

Gulam Abbas and Others

Vs

State of U. P. and Others

Civil Miscellaneous Petitions Nos. 3458 and 3458-A of 1985 in Writ Petition No. 4675 of 1978

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

07.03.1986

ORDER

TULZAPURKAR, J. -

1. By these CMPs the petitioners and through them members of the Shia community of Doshipura, Varanasi are seeking implementation of this Court's order dated September 23, 1983 in the matter of shifting of the two graves of Lal Mohammad and Smt. Sakina and enclosing the open space in the remaining 8 plots (except plot No. 246 on which the mosque stands) by erecting a compound wall.

2. With a view to find an effective permanent solution to the perennial problem of recurring ugly incidents of violence and vandalism disturbing public order that prevented the peaceful performance of their religious rituals, rites and practices by members of the Shia community over the 8 plots in question (except plot No. 246 on which the mosque stands) and the structures standing thereon during the yearly Moharram festivals this Court by its order dated September 23, 1983 gave appropriate directions in the matter of :

(a) shifting of the two graves for Lal Mohammad and Smt. Sakina from their original location to a spot the south of the grave of Hakim Badruddin and surrounding the said three graves on three sides by a compound wall in such a way as to leave access thereto only from the road on the western side which would ensure to the heirs of Lal Mohammad and Smt. Sakina as also to the members of the Sunni community the performance of the rituals, namely, recitation of Fatiha and laying of Chaddar at those three graves on specified dates during every Moharram; and

(b) enclosing the open space in the remaining 8 plots (except plot No. 246 on which the mosque stands) by constructing a compound wall all around so as to prevent any encroachment thereon by members of the Sunni community. The manner in which the aforesaid two things are to be accomplished and the requisite directions in that behalf are contained in this Court's orders dated September 23, 1983 and February 2, 1984.

3. We would like to reiterate our view that the court has ample powers to direct the shifting of any graves in the larger public interest and no bar to such shifting could be spelt out legally, constitutionally or in the name of religion and having regard to the past history about the manner in which the members of the Sunni community have behaved and conducted themselves we are of the confirmed view that the effective solution to the perennial problem in question would be the implementation of the aforesaid orders.

4. However, for the two Moharram festivals of 1984 and 1985, instead of implementing the shifting of the graves, the court, as an experimental measure gave certain directions on the basis of which the members of the Shia community would be able to perform their rites, rituals, functions and practices on the plots in question in a peaceful manner without any let or hindrance by any member of the Sunni community or any other person whatsoever and particularly directions were given to the District Magistracy as also to the police authorities in that behalf. All the detailed directions on the basis of which the experimental measure was to be put through are to be found in this Court's orders dated September 28, 1984, and May 7, 1985 and we are happy to find that but for some minor incidents of breach of peace and some incidents involving damage to the Tazia and Zulzana (ceremonial horse) belonging to the members of Shia community that occurred during the Moharram festivals of 1984 and 1985, the experimental measure has by and large proved successful and has ensured peaceful performance of religious rites, rituals, practices and functions by the members of the Shia community and we are of the opinion that the same experiment governed by the same directions but with some agreed modifications could be continued for quite a few years to come. We, therefore, direct that this Court's orders dated September 23, 1983 and February 2, 1984 are kept in abeyance for a period of 10 years, that is, up to December 1995 during which years experiment carried out in the years 1984 and 1985 under the directions contained in this Court's orders dated September 28, 1984 and May 7, 1985 should be carried out subject to the following modifications :

(1) Instead of cordoning the two graves of Lal Mohammad and Smt. Sakina by barbed wire fencing on all sides as was being done for the purpose of the Moharram festivals of 1984 and 1985, the said two graves should now be permanently enclosed by surrounding them with a brick masonry wall of 12 ft. in height on all sides thus cordoning off and sealing the same with access to none for all times to come. The heirs of Lal Mohammad and Smt. Sakina as well as members of Sunni community having offered to give up their existing or supposed rights of performing the recitation of Fatiha and Chaddar functions at the said two graves for all times to come in future the aforesaid step by way of permanently sealing the two graves should be taken and the surrounding wall should be constructed by the State Government at its expense within a period of four months from today. We might mention that the learned Attorney-General in his report had also approved of such a step being taken. We would like to state that parties appearing before us had agreed to follow this course and hence the direction.

