

Ghulam Abbas and Others

Vs

State of U. P. and Others

Civil Miscellaneous Petitions Nos. 19260 and 19260-A of 1987

(L. M. Sharma, A. C. Sen JJ)

27.11. 1987

ORDER

1. Having heard Sri Asoke Sen, learned counsel appearing for the petitioners, Sri A. K. Srivastava, learned counsel for the State Government and the District Magistrate, Varanasi, and Sri T. S. Krishnamoorthy Iyer learned counsel appearing for respondent 5, we find no reason or justification to disturb the arrangement effected by this Court's order dated March 7, 1986 (1986 Supp SCC 487) as an experimental measure. The said arrangement, as directed by the said order, has to continue for a period of ten years. It is amply clear from the counter-affidavit sworn by the City Magistrate, Varanasi that the experimental measure has proved successful and has ensured peaceful performance of religious rites, rituals, practices and functions by the members of the Shia community, barring some minor incidents for which appropriate proceedings have been taken by the District Magistrate under Section 107 read with Section 110 of the Code of Criminal Procedure, 1973 against both the rival communities i.e. Sunnis and the Shias communities.

2. We wish to emphasise that the maintenance of law and order is a function of the District Magistrate and we have every reason to believe that the District Magistrate with a view to avoid any possible breach of peace would take the necessary steps well in advance for the purpose of maintaining public order which would be in the larger interests of the society. The exercise of fundamental rights under Articles 25 and 26 of the Constitution is not an absolute right but must yield or give way to maintenance of public order as laid down by this Court in *Gulam Abbas v. State of U. P.* ((1982) 1 SCC 71 : 1982 SCC (Cri) 82 : (1982) 1 SCR 1077). The principles are well settled and it is but for the District Magistrate to exercise his powers in consonance with the provisions of Section 144 of the Code.

3. Sri Asoke Sen, learned counsel for the petitioners, however, draws our attention to the fact that in terms of the court's order dated March 7, 1986 (1986 Supp SCC 487), the two graves of Lal Mohammed and Smt. Sakina has to be enclosed by the construction of a brick masonry wall of 12 ft. in height on all sides but the District Authorities have instead constructed a masonry wall on all sides to enclose the graves in question and this according to him, constitutes a non-compliance of the Court's order. The direction in the order is in these terms : (SCC p. 489, para 4)

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 in 12 in height on all sides thus cordoning off and sealing the same with access to none for all times to come.

We find considerable force in the submission. It is quite apparent that the two graves should have been separately enclosed by the construction of a brick masonry wall of 12 ft. in height but the District Authorities have instead constructed a brick masonry wall of 12 ft. in height to enclosed both the graves. The mistake in so enclosing the graves in question can easily be rectified by the District Magistrate be requiring the two graves to be separately enclosed by a brick masonry wall of 12 ft. in height each, instead of one wall, leaving intervening space between the two graves, at the expense of the State Government.

4. Civil Miscellaneous Petitions are disposed of accordingly.

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