for the reasons which we shall presently indicate. It is well settled that s. 11 of

the C.L.C. is not exhaustive of the general doctrine of res judicata and though the rule of res judicata as enacted in s. 11 has some technical aspects the general doctrine is founded on considerations of high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. In Daryao and others v. The State of U.P. this Court at page 582 has observed thus:

> "Now the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance, the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation."

Reference in this connection was made by the Court to the famous decision in the leading Duchess of Kingston's(4) case. Halsbury's laws
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of England and Corpus Juris. In Gulab Chand Chhotalal Parikh v. State of Bombay (now Gujarat) the question was whether after the dismissal of a writ petition on merits after full contest by the High Court under Art. 226 of the Constitution a subsequent suit raising the same plea claiming discharge from the liability on the same ground was entertainable or not and this Court held that on general principles of res judicta the decision of the High Court on the writ petition operated as res judicata barring the subsequent suit between the same parties with respect to the same matter. On a review of entire case law on the subject, including Privy Council decisions, this Court at page 574 observed thus:-

> "As a result of the above discussion, we are of opinion that the provisions of s. 11 C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial.
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> We do not see any good reason to preclude such decisions on matters in controversy in writ proceeding under Arts. 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest." (Emphasis supplied).

The above observations were approved by this Court in a subsequent decision in the case of Union of India v. Nanak Singh. It is thus
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clear that technical aspects of s. 11 of C. P. C., as for

instance, pecuniary or subject-wise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicata is to be invoked. The two decisions relied upon by counsel for the respondents 5 and 6 were directly under s. 11 of C. P. C. Even under s. 11 the position has been clarified by inserting a new Explanation VIII in 1976. It was not disputed that the Munsif's Court at Banaras was competent to decide the issues that arose for determination before it in earlier litigation and, therefore, the decision of such competent Court on the concerned issues must operate as a bar to any subsequent agitation of the same issues between the same parties on general principles of res judicata. The contention raised by counsel for respondents 5 and 6 in this behalf, therefore, has to be rejected. It was then faintly urged by counsel for respondents 5 and 6 that the dismissal of plaintiffs' suit (No. 232 of 1934) would not confer any rights on the Shia community who were party defendants to the suit. The contention is merely required to be stated to be rejected. Not only were the Sunnis' customary rights (specified in para 4 of the plaint) over the plots and structures in question put in issue during the trial but the customary rights to perform their religious ceremonies and functions on the plots and structures thereon claimed by the Shias were also directly and substantially put in issue inasmuch as the plaintiffs (Sunni Muslim) 'had sought an injunction restraining the Shias from exercising their customary rights. Therefore, the decision in this litigation which bore a representative character not merely negatived the Sunnis' customary rights claimed by them over the plots and structures but adjudicated, determined and declared the Shias' entitlement to their customary rights to perform their religious ceremonies and functions on the plots and structures thereon in question and this decision is binding on both the communities of Mohalla Doshipura. There is no question of there being any gap or inadequacy of the material on record in the matter of proof of Shias' entitlement to customary rights over the plots and structures in question, whatever be the position as regards their title to the plots or structures. We have already indicated that this decision even upholds their title to two main structures, Zanna Imambara and Mardana Imambara (Barardari). In our view, therefore, this is a clear case of an existing or established entitlement to the customary rights in favour of the Shias' community to perform their religious ceremonies and functions over the plots and structures
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in question under the decree of competent Civil Court for the enforcement of which the instant Writ Petition has been filed.

Turning to the other fundamental basis on which the petitioners are claiming their customary rights for performing their religious ceremonies and functions on the plots and constructions in question is the registration of these plots and structures thereon as Shia Wakfs under the U. P. Muslim Wakfs Act, 1936. A two-fold plea has been raised by counsel on their behalf namely (a) that the Report of the Chief or Provincial Commissioner of Wakfs dated 28th/31st October, 1938 submitted to the State Government under sec. 4 (5) showing these plots and structures as Shia Wakfs followed by the Notification dated 15-1-1954 issued by the Shia Central Wakf Board under sec. 5 (1) of the Act and published in the U. P. Government Gazette on 23rd January,

1954, had become final and conclusive under sec. 5(3) of the Act since no suit challenging his decision had been filed either by the Sunni Board or any other Sunni Muslim interested in it within the period specified under sec. 5(2) of the Act, and (b) that plots and structures in question had been registered as Shia Wakfs for purposes of performing their religious ceremonies and functions thereon under sec. 38 of the Act as early as in 1952 and therefore their case is that Shia Muslims cannot be deprived of the lawful exercise of their customary rights over the properties which have been recognised and registered as Shia Wakfs. As against this, respondents 5 and 6 and through them the Sunni community are relying upon a notification dated 26th February, 1944 issued by the Sunni Central Wakfs Board under sec. 5(1) of the U. P. Muslim Wakf Act, 1936 following upon the Report of the Chief or Provincial Commissioner of Wakfs in respect of Mosque in Doshipura showing the same as Sunni Wakfs and registration of some of these properties as Sunni Wakfs under sec. 29 of the U. P. Muslims Wakfs Act, 1960.

Before going into the factual aspects it will be desirable to indicate briefly the legal position arising under the two enactments, the U.P. Muslim Wakfs Act, 1936 (Act XVIII of 1936) and the U.P. Muslim Wakfs Act, 1960 (Act XVI of 1960), which repealed earlier Act, in the matter of finality Survey Reports and effect of Registration of Wakfs belonging to the respective sects in the State of U.P. Broadly speaking it could be stated that while repealing the 1936 Act the 1960 Act maintains and preserves the finality and conclusiveness accorded to the Survey Reports completed and submitted by the Wakfs Commissioners under the former Act and the

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registration of Wakfs under the 1936 Act has been kept alive and effective as if such registration has taken place under the latter Act and registration of Wakfs under the latter Act has been permitted only in respect of Wakfs other than those which have already been registered under the former Act. Under the 1936 Act appointment of district-wise Commissioners of Wakfs for the purpose of undertaking survey of all Wakfs in such districts and appointments of Provincial Commissioners of Wakfs having jurisdiction in all the districts of the State for the same purpose and with same duties and powers were contemplated by sec. 4 and 4A respectively; under sec. 4 (3) such Commissioners were required to make such inquiries as they considered necessary for ascertaining and determining the number of all Shia and Sunni Wakfs within the area of their jurisdiction, the nature of each Wakf, the gross-income of property comprised in the Wakf etc. and under sec. 4 (5) on completion of inquiry they had to submit their Reports of Inquiries to the State Government; under sec. 5 (1) a copy of the Commissioner's Report had to be sent to each of the Central Boards (the Shia Central Wakfs Board and Sunni Central Wakfs Board) whereupon each Central Board had to, as soon as possible, notify in the Official Gazette the Wakfs relating to the particular sect to which, according to such report, the provisions of this Act applied: under sec. 5 (2) the Central Board or the Mutawali of a wakf of any other person interested in it, if aggrieved by the decision recorded by the Commissioner in his Report had to bring a suit in a Civil Court competent jurisdiction for a declaration or appropriate relief and such a suit by the Central Board had to be filed within two years of the receipt of the Report by the Board and by the Mutawali or a person interested within one year of the Notification mentioned in sub-sec. (1); and