(2) The question of putting up a compound wall or wire fencing surrounding the open space in the remaining plots in question except plot No. 246 (where mosque stands) is, therefore, deferred for the present.

(3) Parties are agreed that the unauthorised Gumties lying near plot Nos. 602/1133 and 602 will be removed by the State Government at its own expense within four months from today.

(4) The petitioners and the members of the Shia community through them will be at liberty to withdraw the sum of Rs. 1,32,250 deposited by them with the concerned authorities pursuant to this Court's order dated February 2, 1984.

Subject to the aforesaid we direct that the experimental measure that was carried out in the 1984 and 1985 Moharram festivals should be carried out for a period of 10 years, that is to say up to

December 1995 and the same should be strictly governed by the directions contained in this Court's orders dated September 28, 1984 and May 7, 1985.

5. Liberty to the parties to apply in the meantime if the experimental measure fails in any of the 10 years or any other occasion arises.

Ed. : Previous Orders of the Court dated February 2, 1984 (CMP Nos. 34100 and 34586 of 1983 and 3196 of 1984) and dated May 7, 1985 (CMP Nos. 3458 & 3458-A of 1983) in Writ Petition No. 4675 of 1978, delivered by V. D. Tulzapurkar, D. A. Desai and A. P. Sen, JJ., are set out in the appendix below :

APPENDIX

Order dated February 2, 1984

1. As directed on the previous occasion photographs of the two graves (directed to be shifted) have been filed and matter has come up for further directions. The State of U. P. has filed another C. M. P. No. 3196 of 1984 seeking further directions from the Court.
2. After hearing counsel on both sides as well as counsel for the State of U. P. and after going through the contents of the two applications for directions (C. M. P. Nos. 34586/1983 and 3196/1984) made on behalf of the State of U. P. we are satisfied that there are no insurmountable difficulties in carrying out this Court's order dated September 23, 1983 as regards the shifting of the graves
3. Two or three difficulties were put before us by counsel for the State of U. P. In the earlier application for directions it was stated that in the matter of removal of the two graves a heavy operation would be required to be undertaken with the help of cranes if the graves are to be removed as one piece or one block or one chunk (a heavy mass of earth together with the stony superstructures weighing about 115 MTs and 80 MTs respectively) and having regard to the situation of the plot in question it will be difficult to carry cranes to the site. Therefore, directions were given to the parties to produce photographs of the two graves from all angles in order ascertain whether the removal of the two graves could be undertaken by following any other method. We have seen the photographs of the two graves and they clearly indicate that the stony superstructures above the ground in the case of each is capable of being dismantled and removed separately and after that is done the graves could be shifted by undertaking a digging operation. This process will obviate the necessity of carrying any crane to the site. In the letter dated October 22, 1983, written by Mr. Mohammadullah, Executive Engineer, to Mr. Mittal, the District Magistrate, Varanasi, (being Annexure "A" to the affidavit of Mr. Anand Prakash Garg) the process suggested above has been indicated as the proper and feasible method to undertake the operation of shifting the graves. The officers has clearly stated that masonry structure may be shifted separately and, thereafter, the earth of graves may be shifted in small blocks by undertaking the digging operation and collecting the bones, i. e. remains of the dead body and the same may be placed in graves at the other places (being the spots indicated to south of Hakim Badruddin's grave). In our opinion the course mentioned by Mr. Mohammadullah would be proper and would

avoid the necessity of undertaking any heavy operation. We, therefore, direct that first the stony superstructures should be dismantled and removed to the proposed sited and thereafter the shifting of the graves should be done by undertaking earth digging operation for the purpose of collecting the bones i. e. the remains of the dead body and without causing any damage to the frame of the body if it is intact and putting the same in the new graves that are to be constructed to the south of the grave of Hakim Badruddin.

