

Abdul Jalil and Others

Vs

State of U. P. and Others

Writ Petitions Nos. 11229-32 of 1983

(D. A. Desai, A. P. Sen, V. D. Tulzapurkar JJ)

14.02.1984

JUDGMENT

TULZAPURKAR, J. -

1. Brief reasons for the dismissal of these writ petitions are :

(1) This is a second attempt on the part of Sunni Muslims of Varanasi substantially to have our main decision rendered in Writ Petition No. 4675 of 1978 on November 3, 1981 reviewed, the first attempt having failed as a result of the dismissal of Writ Petition Nos. 9014-16 of 1983 on September 23, 1983; the second attempt in the same direction has also to fail.

(2) Apart from challenging the main decision, the petitioners are aggrieved by our direction to shift the two graves from existing position to the south of the grave of Maulana Hakim Badruddin, a direction contained in our order dated September 23, 1983 in C.M.P. No. 4939 of 1983. Here also it must be stated that it was after giving a full hearing on the point to the Sunni Muslims on whose behalf Writ Petitions Nos. 9014-16 of 1983 were filed that the direction of shifting of the graves was given and hence that direction also cannot be made a subject-matter of a review by means of the present writ petitions.

(3) Even on merits no case has been made out for admitting these writ petitions. The main contentions of the petitioners as urged by their counsel have been that the direction of the shifting of the two graves in question amounts to desecration of the sacred graves and interference with the religious practice of Sunni Muslims of respecting their dead and as such it contravenes their fundamental rights guaranteed under Articles 25 and 26 of the Constitution; that though their rights under Articles 25 and 26 are exercisable subject to public order, the need of maintaining the public order does not warrant such drastic interference, namely, the shifting of the graves and the direction in that behalf amounts to disproportionate interference with their practice to respect their dead when less drastic interference with it would have sufficed and in this behalf V. G. Row case (State of Madras v. V. G. Row, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966) was relied upon.

2. At the outset we would like to observe that such a great concern about preserving their fundamental rights under Articles 25 and 26 of the Constitution and the meticulous anxiety to have least interference with their religious practice of respecting their dead sounds ironical when the

petitioners who constitute a majority sect of Sunni Muslims of Varanasi had done their best during the hearing of the main Writ Petition No. 4675 of 1978 to defeat and deny similar rights under articles 25 and 26 of the Constitution to the Shia Muslims of Varanasi, who constitute a small minority pertaining to the performance of their religious ceremonies and functions on the plots in question and when, even after this Court decided the matter in favour of Shias, they have been violently interfering with their performance of religious ceremonies and functions by indulging in stone-throwing, hurling of acid bulbs/bottles, damaging and destroying their property (these ugly incidents of violence that occurred during the two Moharram festivals celebrated in December, 1981 and October, 1982 have been referred to by us in our order dated September 23, 1983). Furthermore, all the aforesaid aspects now put forward by counsel for the petitioners were taken into consideration by this Court when the order dated September 23, 1983 was passed and there is no substance in any of these contentions.

3. In our order dated September 23, 1983 it has been pointed out that the fundamental rights conferred on all persons and every religious denomination under Articles 25 and 26 of the Constitution are not absolute but the exercise thereof must yield to maintenance of public order and that the suggestion mooted by the Court to shift the graves was in the larger interest of the society for the purpose of maintaining public order on every occasion of the performance of their religious ceremonies and functions by the members of both the sects herein. It has been further pointed out that the ecclesiastical edict or a right not to disturb an interred corpse is not absolute as will be clear from Section 176(3) of CrPC which permits its exhumation for the purpose of crime detection and that this provision is applicable to all irrespective of the personal law governing the dead. In particular reference was made to one of the Fatwas relied upon by Sunni Muslims to show that even according to a Hadis quoted in the Fatwa "unnecessary shifting of graves was not permissible" and as such the edict clearly implies that it may become necessary to shift the graves in certain situations and that exigencies of public order would surely provide the requisite situation. Moreover, during the present hearing we persistently inquired of counsel appearing on both the sides as to whether there was anything in the Holy Koran which prohibited shifting of graves and counsel for the Sunni Muslims was not able to say that there was any to be found in the Koran. On the other hand, Shri Ashok Sen appearing for Shia Muslims categorically stated that there is no text in the Holy Koran which prohibits removal or shifting of graves; he also stated that his clients (Shia Muslims) do not regard removal or shifting of a grave (whether of a Sunni Muslim or a Shia Muslim) from one place to another as un-Islamic or contrary to Koran. That it is neither un-Islamic nor contrary to Koran is proved by two things. First, as pointed out in one of the affidavits, in a meeting convened by the Divisional Commissioner on October 4, 1983 Maulana Abdul Salam Nomani, Pesh Imam of Gyan-Vapi Masjid, Varanasi was present and when the Commissioner asked him regarding the shifting of the graves as directed by this Court, he replied that a grave can never be shifted except only in the circumstances when the graves are dug on the land belonging to others and the graves are set up illegally on others' land. (In our order dated September 23, 1983 we have pointed out that the two graves in question have come up on the land of Maharaja unauthorisedly and illegally in contravention of Court's injunction.) Secondly, two historical instances of such removal have been placed on record before the Court, namely, the grave of Mumtaz Mahal was removed from Burhanpur and brought to Taj Mahal at Agra and the grave of Jahangir was removed from Kashmir and taken to Lahore. There is, therefore, no question of this Court's direction being un-Islamic or contrary to Koran or amounting to desecration of the two graves as suggested. As regards the contention that the impugned direction amounts to disproportionate interference with the religious practice of the Sunnis to respect their dead, we would like to place on record that during the earlier hearings several alternative suggestions were made to the Sunni Muslims including on to stagger

their ceremonies and functions during the Moharram festival to avoid a conflict with the ceremonies and functions of the Shias but all those suggestions were spurned with the result that the spectre of yearly recrudescence of ugly incidents of violence, stone-throwing, hurling of acid bulbs/bottles, damage and destruction to life and property (the latest in the series even after giving the impugned direction being the burning and destruction of the most valuable Tazia of Shias during Moharram festival of 1983, which was discovered in the morning of October 11, 1983) left no choice for the Court but to direct the shifting of the graves and this direction was also given in the larger interest of the society for the purpose of maintaining public order on every occasion of the performance of their religious ceremonies and functions by members of both the sects herein. Experience of such yearly recrudescence of ugly incidents over past several years or in the alternative prohibiting ceremonies and functions of both the sects under Section 144, CrPC necessitated the issuance of the impugned direction with a view to find a permanent solution to this perennial problem.

4. These writ petitions deserved to be dismissed and were therefore dismissed on November 15, 1983.

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