sec. 5 (3) accorded, subject to the final result of such suit, finality and conclusiveness to the Commissioner's Report. Section 38 of the Act provided for registration of Wakfs pertaining to each sect by the concerned Central Board and the procedure to be followed and inquiry to be made by the concerned Board in that behalf was indicated in that section and under sec. 39 it was made incumbent upon each Central Board to maintain a Register of Wakfs showing various particulars specified therein in respect of each Wakf. Under the 1960 Act, appointments of Commissioner of Wakfs and Additional or Assistant Commissioner of Wakfs is contemplated by sec. 4 while Survey of Wakfs to be undertaken by such Commissioners is contemplated by sec. 6 and under sec. 6(4) the Commissioner's Report of Inquiry is required to be forwarded to each of the Boards
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and to the State Government and the State Government has to, as soon as possible, notify in the Official Gazette the Wakfs relating to particular sect to which, according to such Report, the provisions of this Act apply; sec. 8 provides that if a dispute arises with regard the findings or decisions recorded by Commissioner in his Report the same shall be referred to Tribunal for adjudication, which must be done within one year from the date of publication by the State Government of the list of Wakfs under sec. 6 (4); sec. 9 is important and provides that proceedings of any survey of wakf properties started before the commencement of this Act shall continue and such survey shall be completed in accordance with provisions of the 1936 Act and under sub-sec. (2) it is provided that nothing in this chapter shall effect the finality of the decisions of the Chief State Commissioner of Wakfs or of any State Commissioner of Wakfs or Commissioner of Wakfs in cases in which, prior to the commencement of this Act, the report of such Commissioner has become final; in other words the finality and conclusiveness accorded to the Wakf Commissioners' Report under sec. 5 (3) of the 1936 Act has been preserved. Registration of Wakfs under the 1960 Act has been provided by secs. 28 and 29: under sec. 28 it is provided that a Wakf registered before the commencement of this Act under the 1936 Act shall be deemed to have been registered under the provisions of this Act; and sec 29 which follows sec. 28: says: Every other Wakf, whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Board of the sect to which the Wakf belongs"; the opening words "every other Wakf" occurring in sec. 29 must mean that sec. 29 provides for registration of all Wakfs other than those which have already been registered under the 1936 Act. As stated earlier a perusal of these provisions of the two enactments clearly show that the finality and conclusiveness accorded to the Commissioner's Report under sec. 5 (3) of the 1936 Act has been preserved and the registration of Wakfs under the 1936 Act has been maintained under the 1960 Act notwithstanding the repeal of the former Act by the latter. In other words any Survey Report submitted under the 1960 Act and any Registration made under the 1960 Act will be futile and of no avail in regard to Wakf properties respecting which the Commissioner's Report under the 1936 Act has become final and registration has been effected under the 1936 Act.

It appears that the Government of Uttar Pradesh appointed Shri Munshi Azimuddin Khan, a Deputy Collector, as a Chief or
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Provincial Commissioner of Wakfs under sec. 4A of the 1936 Act for the purpose of making a survey of all the Waqfs in all the districts of the State. During the survey proceedings one Imam Ali Mahto, a Shia Muslim, who was defendant No. 2 in Suit No. 232 of 1934 as the Mutawalli of Imambara and the Mosque of Mohalla Doshipura has filed an application on 25th June, 1938 before the said Chief or Provincial Commissioner of Waqfs claiming six items of property, namely, (1) the Mosque on Municipal No. J-15/94 (i.e. plot No. 246) (2) Imambara on Municipal No. J. 15/95 (i. e. Baradari on plot No. 247/1130), (3) Zanana Imambara on Municipal No. J-15/96 (i.e. Plot No. 245), (4) Imam Chowk with land (i. e. on plot No. 247), (5) Chabutra Sabil Pucca (i. e. on Plot No. 246/1134) and (6) one Sabil Stone on the land to the east of Imambara-Baradari (i.e. on plot No. 602/1133) to be Shia Waqfs having been used since time immemorial for the purposes of their religious ceremonies and functions (Azadari, Majlises Mourning in Moharram, Tazia and Zulzana processions, Taziadari, Matam, etc.), the constructions having been made by subscriptions and requesting the Commissioner to enter the same in the list of Shia Public Waqfs; on the same day i.e. 25th June, 1938 Imam Ali's statement on oath was also recorded before the Commissioner and an order was passed to the effect "the waqf property be taken under the control of Waqfs Act". A copy of the application, the statement of Imam Ali recorded on oath, together with the endorsement of the order, which formed part of Survey File No. 55 before the Commissioner have been produced as Annexure P-15 (colly) to the affidavit in rejoinder dt. Nov. 5, 1979 of Shri Iqbal Hussain, petitioner No. 3 filed on behalf of the writ petitioners and also as an Annexure to the affidavit dated January 9, 1980 of Dularey Mirza, the Peshkar of the Shia Central Waqfs Board, Lucknow. After making the necessary inquiries Shri Munshi Azimuddian Khan submitted to the State Government his Report dated 28th/31st October, 1938 and annexed several appendices to his Report; Appendix VIII referred to Waqfs pertaining to Sunnis and declared as subject to the 1936 Act and Appendix IX mentioned waqfs pertaining to Sunni sect which were exempted from the Act; Appendices X and XI contained corresponding information about the Shia waqfs which were respectively declared as subject to the Act or exempt from the Act. The original Report bearing the signature of Shri Munshi Azimmuddin Khan, Chief Waqfs Commissioner was produced before us (marked Exh. A) for our inspection by Mr. Rana, counsel for the State of U.P. and the same was made available for inspection to the parties. There is a slip attached to
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the Report placed in between Annexure VII and Annexure XIII containing an endorsement to the effect "Appendices VIII and IX sent to the Sunni Board" and Appendices X and XI sent to the Shia Board" with the signature of the Chief Commissioner of Waqfs below it. The aforesaid facts mentioned in connection with the original Report have been stated in the affidavit of Shri Sayed Shamshuddin Ahmed, Secretary to the Government of Uttar Pradesh in the Waqfs and Appointment Department sworn on January 6, 1980, filed before us by the counsel for the State of U. P. alongwith the Report. Presumably the aforesaid action of sending the relevant appendices alongwith a copy of the Commissioner's report to the respective Sunni Central Waqf Board and the Shia Central Waqf Board was taken as required by s. 5(1) of the Act. It may be stated that the Shia Central Waqfs Board has accepted the position that it did receive a copy of Commissioner's

Report together with Appendices X and XI and through an affidavit dated 9th January, 1980 of their Pashkar Dularey Mirza, the Shia Board offered to produce the said Appendices stating that the copy of the Report itself was not traceable as the same appeared to have been produced in some court proceedings. It further appears that after receiving the aforesaid documents (Report together with the Appendices X and XI), the Shia Central Waqf Board, as required by sec. 5 (1) of the Act, took steps to notify in the Official Gazette all the Waqfs relating to their sect on the basis of the Appendices annexed to the Report; the relevant Notification under sec. 5 (1) was issued on 15th January, 1954 and published in the Government Gazette on 23rd January, 1954. According to the petitioners the Shia Waqfs in question appear at Sl. No. 55 (entry against the name of Imam Ali, Dhoshipura, Banaras) on page 157 of Appendix X and at Sl. No. 431 (entry being 'Imambara and Masjid against the name of Imam Ali Mahato in the Gazette Notification dated 15th January, 1954). Photostat copy of Entry at Sl.No. 55 on page 157 of Appendix X has been annexed to Dularey Mirza's Affidavit dated. 9th January, 1980 and a copy of the Gazette Notification dated 15th January, 1954 published in the U.P. Government Gazette on 23rd January, 1954 under sec. 5 (1) of the 1936 Act has been separately produced by the petitioners on the record. It is true that entry at Sl. No. 431 in the Gazette Notification dated 15th January, 1954 shows the name of Imam Ali Mahato as the Waqif, which is obviously a mistake for he never claimed himself to be the settlor or Waqif but only a Mutawalli of the Waqfs as is clear from the application made by him and the statement on oath given by him before the Commissioner and in fact the properties were claimed

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to be Shia public Waqfs by long user. It is also true that in the column 'Name of Waqf's the entry reads 'Imambara and Masjid' suggesting as if only two properties were declared to be Shia Waqfs but at the foot of the Notification under s. 5 (1) there is a nota bena to the following effect:

> "the details regarding property and other matters relating to the Wakfs are kept in the Board's office and can be inspected by any person who is interested in the matter."