4. The second difficulty pointed out on behalf of the State of U. P. pertains to the so-called four shops (gumties) which exist near the place where the graves are to be shifted and it has been stated in the application (C. M. P. No. 3196 of 1984) that "shops are said to be 15 to 20 years old". We inquired from counsel whether there was any material to substantiate the aforesaid averments of the shops being 15 to 20 years old but counsel stated that none was available with him at the moment. Having regard to the material which is available on record before us it is impossible to accept that these so-called shops have in existence for the last 15 to 20 years. During the hearing of the main writ petition this Court had appointed two Commissioners to undertake a survey of the several plots in question as also the structures standing thereon and the Commissioners have submitted their report to this Court in December 1979. From this report it is quite clear that at the time of the sport inspection done in December 1979, there were no such shops (gumties) to the south of the grave of Hakim Badruddin and there was no other structure which means that site was vacant then. Further, on the occasion of 1982 Moharram festival this Court had an occasion to permit the Sunnis to perform their Chaddar function and reading of Fatiha only at the grave of Maulana Hakim Badruddin on November 19, 20 and 21, 1982 and for that purpose the District Magistrate was directed to cordon off certain area around that grave and to make necessary security arrangements for those functions on the said dates, and this was done, which suggests that there were no shops and sheds near about that grave at the that time. It will be interesting to note that in the earlier application for directions (C. M. P. No. 34586 of 1983) existence of such gumties as likely obstacles in the shifting operation was not mentioned as it has been done now in C. M. P. No. 3196 of 1984. In any case the photographs also indicate that there are no shops in the real sense of the word but that some sort of temporary tin-sheds or wooden structures have come up recently sometime after November 1982. There is, therefor, no material produced before us to show that those sheds (gumties) have been in existence for 15 to 20 years as suggested on behalf of the State. On the other hand, the material on record shown that they must be very recent structures. Quite clearly the so-called structures, which stand on the land belonging to the Maharaja are unauthorised structures and though the question of shifting of the graves to the south of the grave of Maulana Hakim Badruddin is under consideration of this Court for the past several months in this long drawn out litigation between Sunnis and Shias, no one has come forward laying a claim to the said gumties or to suggest that these have been in existence since prior to the inspection that was undertaken by the two Commissioners appointed by the Court. These unauthorised gumties, therefore, do not present any difficulty and they will have to be and should be removed for the purpose of shifting the two graves to the south of the grave of Maulana Hakim Badruddin as directed by the Court. There is a municipal water tap but the same could be shifted to a convenient place and the

Municipality (Nagar Palika) should be asked to do so. We are told that there are four trees near about the spot where the graves are to be shifted but the shifting of the graves and placing them at the new spot (south of the grave of Maulana Hakim Badruddin) should be so undertaken as to preserve the trees as far as possible. Yet another difficulty was maintained by counsel arising from our order dated September 23, 1983 which states that the operation of shifting of the graves should be completed with due regard to rituals if any that might be required to be observed at the time of shifting of the graves. In this behalf in our earlier order dated November 1, 1983, the Sunnis were directed to file either their own affidavit or affidavit of any religious head (Maulana) whomsoever they want to consult, indicating clearly the rituals, if any, that may be required to be performed at the time of the shifting of the graves but no affidavit of any Sunni nor of any religious head has been filed so far. In fact, it is stated in C. M. P. No. 3196 of 1984 that the Divisional Commissioner had discussed this matter with number of religious scholars (Ulemas), including Maulana Abdul Salam Nomani, who happens to be the Pesh Imam of Gyan-Vapi Masjid, Varanasi and the Maulana merely opposed the very idea of the shifting of the grave but what is important is that he further stated that since there is no provision in the holy books of Islam for the shifting of the graves no authentic advice should be given as to the rituals and ceremonies for the shifting of the graves no authentic advice should be given as to the rituals and ceremonies for the removal of the graves. It is, thus, clear that there are no rituals - At any rate none is put on record before us by means of any authoritative affidavit. The State counsel has pointed out that as per the opinion of the Pesh Imam the graves could be touched only by the heirs or the relatives of the deceased and failing them only Sunni Muslims should be allowed to touch the graves. In our view, this is no ritual that is required to be performed before the shifting of the grave is undertaken but it is merely an expression of a pious sentiment. Even so, with a view to respect that sentiment we direct that co-operation of the heirs and or the relatives of the deceased and failing them of the Sunnis should be taken in the matter of shifting the graves and such co-operation should be sought by issuing a public notice with 4 days from today in local newspaper but if such co-operation would not be forthcoming within 15 days of the publication of the notice the operation of the shifting of the graves should be undertaken without delay. The State of U. P. has already expressed its apprehension that in the assessment of the District Authorities the relatives of the deceased and for that matter on Sunni will extend co-operation in the matter. Even, so, we have given the aforesaid direction of seeking such co-operation from the heirs or relatives of the deceased and from the Sunnis of the locality only with a view to respect the pious sentiment given expression to by the Pesh Imam of Gyan-Vapi Masjid, Varanasi. We would, however, reiterate that if the Sunnis do not want to co-operate it would be their choice but they should not in any manner interfere or obstruct the operation of the shifting of the graves and they are restrained by way of injunction from doing so.

