Source : www.thehindu.com Date : 2019-11-15

# PEACE BOUGHT BY AN UNEQUAL COMPROMISE

Relevant for: null | Topic: Regionalism, Communalism & Secularism

The Supreme Court's Ayodhya Bench had a difficult task. The case before it was a property dispute: who had title to those 2.77 acres of land in Ayodhya? But embedded within it was an act of political and religious violence: the destruction of the Babri Masjid. The Court faced an agonising choice. It could have decided the case as a property dispute, leaving the events of 1992 to be adjudicated on other forums (where they still linger). Or, it could have acknowledged that property rights had become inseparable from the question of justice. Instead, the Court tried to do both. The result is a judgment that falls short both on law and justice.

Civil disputes in India are decided on "a preponderance of probabilities." A court weighs the available evidence and determines which of the competing claims is more likely to be true. The Ayodhya judgment applies this standard. But the Supreme Court's conclusion that the balance of probabilities was tilted in favour of the Hindu parties, despite the vast swathes of both documentary and testamentary proof that it cites, is almost glib.

The inference turns on a surprising departure from the Allahabad High Court's ruling in 2010, which had split the land into three portions. The Supreme Court, instead, designates the disputed property as a single, composite unit. This finding allows it to use evidence of the exclusive use of the outer courtyard by the Hindus in determining the probability of the possession of the entire property. While the Court recognises that prayers were offered by Muslims between 1857 — after the annexation of Oudh by the British — and 1949, it takes the view that this fact is not sufficient proof of exclusive possession of the inner courtyard. This, the Court holds, is because the Hindus, in continuing to worship in the outer courtyard through their behaviour (such as offerings made to the 'Garbh Griha' while standing on the railing between the courtyards) had exhibited a belief that Lord Ram's birthplace was within the precincts of the central dome. Therefore, that the Muslims showed no interest in the outer courtyard was effectively held against them, although they consistently treated the inner courtyard as a mosque. Given that the property was categorised as an indivisible whole, this meant that the Hindus were exempted from the need to demonstrate possessory rights over the inner courtyard, beyond an exhibition of interest. Thus, although the nub of the dispute concerned the inner courtyard, eventually it was the Hindus' exclusive possession of the outer courtyard that tipped the balance.

The court notes that events subsequent to the annexation of Oudh in 1856 "form the continued basis" through which the parties have claimed their respective legal rights. But having done so, it, inexplicably, while recognising that the dispossession of the Muslims in 1949 (when Hindu idols were installed in the inner courtyard) was an act of desecration, fails to hold this against the claim made by the Hindus over the property. After all, it was this action that deprived the Muslims in many ways of their ability to establish a more entrenched possessory right over the inner courtyard. Having concluded that the possessory rights of the Hindus over the disputed site stood on a better footing, the court nonetheless thought it fit to recompense the Muslims for the mosque's desecration in 1949 and its ultimate destruction in 1992 by ordering an allotment of five acres of alternate land in Ayodhya to the Sunni Central Waqf Board. It is here that the questions of law and the question of justice become entangled once again. And it is that entanglement that underlies much of the praise that the legal community has showered upon the judgment. Legal scholar Upendra Baxi called it a "miracle" of "complete justice." Justice (Retd.) Santosh Hegde said the judgment "is in the larger interest of the nation and peace in society." Encomiums such as this — focussing not on legal analysis but on 'statesmanship' — have come thick and fast.

But it is important to take a step back and ask: what does this really mean? There are two possible ways in which, despite the law, the Supreme Court's judgment may be defended for its 'statesmanship.' One may argue that the court used its powers under Article 142 of the Constitution to deliver "complete justice", without being shackled by the chains of civil law. Or, one may claim that the court acted "pragmatically" to bring about closure to a festering dispute in a manner that would allow the country to move on. The first justification is flawed. Basic principles of restitution demand that parties be restored to their original positions, where possible. If the court believed that the Muslims had been wronged in 1949 and 1992, it could quite easily have ordered a reinstitution of the status quo that prevailed before those events. As it stands, the court's direction has an air of condescension to it — not justice.

But it is the second justification — one that hails the judgment as an exercise of "pragmatism" in order to ensure peace — that is disturbing. There is a crucial distinction between resolving a dispute on the basis of principle, and achieving "peace" simply by endorsing the existing balance of power — or by not provoking the strong. The Greek historian Thucydides recalled how the conquering Athenians told the rulers of Melos: "right... is only in question between equals in power, while the strong do what they can and the weak suffer what they must." The rule of law exists to save society from such a permanent state of *matsya nyaya*, and the judiciary exists to enforce that rule of law. And it is the commitment to the rule of law that defines the distinction between a just peace, and peace bought by an unequal compromise.

There is another important reason why such considerations should play no part in judicial rulings. And that is that judges — like the rest of us — are neither savants nor seers. The consequences of judgments, in the medium and long-term future, are impossible to predict. Perhaps peace will last; but perhaps, as experience tells us, wounds that are papered over only fester further. Therefore, we must be particularly wary of verdicts that align cleanly with what appears to be the dominant public sentiment at a given time, on the apparent basis that the strict application of law and justice must give way, temporarily, to the interests of peace; because history tells us that the "temporary" can slip all too easily into the permanent.

It was reported that at a recent gathering, one of the judges of the Supreme Court, highlighting the unanimity of the decision, compared it with the famous U.S. Supreme Court verdict in *Brown v Board of Education*, which ordered American schools to be desegregated. Unanimity aside, *Brown v Board of Education* is, however, a case that is defined by the opposite logic. In *Brown*, the U.S. Supreme Court went against the dominant opinion, which was strongly in favour of keeping black and white schoolchildren "separate but equal." The Court went against it because, quite simply, it was the right thing to do. The status quo was disrupted. There were demonstrations and protests. But under immense pressure, the Court held firm. And the schools were desegregated.

In Ayodhya, on the other hand, the final verdict appears to strike an uneasy detente with a pernicious political ideology that resists substantive justice, reparations for past wrongs, and mutual tolerance. What else is the final relief — of giving the Muslim parties some land at another site to make it up to them for the destruction of the mosque — but only another way of telling them, "you are equal, but must be separate"?

*Suhrith Parthasarathy is an advocate practising at the Madras High Court; Gautam Bhatia is a Delhi-based lawyer*