It seems to us quite clear having regard to the six properties being specifically asked to be entered in the list of Shia Waqfs by Imam Ali Mahto in his application and the order made thereon, all the properties mentioned in the application must be regarded as having been entered in the list of Shia Waqfs by the Chief or Provincial Commissioner for Waqfs and the Notification under s. 5(1) related to all those properties as having been notified to be Shia Waqfs, particulars whereof were stated to be available in the Board's office. The Nota Bena at the foot of the Notification, in our view amounted to sufficient particularisation of the properties notified as Shia Waqfs. Non-mentioning of those properties as Sunni Waqfs in Appendices VIII and IX sent to the Sunni Central Waqfs Board must amount to a notice to the Sunni Board and the Sunni Muslims that these had been enlisted as Shia Waqfs. Admittedly, no suit was filed either by the Sunni Central Board or any other person interested in those waqfs challenging the decision recorded in his Report by the Chief or Provincial Commissioner for Waqfs within the time prescribed under s. 5(2) of the Act, and, therefore, the Chief Commissioner's Report together with the appendices X and XI thereto dated 28th/31st October, 1938, on the basis

of which the Notification dated 15th January, 1954 was issued and published in Official Gazette on 23rd January, 1954, must be held to have become final and conclusive as between the members of the two communities. In this behalf we would like to refer to the decision of the Court in Board of Muslim Waqfs v. Radha Krishna and Ors. where one of us (Sen, J.) has analysed the scheme of the Waqfs Act,1954 (a Central enactment) which is substantially the same as the scheme of the 1936 Act and we are in respectful agreement with the ratio of that case but here we are not concerned with any paramount title of any stranger (like the
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Maharaja) to any property declared as waqf and hence that part of the ratio of that decision will be inapplicable.

As against the aforesaid material respondents 5 and 6 and through them the Sunni community have relied upon a Notification dated 26th February, 1944 issued by the Sunni Central Waqfs Boards under s. 5(1) of the U.P. Muslim Waqfs Act, 1936 following upon the receipt of the Report of the Chief or Provincial Commissioner of Waqfs in respect of mosque in Doshipura showing the same as Sunni Waqf, copy whereof has been annexed as Annexure S-2 to the affidavit dated 6th February, 1980 of Mohd. Bashir Khan filed on behalf of the Sunni Central Waqfs Board as its 'Pairokar'. This Notification on which reliance has been placed by the Sunnis appears to us of doubtful validity and probative value for the reasons which we shall presently indicate. Though issued and published earlier in point of time than the Notification of Shia Central Waqfs Board, it is admittedly not based on Appendices VIII and IX annexed to the Chief Commissioner's Report dated October 28th/31st October, 1938 but on the basis of some Registers of Waqfs (meaning lists of Waqfs) (said to have been received by the Sunni Board from the Commissioner of Waqfs. Curiously enough the Sunni Central Waqfs Board had stated through two affidavits dated 6th January, 1980 and 9th January, 1980 of their Pairokor Shri Mohd. Bashir Khan that along with the copy of the Commissioner's Report Registers of Waqfs were received but no appendices like Appendices VIII and IX were received from the Commissioner, that according to the Registers of Waqfs there were 245 charitable Sunni Waqfs in the District of Banaras which were covered by the 1936 Act and all such Waqfs were accordingly notified by the Sunni Board in the Government Gazette by issuing the Notification dated 26th February, 1944 under sec. 5 (1) of the Act. The Original Report of the Commissioner does not refer to anything like Registers of Waqfs but, as stated earlier, it refers to Appendices Nos. VIII, IX, X and XI and the endorsement on the slip under the signature of the Chief Commissioner shows that the former two appendices were sent to the Sunni Board and the latter two to the Shia Board. In face of this endorsement and having regard to the fact that the Shia Board had received Appendices X and XI alongwith the Commissioner's Report which that Board offered to produce, it is difficult to accept the statement of the Pairokar of the Sunni Board that no appendices were received by the Board along with a copy of the Commissioner's Report. It seems the relevant appendices, though received, are being withheld as their production would be adverse to the Sunnis. Apart form that aspect it is clear on their own
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admission that the Notification under s. 5 (1) of the 1936 Act was issued by the Sunni Central Waqfs Board not on the basis of Appendices VIII and IX which formed part of the Commissioner's Report but on the basis of some Registers of

Waqfs said to have been received by it. The Notification regarding the Sunni Waqfs issued on the basis of material which did not form part of the Chief Commissioner's Report would be in violation of s. 5(1) of the Act which required issuance of a Notification thereunder 'according to' the Commissioner's Report and as such the Notification dated February 26, 1944 relied upon by respondents 5 and 6 and members of the Sunni community would be of doubtful validity. Secondly, the relevant entry in the Register of Waqfs is at Serial No. 224 and it pertains to "one quita mosque and land" of which the "present Mutawali" is shown as "Hayatullah resident of Dhosipura, Banaras" and correspondingly the entry in the Notification dated February 26, 1944 issued under s. 5 (1) of the 1936 Act is also at Sl. No. 224 which reads: "Masjid Dhoshipura-Hayatullah r/o Doshipura, Banaras-one quita mosque", but the petitioners have produced documentary and other material throwing doubt on the genuineness of the entry as being in relation to the mosque in question on plot No. 246 (i.e. Municipal No. J-15/94); according to the affidavits of Dularey Misra (the Peshkar of Shia Central Waqfs Board) dated 12th August, 1980 and 1st October, 1980 there were two Hayatullahs in Mohalla Dhoshipura, Varanasi, one was Hayatullah alias Hayatoo r/o H. No. J-15/125, Mohalla Doshipura, who had died in 1926 long prior to Survey of Waqfs under the 1936 Act, that his son Abdul Shakoor, who was plaintiff No. 2 in suit No. 232/1934 admitted in his evidence in that suit that his father (Hayatullah) had expired 8 years before the filing of the suit and as such entry at serial No. 224 which describes Hayatullah r/o Mohalla Doshipura as the "present Mutawali" (i.e. in 1944 when the Notification was issued) obviously could not refer to this Hayatullah father of Abdul Shakoor, while the other Hayatullah, who was known by the name of Moulavi Hayatullah r/o H. No J-15/8 in Mohalla Dhosipura was the father of Hakim Mahmood and Ali Ahmed, who are the present Mutawalis of a mosque in Mohalla Salarpura standing on Municipal No. J-18/108 and therefore, if the name in entry at serial No. 224 refers to this Hayatullah who could be its "present Mutawali" in 1944 then the mosque would be the mosque in Mohalla Salarpur and not the mosque in question standing on Municipal No. J-15/94 (i.e. Plot No. 246) in Mohalla Doshipura and while making the entry by mistake Mo-