5. Counsel for the State reiterated its grave apprehension that this operation might lead to violence, bloodshed or breach of peace. We were not impressed by this plea when it was originally made nor are we impressed with it now and surely this cannot be a ground justifying the non-implementation of this Court's order. We do not wish to use strong words but the State must discharge its constitutional duty to implement this Court's order and obviously with all efforts to avoid the apprehended

consequences. Further, it is not for this court to give directions, as sought, as to how much police force should be deployed, in what manner it should be used and to what extent force should be used. These are all matters for the State Government and its officers to decided depending upon the need of the situation. We also reject the prayer that an officer of this Court should remain present at the time of the shifting of the graves as we feel that no officer of this court should involve or associate himself with the execution or carrying out this Court's order, which is entirely the duty of the executive.

6. We further direct that simultaneously with the shifting of the two graves from their position to the south of the grave of Maulana Hakim Badruddin, the work of the cordoning off these three graves by erecting a wall of 12 ft. in height on three sides as already indicated in our earlier order should be done. We further direct hats the entire operation mentioned above (shifting of the two graves and cordoning off the three graves by a wall) should be completed within 10 weeks from today and compliance report should be filed in this Court immediately thereafter.

7. In addition to the District Magistrate, Varanasi who will implement the aforesaid order under the supervision of the Divisional Commissioner, Varanasi it is obvious that the State Government will have to appoint responsible officers who will be entrusted with the work and will actively participate and help them in the implementation of the operation. We have asked counsel for the State to furnish us the names of the officers who will be deputed for the purpose and counsel has stated that the State will furnish the names within a week from today.

8. Further directions with regard to the construction of the boundary wall will be given at the next date of hearing. To enable the Court to give such direction both the parties are directed to file fresh maps indicating the exact location of the entire boundary wall which should be so indicated as to exclude public latrines situate on plot No. 602/1133. These maps should be made available to the Court at the next hearing.

Order dated May 7, 1985

1. We have gone through the averments made in the CMPs as also the several affidavits - Counter-affidavits and further affidavits filed herein by parties in support of their respective version. We have heard counsel on both sides as also counsel for the State of U. P.

2. We are happy to note from the affidavits filed by the District Magistrate that during the Moharrum festival of 1984 (October 6 to December 2) members of the Shia community were able to perform their rites, rituals and functions on the plots in question in a peaceful manner and without any let or hindrance by any member of the Sunni community or any other person whatsoever and the District Magistracy as also the police authorities have implemented our order dated September 28, 1984 quite well. Having been satisfied that the rituals and functions of the Shias have gone off well we accept the report which the District Magistrate had made to this superiors (Home Secretary of U. P.) on December 3, 1984 in that behalf and to this extent the experiment contemplated by our order seems to have worked out well. This result is

achieved by court's intervention for the first time in a century and a quarter.

3. However, what transpired on December 7, 8 and 9, 1984 during which permission had been rightly granted by the District Magistrate to the members of the Sunni community to perform the two rituals of reading Fatiha and laying Chaddar at the grave of Hakim Badruddin, the parties are at great variance and there is serious deputies as to whether the members of the Sunni community were allowed to and did put up shamianas on the remaining 8 plots including the area around the two cordoned off graves of Lal Mohd. and Smt. Sakina and whether the assemblage of Sunni community had spread out and occupied these plots as also the Baradari while performing the two rituals at the grave of Hakim Badruddin. The Shias have complained about encroachments having been made by the Sunnis over the other 8 plots of land including Baradari which according to them was in breach of the directions of this court contained in the order dated September 28, 1984 and have annexed photographs taken on the occasion of the performance of these two rituals by the members of the Sunni community between December 7 and 9. The Sunnis have denied that any such encroachments had been made by them and the affidavits filed by the District Magistrate and the concerned police officer naturally support the Sunnis' version. Regarding in between the lines of the rival affidavits when the Court at the previous hearing felt that the Shias complaint appeared to have some substance and that the apparent encroachment could be the result of lack of proper understanding of the Court's order or due to its misinterpretation on the part of the concerned authorities an opportunity was given to the District Magistrate and other officers to make a proper affidavit but we regret to find that instead of coming forth with any frank and candid explanation an attempt has been made to stick to the original denial of any encroachment by filing a further affidavit wherein at least a half-hearted admission had been made that the Shamianas had been put up mainly on a part of land No. 602/1133 (on which grave of Hakim Badruddin stands) which also extend to Plot No. 246/1134 on the open portion thereof and a justification is sought to be given that if Sunnis had not been permitted to use a part of the open Plot No. 602/1133 the only alternate course would have been to use the public street to the west of the grave of Hakim Badruddin which would have blocked the passage of the residents of the area and of the passers-by. It is also stated in the same affidavit that there was no specific direction contained in the order dated September 28, 1984 in regard to the manner of performance of Chaddar and Fatiha rites by Sunnis and the extent of the assemblage and the space over which such assemblage was to sit and spread. In our view, this is a clear misunderstanding of this Court's order whereby under clause (1) a specific direction to cordon off Hakim Badruddin's grave by barbed wire fencing on all its three sides with access thereto only from the road lying on its west was given so that the Sunnis could perform the two rituals within the area so cordoned off. Moreover, our order seems to have been understood wrongly as if the directions and restraints upon Sunnis contained therein were to last only during the 58 days of Moharrum festival and thereafter the Sunnis could go over to the other plots while performing the two rituals at the grave of Hakim Badruddin. Such understanding is contrary to what is expressly contained in para 3 of our order where it has been declared that members of Sunni community of Varanasi have no right whatsoever over the other 8 plots or structures standing thereon for performing any rites or rituals at any time. The manner in which the further affidavit has been filed,

presumably under legal advice, has left unsavoury impression on the Court and this Court cannot accept the apology tendered hedged in with if's and but's and we leave the matter at that.

4. There is of course the prayer made by the petitioners in the CMP seeking implementation of this Court's order dated September 23, 1983 in the matter of shifting of the two graves. However, we feel that the experiment done during the Moharrum festival of 1984 should be repeated during the Moharrum festival of 1985 and the Court would like to observe the conduct and behaviour of the members of the two communities during the ensuing Moharrum festival also. We, therefore, direct that all the directness given by this Court in its order dated September 28, 1984 would be operative during the Moharrum festival of 1985 with the further clarification that the directions and restraints placed upon the Sunnis by our aforesaid order are not confined to the period of the Moharrum festival but would continue to operate even thereafter and particularly the declaration in part 3 of the order will be operative until further orders of the Court. It is hoped that the District Magistracy and the police authorities will now have no occasion to misunderstand any part of our directions contained in the said order and will exert their utmost to carry out the same in letter and spirit.

5. With these directions the matter of shifting of the two graves and all other things incidental thereto are adjourned and directed to be places on Board a fortnight after the Moharrum festival of 1985 is over.

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