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halla Doshipura was wrongly mentioned instead of Mohalla Salarpura as the two Mohallas are quite adjacent to each other; in other words, according to the petitioners if the entry at serial No. 224 in the Registers of Waqfs or in the Notification dated 26th February, 1944 refers to Hayatullah father of Abdul Shakoor the entry is obviously wrong as it would be mentioning a dead person as the "present Mutawali" of the mosque and in case the entry at serial No. 224 is referable to Maulvi Hayatullah then the reference to the mosque being in Mohalla Doshipura would be erroneous. It is the petitioners' case that it was Maulavi Hayatullah who had as early as in 1944 submitted an application for registration of the mosque in Mohalla Salarpura standing on Municipal No. J-18/108 to the Sunni Central Waqfs Board but by mistake it was stated therein that the mosque was for the benefit of people of Doshipura and it was registered under his name under serial No. 224 in the Register of Waqfs maintained by the Sunni Board and by mistake that mosque was wrongly entered as being in Mohalla Doshipura; and in support of this reliance has been placed upon a Report dated 14th February, 1961 submitted by Inspector Ashraf Ali to the

Sunni Board in which he had noticed and placed on record such mistake having taken place copy whereof has been annexed as Annexure-I to the affidavit of Dularey Mirza (Peskhar of Shia Board) dated 13th February, 1980; in other words, the aforesaid material casts a serious doubt on the aspect whether the mosque mentioned in entry No. 224 in the Notification dated February 26, 1944 really pertains to the mosque in question standing on Plot No. 246 (Municipal No. J-15/94) in Mohalla Doshipura and as such the Notification will have no probative value. In this state of affairs Notice dated 11.4.1945 issued by Shia Board under s. 53 of the 1936 Act complaining about this entry at Sl. No. 224 relied upon by counsel for respondents 5 and 6 must be regarded as having been issued ex majori cautela. Thirdly, even if it were assumed for the purposes of argument that entry at Serial No. 224 in the Notification dated 26th February, 1944 refers to the mosque in question it cannot affect the customary rights of the petitioners and through them the Shia community to perform their religious ceremonies and functions over the other 8 plots and structures thereon which had been listed as Shia Wakfs under the Notification dated 15th January, 1954, especially when it is now common ground that the mosque on Plot No. 246 is a public mosque constructed by general subscriptions and is accessible to members of both the sects for offering
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prayers and doing worship therein. Admittedly the Notification dated 26th February, 1944, does not refer to any other plots or the structures thereon at all. We are, therefore, clearly of the view that the Notification dated 26th February, 1944 issued under s. 5(1) of the 1936 Act by the Sunni Board is of no avail to the Sunnis for the purpose of defeating the customary rights of the Shias to perform their religious ceremonies and functions on the other plots and structures thereon.

Apart from the finality attaching to the Chief Commissioner's Report (together with the Appendices X and XI annexed thereto) dated 28th/31st October, 1938 the petitioners have also claimed that the aforesaid plots and structures thereon had been registered as Shia Waqfs for performance of their religious ceremonies and functions under s.38 of the 1936 Act by the Shia Central Waqfs Board after making full inquiry and following the procedure prescribed by that section as early as in 1952 and the Board had issued the requisite Sanads in that behalf. Reliance in this regard has been placed on five certificates issued by Shia Central Waqfs Board, Lucknow, bearing Certificate Nos. 209, 210, 211, 214 and 21 all dated 22nd December, 1952- first relating to Mardana Imambara (the Baradari) on Plot No. 247/1130, the second relating to Zanana Imambara on Plot No. 245, the third relating to Imam Chowk on Plot No. 247, being appurtenant to Baradari the fourth relating to the entire Plot No. 602/1133 being appurtenant to the Baradari and the last relating to Sabil Chabutra Mardana on Plot No. 246/1134 (Annexures VIII & VIII-A to VIII-D to the Writ Petition). It may be stated that the petitioners have also produced a certificate of registration in respect of Purani Masjid of Doshipura as a Shia Waqf dated 3rd July, 1973, the registration being under the 1960 Act, but counsel for the petitioners fairly conceded that the mosque in question belongs to both the sects and no special rights are claimed by the Shias over it except those conferred on them under the decree in Suit No. 849 of 1878 by Shri Pramoda Charan Banarjee. The registration in respect of the five properties mentioned above under sec. 38 of the 1936 Act would be

available to the petitioners and must prevail over the subsequent registration, if any, obtained by the Sunnis in respect of some of the properties under the 1960 Act; really speaking such latter registration would be non est in the eye of law.

Apart from the Certificates of Registration issued by the Shia Central Waqfs Board on 22nd December, 1952 the petitioners are

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also relying upon yet another Notification issued by the Shia Central Waqfs Board under Rule 54 (vii) of the U.P. Shia Central Waqfs Rules, 1944 enlisting the Shia Waqfs in question and published in the U.P. Government Gazette on 1st December, 1956. It may be stated that the Shia Board had framed rules called the U.P. Shia Central Waqfs Rules 1944 in exercise of powers conferred on it by sec.-61 of the 1936 Act and under Rule 54(vii) the Board was required to notify a list of Waqfs which had been registered during the year under report. It appears that a consolidated list of Shia Waqfs which were registered during the period 28th July, 1942 to 31st March, 1956 subsequent to the submission of the Report of the Chief Commissioner for Waqfs under sec. 5 of the Act was published for the first time by the Shia Board under the Notification dated 1st December, 1956 issued under Rule 54(vii); a copy of the relevant portion of that Notification is annexed as Annexure VII to the writ petition showing registration of Imambara-Baradari, Doshipura, at Serial No. 152, Imambara Mutalik Purani Masjid, Doshipura at Serial No. 153, Mardana Imambara-Baradari at Serial No. 155, Purani Masjid, Doshipura at Serial No. 157, Zanana Imambara, Doshipura at Serial No. 159, Imam Chowk, Dhoshipura at Serial No.160 and Chabutra Mardana Sabil at Serial No. 161 as Shia Waqfs. This Notification issued by the Shia Board on 1st December, 1956 also supports the petitioners' case that the concerned properties had been registered as Shia Waqfs under s. 38 of the Act. It is thus clear that even on the second foundational basis the Shias have proved their existing or established entitlement to their customary rights to perform their religious ceremonies and functions on the concerned plots and structures thereon.

Much was made by Counsel for respondents 5 and 6 of certain documents on record showing derivative title of Sunni Muslims to a couple of plots in question and Counsel contended that whatever be the position with regard to three earlier documents (Pattas of 1907, 1927 and 1930 about which the Courts have made observations in earlier litigations), there was yet one more lease of 20.4.1952 in respect of portions of three plots, namely, 602/1133,247 and 245 in favour of Hafiz Mohd. Yusuf and Akram-ul-Haq, two Sunni Muslims from the Maharaja, whereunder they had acquired lessee's interest over the plots at an yearly rent of Rs. 3 and they had dedicated the same to the Sunni community for use as graveyard and such subsequent title could not be affected by the decisions in earlier litigations. It must be stated that in support of this lease of 1952 no lease deed nor any Patta has been produced, but reliance is placed on two

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documents (i) Extract of Register of Agreements (Agreement to Lease) dated 20.4.52 and (ii) Receipt for payment of rent (curiously enough relating to three prior years July 1949 to June 1950, July 1950 to June 1951 and July 1951 to June 1952=1357, 1358 and 1359 Fasli), being Annexures 3 and 4 to the Counter Affidavit of Respondent No. 5 dated 17.4.1979. At the outset we would observe that it is

difficult to accept the claim that the three plots had been dedicated by the two Sunni Muslims to their community for use as graveyard, for, the Commissioners appointed by this Court for survey and spot inspection in December 1979 did not find any such use being made of plots No. 247 and 245 and merely noticed two graves and one in damaged condition on plot No. 602/ 1133 only-same plot with graves which was the subject matter of Maharaja's Suit No. 424/1931 in which a permanent injunction was issued restraining all Muslims (virtually all Sunnis) from using the said plot as any graveyard in future. Dealing with the aspect of derivative title put forward by counsel on behalf of the respondents No. 5 and 6, we have already made the position clear in the earlier part of our judgment that the Shias' are claiming the right to perform their religious ceremonies and functions on the plots and structures in question not so much on the basis of any title or ownership thereof but on the basis of customary exercise since time immemorial and they have been claiming customary rights by prescription over the plots belonging to the Maharaja of Banaras as Zamindar and superior title-holder and the prescriptive rights have enured for the benefit of all the Shias notwithstanding such superior title in the Maharaja and if that be so they will also enure for their benefit as against any derivative title claimed by anyone under the Maharaja. Moreover, when these plots and structures, particularly these three plots were being registered as Shia Waqfs under the U.P. Muslim Waqfs Act 1936 by the Shia Board and Sanads of Certificates of Registration in respect thereof were being issued in December 1952, the two Sunni Lessees who are said to have obtained a Lease on 20.4.1952 did not raise any objection to such registration. The Shias customary rights acquired by prescription over these plots cannot thus be defeated by such derivative title.

The next question that arises for consideration is whether an Order made under s. 144 Criminal Procedure Code is judicial or quasi-judicial order or whether it is passed in exercise of an executive power in performance of executive function amenable to writ jurisdiction under Art. 32 of the Constitution ? Counsel for respon-

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dents 5 and 6 and through them the Sunni community contended that such an order is a judicial or quasi-judicial order passed by a Magistrate's Court after hearing parties (except in cases of emergency when it is passed ex-parte without notice to the person or persons affected under sub-s. (2) of s. 144) and since no fundamental right can be said to be infringed by any judicial or quasi-judicial order a Writ of mandamus under Art. 32 would not lie, but the order may be and is revisable by a superior Court like the Sessions Court or the High Court. In support of this contention reliance was placed upon one decision of the Bombay High Court and three of the Madras High Court. It was pointed out that in D. V. Belvi v. Emperor a Division Bench of the Bombay High Court has held that the orders under s. 144 are judicial and not administrative and that this question had been set at rest by several earlier decisions cited in the judgment; in Queen Empress v. Tirunarasimha Chari the Madras High Court has taken the view that the Magistrate, making inquiry before the issue of an order under s. 144 is acting in a stage of judicial proceeding and has, therefore, jurisdiction to take action under s. 476, if he is of the opinion that false evidence has been given before him; similarly in Muthuswami Servaigram and Anr. v. Thangammal Ayyiar as also in Bondalpati Thatayya v. Gollapuri Basavayya

and Ors. the same view is taken. Counsel also invited our attention to three cases of this Court, namely Babulal Parate's case, K K. Mishra's case and Madhu Limaye's case, in each one of which the constitutional validity of s. 144 Cr. P.C. or part thereof was challenged, and while upholding the constitutional validity of the section or of the concerned part this Court has touched upon certain aspects of the section and the procedure thereunder (hearing the parties, order being of temporary character and revisable) which suggest that the proceeding before the Magistrate is judicial or quasi-judicial proceeding. Counsel, therefore, urged that if the order under s. 144 Cr. P. C. is a judicial or quasi-judicial order then this Court has taken the view that such an order will not attract writ jurisdiction of this Court under Art. 32 since such an order cannot affect or infringe any fundamental right and in that behalf reliance

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was placed upon Sahibzada Saiyed Muhammed Amirabbas Abbasi and Ors. v. The State of Madhya Bharat and Ors., The Parbhani Transport Co-operative Society Ltd. v. The Regional Transport Authority, Smt. Ujjam Bai' case (subject to three exceptions mentioned therein) and N.S. Mirajkar's case, the principle in the last mentioned case having been stated at p. 760 of the Report thus:

> "When a Judge deals with matters brought before him for adjudication, he first deals with questions of facts on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong and whether the conclusions of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the Appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Art 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by Court in or in relation to a matter brought before it for its decision cannot be said to affect that fundamental rights of citizens under Art. 19(1)."

The question whether an order under s. 144 Criminal Procedure Code is a judicial order or an order in exercise of the executive power in performance of an executive function will have to be decided in the instant case by reference to the new Criminal Procedure Code, 1973 and not by reference to the old Criminal Procedure Code, 1898. We would like to point out that the position under the 1898 Code, wherein separation between the judicial functions and executive or administrative functions of Magistrates did not obtain, was quite different and the power to act in urgent cases of nuisance and apprehended danger to public tranquility under s. 144

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of the Code had been conferred on "District Magistrates, Chief Presidency Magistrates, Sub-Divisional Magistrates, or other Magistrates specially empowered by the State Government" and it was in those circumstances that the view prevailed in the decisions of several High Courts that the

order passed by a Magistrate under s. 144 of that Code was a judicial order and it must be pointed out that all the decisions including those of this Court that have been relied upon by counsel for respondents 5 and 6 are in relation to the said section under that Code, while the position under the new Criminal Procedure Code 1973 is entirely different whereunder the scheme of separation of judicial functions from executive functions of the Magistrates, as recommended by the Law Commission has been implemented to a great extent. The Law Commission in its 37th Report on the Code of Criminal Procedure 1898 made several recommendations in this behalf to which we might usefully refer, At page 15 of the Report the Law Commission in para 41 has observed thus:

> "41. The usual way of classifying the functions of Magistrates under the Code of Criminal Procedure and various other statutes is to divide them into three broad categories, namely-
>
> (a) Functions which are 'police' in their nature, as for instance, the handling of unlawful assemblies;
>
> (b) functions of an administrative character, as for instance, the issue of licences for fire-arms, etc., etc.; and
>
> (c) functions which are essentially judicial, as for instance, the trial of criminal cases.
>
> The essential features of the scheme for separation (it is stated) would be, that purely judicial functions coming under category (c) above are transferred from the Collector and Magistrates subordinate to him, to a new set of officers who will be under the control not of the Collector but of the High Court. Functions under (a) and (b) above will continue to be discharged by the Collector and the Revenue Officers subordinate to him."

Again in para 43 the Law Commission observed thus:

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> "43. It is in this background that the concept of separation has to be understood. In its essence, separations means separation of judicial and executive functions in such manner that the judicial functions are exercised by the judiciary which is not controlled by the executive. This would ensure that influence of the executive does not pollute the administration of criminal justice."

On the question of allocation of functions between judicial and executive Magistrates it appears that there were before it three main patterns of separation (1) the Bombay pattern (suggested in the Report of the Committee on the separation of judiciary from the executive, 1947 appointed by the Government of Bombay), (2) the Madras pattern (Government of Madras, Public (Separation) Department G.O. Ms. No. 2304 dated 24th September, 1952) and (3) the Punjab pattern (introduced by Punjab Separation etc. Act 25 of 1964) and according to the Law Commission the allocation under the Bombay and Punjab schemes proceeded on the basis that powers other than those of trial of offences should be left to the Executive Magistrates even where recording and sifting of evidence and a decision thereon were required and this was brought about by making the requisite amendments in certain sections of the Code including s. 144 while under the Madras scheme matters involve the recording and sifting of evidence were strictly within the purview of the Judicial Magistrates but concurrent jurisdiction was provided in some cases and powers in those cases particularly under s. 144 were kept with both judicial and executive Magistrates but Judicial

Magistrate were to exercise them in emergency and until an executive Magistrate was available. After considering all the patterns of allocation as also patterns of Magistracy under the Bombay, Punjab, and Madras schemes in paragraphs 94 to 98 of the Report the Law Commission came to the conclusion that the combination of Bombay and Punjab scheme was the best for being adopted as a model. In Paragraph 113 of its Report while dealing with the aspect of appointment of Magistrates the Law Commission recommended that executive Magistrates should be continued to be appointed by the State Government and their area should be defined by the State Government or by the District Magistrate subject to the control of the State Government while judicial Magistrates should to appointed by the High Court and if separation was to be introduced effectively the conferment of magisterial powers should belong to the High Court. As regards s. 144 (1) of the old Code in para 353 of its Report the Law Commission in terms recommended that before
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the words 'other magistrate' the word 'executive' be added and the recommendation has been accepted while drafting that section in the new Code.

Turning to the 1973 Code itself the scheme of separating judicial Magistrates from executive Magistrates with allocation of judicial functions to the former and the executive or administrative functions to the latter, as we shall presently indicate, has been implemented in the Code to a great extent. Section 6 provides that there shall be in every State four classes of Criminal Courts, namely, (1) Courts of Session, (ii) Judicial Magistrates of the First Class and, in any Metropolitan area, Metropolitan Magistrates; (iii) Judicial Magistrates of the Second Class; and (iv) Executive Magistrates; ss. 8 to 19 provide inter alia for declaration of metropolitan area, establishment of Courts of Session, Courts of Judicial Magistrates, Courts of Metropolitan Magistrates and appointments of Sessions Judges, Additional Sessions Judges, Assistant Sessions Judges, Chief Judicial Magistrates Judicial Magistrates, Chief Metropolitan Magistrates and Metropolitan Magistrates together with inter subordination, but all appointments being required to be made by the High Court, while ss. 20, 21, 22 and 23 deal with appointment of District Magistrates, Additional District Magistrates, Executive Magistrates, Sub-Divisional Magistrates and Special Executive Magistrates and their respective jurisdictions in every district and metropolitan area together with inter se subordination, but appointments being made by the State Government, Chapter III comprising ss. 26 to 35 clearly shows that Executive Magistrates are totally excluded from conferment of powers to punish, which are conferred on Judicial Magistrates; this shows that if any one were to commit a breach of any order passed by an Executive Magistrate in exercise of his administrative or executive function he will have to be challaned or prosecuted before a Judicial Magistrate to receive punishment on conviction. Further, if certain sections of the present Code are compared with the equivalent sections in the Old Code it will appear clear that a separation between judicial functions and executive or administrative functions has been achieved by assigning substantially the former to the Judicial Magistrates and the latter to the Executive Magistrates. For example, the power under s. 106 to release a person on conviction of certain types of offences by obtaining from him security by way of execution of bond for keeping peace and good behaviour for a period not exceeding three years-a judicial function is now

exclusively entrusted to a Judicial Magistrate whereas under s. 106 of the old
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Code such power could be exercised by a Presidency Magistrate, a District Magistrate or Sub-Divisional Magistrate, but the power to direct the execution of a similar bond by way of security for keeping peace in other cases where such a person is likely to commit breach of peace or disturb the public tranquility-an executive function of police to maintain law and order and public peace which was conferred on a Presidency Magistrate, District Magistrate, etc. under the old s. 107 is now assigned exclusively to the Executive Magistrate under the present s. 107; Chapter X of the new Code deals with the topic of maintenance of public order and tranquility and in that Chapter ss. 129 to 132 deal with unlawful assemblies and dispersal thereof, ss. 133 to 143 deal with public nuisance and abatement or removal thereof, s. 144 deals with urgent cases of nuisance and apprehended danger to public tranquility and ss. 145 to 148 deal with disputes as to immovable properties likely to cause breach of peace-all being in the nature of executive ('police') functions, powers in that behalf have been vested exclusively in executive Magistrate whereas under equivalent provisions under the old Code such powers were conferred indiscriminately on any Magistrate, whether Judicial or Executive. In particular it may be stated that whereas under the old s. 144 the power to take action in urgent cases of nuisance or apprehended danger to public tranquility had been conferred on "a District Magistrate, a Chief Presidency Magistrate, a sub-Divisional Magistrate or any other Magistrate, specially empowered by the State Government", under the present s. 144 the power has been conferred on "a District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in that behalf." Having regard to such implementation of the concept of separation of judicial functions from executive or administrative functions and allocation of the former to the Judicial Magistrates and the latter to the Executive Magistrates under the Code of 1973, it will be difficult to accept the contention of the counsel for respondents 5 and 6 that the order passed by a District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate under the present s. 144 is a judicial order or quasi judicial order, the function thereunder being essential an executive (police) function. Under the new Code the designation of District Magistrate of Sub-Divisional Magistrate has been statutorily used in relation to officers performing executive functions only in recognition of the concept of separating Executive Magistrates from Judicial Magistrates. It is true that before passing the order the District
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Magistrate, Sub-Divisional Magistrate or the Executive Magistrate gives a hearing parties except in cases of emergency when ex-parte order can be made under s. 144 (2) by Him without notice to the person or persons against whom it is directed, but in which cases on an application made by any aggrieved person he has to give hearing to such person under s. 144 (5) and thereupon he may rescind or alter his earlier order. It is also true that such an order made by the Executive Magistrate is revisable under s. 397 of the Code because under the Explanation to that section all Magistrates, whether executive or judicial or whether exercising appellate or original jurisdiction, are deemed to

be inferior Courts for purposes of the revisional power of the High Court or Court of Sessions. But the fact that the parties and particularly the aggrieved party are heard before such an order is made merely ensures fair play and observance of audi alteram partem rule which are regarded as essential in the performance of any executive or administrative function and the further fact that a revision lies against the order of the executive magistrate either to the Sessions Court or to the High Court removes the vice of arbitrariness, if any, pertaining to the section. In fact, in the three decisions of this Court which were relied upon by counsel for respondents 5 and 6 namely Babu Parate's case, K. K. Mishra's case and Madhu Limaye's where the constitutionality of sec. 144 of the old code was challenged on the ground that it amounted to unreasonable restriction on the fundamental right of a citizen under Art. 19 (1) of the Constitution the challenge was repelled by relying upon these aspects to be found in the provision. In our view, however these aspects cannot make the order a judicial or quasi-judicial order and such an order issued under sec. 144 of the present code will have to be regarded as an executive order passed in performance of an executive function where no lis as to any rights between rival parties is adjudicated but merely an order for preserving public peace is made and as such it will be amenable to writ jurisdiction under Art. 32 of the Constitution. We would like to mention in this context that the power conferred upon sec. 144 Cr.P.C. 1973 is comparable to the power conferred on the Bombay Police under sec. 37 of the Bombay Police Act, 1951, both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder and it has never been disputed that any order passed under sec. 37 of the Bombay Police Act is subject to writ jurisdiction of the High Court under Art. 226 of the Constitution on the ground that it has the effect of violating or infringing
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a fundamental right of a citizen. The nature of the power under both the provisions and the nature of function performed under both being the same by parity of reasoning an order made under sec. 144 Cr.P.C. 1973 must be held to be amenable to writ jurisdiction either under Art. 32 or under 226 of the Constitution if it violates or infringes any fundamental right. The contention raised by Counsel for respondents 5 and 6 therefore, has to be rejected.

Having come to the conclusion that the order under sec. 144 Cr.P.C. 1973 is amenable to writ jurisdiction under Art. 32, the same being in exercise of executive power in performance of executive function the next question that we have to deal with is whether the petitioners could be said to have made out any ground for challenging the impugned order passed by the City Magistrate, Varanasi on 24th November, 1979 prohibiting both Shia and Sunni communities from holding their Majlises and imposing other restrictions on the occasion of celebration of MOHARRAM festival at the Baradari in Mohalla Doshipura. As already stated the challenge to this order was incorporated in the writ petition by way of an amendment which had been allowed by the Court. Since however, that impugned order has by now exhausted itself by efflux of time it would not be proper for us to go into either the grounds of challenge urged by the petitioners or the materials justifying the same put forward by the respondents for determining its legality or validity. Since however, occasions or situations arise even during a year as well as year after year making it necessary

for the executive magistracy of Varanasi to take action under sec. 144 and since it has been the contention of the petitioners,-though stoutly disputed by all the respondents-that the exercise of the power under the said provision has invariably been perverse and in utter disregard of the lawful exercise of their legal rights to perform their religious ceremonies and functions on the plots and structures in question it will be desirable to make general observations by way of providing to the local authorities requisite guidelines with a view to ensure a correct and proper exercise thereof with a brief reference to few decided cases on the point.

Without setting out verbatim the provisions of sec. 144 of the 1973 Code, we might briefly indicate the nature of power thereunder and what it authorises the executive magistracy to do and in what circumstances. In urgent cases of nuisance or apprehended danger, where immediate prevention or speedy remedy

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is desirable, a District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf may, by a written order stating the material facts of the case, direct a particular individual, or persons residing in a particular place or area, or the public generally when frequenting or visiting a particular place or area, (i) to abstain from a certain act or (ii) to take certain order with respect to certain property in his possession or under his management, if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury to any other person lawfully employed, or danger to human life, health or safety, or a disturbance of public tranquillity, or a riot or an affray. As stated earlier sub-sec. (2) authorises the issuance of such an order ex-parte in cases of emergency or in cases where circumstances do not admit of the serving in due time of a notice upon the person or persons against whom the order is directed but in such cases under sub-sec. (5) the executive magistrate, either on his own motion or on the application of the person aggrieved after giving him a hearing, may rescind or alter his original order. Under sub-section (4) no order under this section shall remain in force for more than two months from the making thereof unless under the proviso thereto the State Government by Notification directs that such order shall remain in force for a further period not exceeding six months.

The entire basis of action under s. 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity. Preservation of the public peace and tranquillity is the primary function of the Government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to over-ride temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. It is further well settled that the section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of Civil nature or questions of title to properties or entitlements to rights but at the same time in

cases where such disputes or titles or entitlements to rights have already been adjudicated and have become the subject-
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matter of judicial pronouncements and decrees of Civil Courts of competent jurisdiction then in the exercise of his power under s. 144 he must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity the exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong-doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant.

In Muthialu Chetti v. Bapun Sahib the facts were that in 1875 Mohammedans of Sevvaipett applied for permission to erect a mosque in that village on the site occupied by the previous mosque that had recently been destroyed but the Hindus objected and the application was refused; the Mohammedans nevertheless occupied the site and in 1878 again applied for permission to build the mosque but the Hindus again opposed the application expressing their apprehension that the erection of mosque would lead to disturbances when they were conducting their processions with music or celebrating ceremonies in the temples adjoining the river. The Collector accorded sanction to the erection of the mosque on condition that the Mohammedans undertook to allow the free passage of processions but professing to act as the District Magistrate he at the same time ordered that all music should cease when any procession was passing or repassing the mosque and directed that the order be notified to the inhabitants of Sevvaipett and Gogoi. The restriction that music should cease when processions would be passing or repassing the mosque was imposed in accordance with G.O. dated 9th May, 1874 which ran thus "All Magistrates should
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make it an invariable condition that music shall cease playing while the procession is passing any recognised place of worship, to whatever denomination belonging, except of course the places of worship appertaining to the processionaries themselves." Some leading Hindus of Sevvaipett filed a suit in Munsif's Court against Mohammedans for a declaration of their right to conduct their processions with music past the site occupied by the mosque and challenged the validity of the District Magistrate's order that the music of their processions should stop whilst passing or repassing the mosque. The Munsif's Court granted a decree in favour of the plaintiffs which was reversed by the District Court but was restored with some qualification by the High Court in second appeal. The High Court laid down that whilst the law recognised the right of an assembly, lawfully engaged in religious worship

or religious ceremonies, not to be disturbed, it also recognised the right of persons for a lawful purpose, whether civil or religious, to use a common highway in parading it attended by music, so that they do not obstruct use of it by other persons; that whenever a conflict of rights exists, it is the duty of the Magistrate, if he apprehends civil tumults, to guard against it, and, if necessary, to interdict a procession; but that a general order interdicting all musical processions is ultra vires and illegal. The High Court pointed out that the extent of authority possessed by the Magistrate was to suspend the exercise of the right on particular occasions, and not prohibit it absolutely and before the occasion arose which entitled him to act; and it consequently held the District Magistrate's order to be ultra vires.

In Parthasaradi Ayyangar v. Chinna Krishna Ayyangar Turner C.J. laid down the law at page 309 of the report thus:

> "Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace."

In Sundram Chetti and Ors. v. The Queen before a Full Bench of the Madras High Court the aforesaid position was maintained and it was further laid down that the worshippers in the mosque or temple

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which abutted on a high road could not compel the processionists to intermit their (processionists') worship while passing the mosque or temple on the ground that there was continuous worship there. Turner C.J. who presided over the Full Bench observed at page 217 of the Report thus:-

> "With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere. But the prejudices of particular sects out not to influence the law."

At page 215 of the Report the learned Chief Justice observed thus:

> "The Criminal Procedure Code declares the authority of the Magistrate to suspend the exercise of rights recognised by law, when such exercises may conflict with other rights of the public or tend to endanger the public peace. But by numerous decisions it has been ruled that this authority is limited by the special ends it was designed to secure and is not destructive of the suspended rights."

Again at page 220 he has observed thus:

> "I must nevertheless observe that this power (to suspend the exercise of legal rights on being satisfied about the existence of an emergency) is extraordinary and that the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient. Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted

in the defence of rights rather than in their suspension; in the repression of illegal rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot, he can hardly be ignorant of the per-
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sons from whom disturbance is to be apprehended, and it is his duty to take from them security to keep the peace.
(Emphasis supplied).

It may be stated that the aforesaid view of the Madras High Court was preferred by the Privy Council to the contrary view of the Bombay High Court. In Manzur Hasan and Ors. v. Muhammad Zaman and Ors. the facts were that Shia Mahomedans in the town of Aurangabad, District Aligarh conducted Muharram a procession bearing religious emblems and pausing from time to time for the performance of "matam" (wailing). From time immemorial the procession performing "matam" had passed along a public street immediately behind a Sunni Mahommedan mosque; in and after 1916 the respondents (Sunnis) interfered to prevent "matam" near the mosque, as they alleged that it disturbed their devotions. The appellants (Shias) brought a suit for declaration of their rights to make short pauses behind the mosque for the performance of "matam" and for a permanent injunction against the Sunnis from interfering with their rights. The Judicial Committee upholding the Madras view and rejecting the Bombay view held that in India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street by the public, and subject to lawful directions by the Magistrates and that a civil suit for declaration lies against those who interfere with a religious procession or its appropriate observances. These decisions show that legal rights should be regulated and not prohibited altogether for avoiding breach of peace or disturbance or public tranquillity.

In Haji Mohammed Ismail v. Munshi Barakat Ali and Ors. there was a dispute concerning the conduct of a prayer in a mosque, and there being an apprehension of breach of peace the Magistrate under s. 144 drew up a proceeding and eventually recorded an order that ."no man of either party will be allowed to read prayers in the mosque." The Court held that the order was mis-conceived; that the effect of the order was that no Mohammedan would be allowed to say his prayers in the mosque it was not justified under s. 144 and that the proper course was for the Magistrate to ascertain which party was in the wrong and was interfering unnecessarily with
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the legal exercise of the legal rights of the other party, and to bind down that party restraining them from committing any act which may lead to a breach of peace. (Emphasis supplied).

In Madhu Limaye's case (supra) this Court has also expressed the view that the key-note of the power in s. 144 is to free the society from menace of serious disturbances of a grave character and the section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health.

The instant case, as we have held above, is one where the entitlement of the Shias to their customary rights to perform their religious ceremonies and functions on the plots and structures in question has been established and is the subject matter of a judicial pronouncement and decree of

Civil Court of competent jurisdiction as also by reason of these properties having been registered as Shia Waqfs for performance of their religious ceremonies and functions and their complaint has been that the power under s. 144 is being exercised in utter disregard of the lawful exercise of their legal rights and every time instead of exercising the power in aid of their rights it is being exercised in suppressing their rights under the pretext of imminent danger to peace and tranquillity of the locality. Having elaborated the principles which should guide the exercise of that power we hope and trust that in future that power will be exercised by the executive magistracy in defence of such established rights of the petitioners and the Shia community and instead of prohibiting or suspending the exercise of such rights on concerned occasions on the facile ground of imminent danger to public peace and tranquillity of the locality the authorities would make a positive approach to the situation and follow the dictum of Turner C.J. that if they are satisfied that the exercise of the rights is likely to create a riot or breach of peace it would be their duty to take from those from whom disturbance is apprehended security to keep the place. After all the customary rights claimed by the petitioners part take of the character of the fundamental rights guaranteed under Articles 25 and 26 of the Constitution to the religious denomination of Shia Muslims of Varanasi, a religious minority, who are desirous of freely practising their religious faith and perform their rites, practices, observances and functions without let or hindrance by members belonging to the majority sect of the community namely, Sunni Muslims, and as such a positive approach is called for on the part of the local authorities, 1134

It is only in an extremely extraordinary situation, when other measures are bound to fail, that a total prohibition or suspension of their rights may be resorted to as a last measure.

Lastly, counsel for the respondents contended that the present writ petition was barred by res judicata or principle analogous to res judicata by reason of this Court's decision in (a) Civil Appeal No. 941 of 1976, (b) Review Petition No. 36 of 1977 and (c) order dated 4.12.1978 permitting withdrawal of Special Leave Petition No. 6226 of 1978; alternatively it was urged that the view taken by a Bench of 3-Judges of this Court in their Judgment dated 6.12.1976 in Civil Appeal No. 941 of 1976 and reiterated in its order dated 16.12.1976 on Review Petition No. 36 of 1977, however wrong, should not be disturbed by another Bench of 3-Judges, especially as the petitioners are seeking by the present petition to set at naught the earlier decision or get it revised on the same material which they should not be allowed to do. It is difficult to accept either of these contentions for reasons which we shall presently indicate. As regards res judicata or the bar based on the principle analogous to res judicata, we have already referred in the earlier part of our judgment to the leading decision of this Court in Daryao's case (supra) where the basts on which the general doctrine of res judicata is founded has been explained, namely, that it is founded on considerations of high public policy to achieve two objectives, namely, (a) that there must be a finality to litigation and (b) that the individuals should not be harassed twice over with the same kind of litigation and in our view neither of these aspects is present here so as to bar the present petition by res judicata or principle analogous to res judicata. We would like to point out that

the present litigation has been fought in a representative character both as regards the petitioners who are representing the Shia community and as regards the respondents 5 and 6 who are representing the Sunni community whereas the earlier writ petitions Nos. 2397 of 1973 (out of which arose the Civil Appeal No. 941 of 1976) and No.3906 of 1978 (out of which arose Special Leave Petition No. 6226 of 1978) were filed in the Allahabad High Court by the then petitioners in their individual capacity and as such these earlier litigations which were fought right up to this Court cannot be regarded as between the same parties who are before us; further, where it was felt by this Court that proper adjudication would not be possible without impleading the two Boards (Shia Central Wakf Board and Sunni Central Wakf Board) notices were issued to them and they were also im-

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pleaded as parties to the petition who have filed their respective affidavits in the matter and have been heard through respective counsel. Secondly, the earlier decision of this Court in Civil Appeal No.941 of 1976 did not record any decision on the rights of the parties on merits but the Court took the view that the parties should be relegated to a civil suit on the assumption that the petitioners before the Allahabad High Court (in W.P.No.2397) had raised disputed questions of title and the Allahabad High Court had decided them for the first time in the writ petition; irrespective of whether the assumption made by this Court was right or wrong, the fact remains that there was no adjudication or decision on the petitioners' rights on merits as a result of the final order passed by this Court in the appeal, which was confirmed in the Review Petition; all that could be said to have been decided by this Court in Civil Appeal No. 941 of 1976 and Review Petition No. 36 of 1977 was that parties should get their rights adjudicated in a Civil Court suit. For these reasons it is obvious that neither res judicata nor principle analogous to res judicata would bar the present writ petition. We may point out that the setting aside of the Allahabad High Court judgment and its findings in writ Petition No.2397/1973 by this Court in Civil Appeal No.941 of 1976 cannot have effect of obliterating or effecting in any manner the findings recorded and adjudication done between the parties to the earlier litigations, particularly Suit No. 232/1934. As regards the alternative submission made by counsel for the respondents, we would like to point out that it is not correct to say that the petitioners are seeking to set at naught the earlier decision of this Court or to have the same revised by present petition on the same materials; if that were so there would have been some force in the contention. Fresh material of substantial character in the form of the original Survey Report of the Chief Commissioner of Wakfs dated 28th/31st October, 1938 and the relevant Notification issued by the Shia Board on 15th of January, 1954 published in the U. P. Government Gazette dated 23rd of January 1954 under sec. 5 (1) of the U. P. Muslim Wakfs Act, 1936, not produced in the earlier litigation either before the Allahabad High Court, or before this Court was produced before us during the hearing on the basis of which the members of the Shia community sought to prove their existing and established entitlement to their customary rights. In fact it was one of the contentions of the respondents 5 and 6 that before the Allahabad High Court in the earlier litigation the then petitioners had misled the Court into believing that the Notification issued by the Shia Board on

1st of December, 1956 under Rule 54
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(vii) was the Notification under s.5 (1) of the U.P. Muslim Wakfs Act, 1936. Moreover, additional material has come before us through both the Boards affording considerable assistance to us in arriving at proper conclusions in the case. Thus where the parties before us are different and when fresh material has been produced before us which was not there in the earlier litigation, the alternative contention loses all force and must be rejected.

In the result we hold that the petitioners and through them the Shia community of Mohalla Doshipura, Varanasi have established their existing customary rights to perform their religious rites, practices, observances, ceremonies and functions minus the recitation and utterance of Tabarra (detailed in the writ petition) over the Plots and structures in question and respondents 5 and 6 and the Sunni community of Mohalla Doshipura are permanently restrained by an injunction from interfering with the exercise of said rights in any manner by the petitioners or members of Shia community and respondents 1 to 4, particularly the executive magistracy of Varanasi is directed, if action under s. 144 Cr. P.C. is required to be taken, to issue their orders under the said provision having regard to the principles and the guidelines indicated in that behalf in this judgment. The writ petition is thus allowed but each party will bear its own costs.

S.R. Petition allowed.
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