

GULAM ABBAS AND OTHERS

v.

STATE OF U.P. AND OTHERS

September 23, 1983

[V. D. TULZAPURKAR, D. A. DESAI AND A. P. SEN, JJ.]

Constitution of India—Arts. 25 and 26—Scope of—Exercise of religious rights is subject to maintenance of public order—Shifting of graves for the purpose of maintaining public order is not irreligious or destructive of fundamental rights.

While deciding a writ petition relating to the dispute regarding performance of religious rights, practices and observances by members of Shia sect on a plot of land in a mohalla, the Court permanently restrained the Sunni community of that mohalla by an injunction from interfering with the exercise of such rights of Shia community. However, the Court found that in an earlier litigation the Sunni community had been given the liberty to read Fathia over the grave of Maulana Hakim Badruddin only found to be existing in the plot and that the other two graves had come up contrary to the Court's injunction in the earlier litigation. Notwithstanding the above decision the members of Shia community apprehended breach of peace and disturbance of public order and the Court had to give directions on each occasion with a view to ensure that all the ceremonies went off smoothly. The Court, with a view to find some permanent solution to this perennial conflict between the two sects, appointed a committee to go into the question, *inter alia*, whether the two other graves now found in that plot could be shifted to some other convenient place. The Chairman of the Committee opined that the suggestion to shift the two graves located on the northern side of the plot to the south of the grave of Maulana Hakim Badruddin was quite feasible as there was sufficient space in the suggested area and that such shifting of the two graves will totally separate the places of worship of Shias and Sunnis. The petitioners (Shias) filed the present petition for issuance of directions to implement the above suggestion.

Allowing the petition,

HELD : The suggestion to shift the two graves cannot be regarded as irreligious or destructive of any fundamental rights of the Sunnis. [69G; 71E]

Articles 25 and 26 of the Constitution undoubtedly guarantee (a) to all persons freedom of conscience and free profession, practice and propagation of religion and (b) to every religious denomination or any section thereof freedom to manage its own affairs in matters of religion but both these fundamental rights have been expressly made "subject to public order, morality and

health". The impugned suggestion was mooted by the Court and has now been found to be feasible by the Chairman of the Committee 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. Over several years in the past experience has shown that such performance of their religious ceremonies and functions was and has been invariably accompanied by ugly incidents of violence, damage or destruction to life and property putting public order in great jeopardy or that the performance by members of both the sects was required to be prohibited by orders under s. 144 Cr. P.C. The latter course benefits neither and obviously members of neither community could be permitted to exercise their fundamental rights under Arts. 25 and 26 so as to put public order in jeopardy. [69 H, 70 A-D]

The religious rights of every person and every religious denomination are subject to "public order", the maintenance whereof is paramount in the larger interest of the society. The ecclesiastical edict or right not to disturb an interred corpse is not absolute as will be clear from sec. 176(3) of Criminal Procedure Code which permits its exhumation for the purpose of crime detection and this provision is applicable to all irrespective of the personal law governing the dead. The edict clearly implies that it may become necessary to shift graves in certain situations and exigencies of public order would surely provide the requisite situation, especially as the fundamental rights under Articles 25 and 26 expressly made subject to public order. [71 B-D]

The impugned suggestion merely seeks to shift those two graves from their present location to the southern side of the grave of Maulana Hakim Badruddin and if taken in proper spirit it would in a sense amount to respecting the sentiments of the Sunni Muslims, for, after placing them to the south of the grave of Maulana Hakim Badruddin, the Chaddar functions and recitation of Fathia could be undertaken by them at all the three graves instead of only at the grave of Maulana Hakim Badruddin. [70 F-H]

The main decision rendered by this Court and the directions issued by it have to be implemented and removal of any impediment or obstruction in that behalf cannot be said to be beyond the powers or jurisdiction of this Court and since the acceptance and implementation of the impugned suggestion of the Chairman of the committee would facilitate the carrying out of the main judgment of this Court the issuance of directions sought by the petitioners would obviously fall within the scope of the present proceedings. [71 F-G]

CIVIL APPELLATE JURISDICTION : Civil Misc. Petition No. 4939 of 1983.

(Appln. for directions)

IN

Writ Petition No. 4675 of 1978.

(Under Article 32 of the Constitution of India)

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A *A.K. Sen, Mrs. Urmila Kapoor and Hashan Imam* for the Applicant.

F.S. Nariman, M. Qamaruddin, Altaf Ahmed and Rizwan Hafiez for the Opposite side.

B The Order of the Court was delivered by

C TULZAPURKAR, J. This Miscellaneous Petition for directions is an off-shoot of this Court's decision in the main Writ Petition No. 4675 of 1978, referred on November 3, 1981, in a dispute *inter se* between the members of the Shia and Sunni sects of Muslims of Varanasi, pertaining to the performance of religious rites, practices and observances by members of Shia sect on certain plots and properties situated in Mohalla Doshipura, Varanasi. The final result in that matter was expressed by this Court in these terms :

D "In the result we held that the petitioners and through them the Shia community of Mohalla Doshipura, Varanasi, have established 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 respondent 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 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."

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G So far as the members of the Sunni community are concerned, in view of the ultimate decisions rendered in two earlier suits (Suit No. 424 of 1931 and Suit No. 232 of 1934) this Court found that all the rights which the Sunnis had claimed in those representative litigations stood finally negated except for one religious practice for which some liberty was reserved to them. To recapitulate the precise liberty reserved to them, it needs to be stated that in Suit No. 424 of 1931 there was prayer for actual removal of graves, if
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any, found on plot No. 602/1133, that the evidence clearly showed that there was only old grave of Maulana Hakim Badruddin situated on the southern side of the said plot existing since 1307 Hazri and it was with regard to this grave that the Court had observed that it would be a bit improper that the soul of the dead be stirred and the defendents be ordered to remove the same and they (Sunni Muslims) were given liberty to read Fathia over that grave but what is significant is that the Court issued permanent injunction restraining the defendants and through them the Muslims of Varansi (in fact the Sunni Muslims) from using the plot in future as burial ground. Even the liberty to read Fathia over grave of Maulana Hakim Badruddin was to be exercised with due regard to the rights of the Maharaja. In other words, excepting this liberty to read Fathia over the grave of Maulana Hakim Badruddin the Sunni Muslims did not have any other rights over the plot in question. All other rights in regard to performance of religious rites, practices and observances over the other plots of structures thereon were negated in Suit No. 232 of 1934. It is obvious that their rights cannot be enlarged or reduced in these proceedings. However, as regards the mosque standing on plot No. 246 is concerned this Court clarified the position that it belonged to both the communities and members of both were entitled to perform their worship by offering prayer and *namaz* therein.

Notwithstanding the aforesaid clear and categorical decision of this Court it appears that during the two Moharram festivals that were to be celebrated in December 1981 and October 1982, grave apprehensions of breach of peace and break-down of public order were entertained by members of the Shia community and on each occasion directions were required to be given by this Court with a view to ensure that all the ceremonies at the festivals went off smoothly and peacefully and notwithstanding the directions issued by this Court on the occasion of the 1981 festival some ugly incidents of violence, stone-throwing, hurling of acid bulbs/bottles, etc. did occur in respect whereof contempt proceedings were required to be taken and criminal cases are pending. It may also be stated that on the occasion of Barawafat ceremony which was desired to be performed by the Shias on 9.1.1982, the Sunnis also wanted to have their Chaddar function and reading of Fathia on the grave and, therefore, this Court with a view to avoid any possible breach of peace had to direct that only Shias would be allowed to perform their ceremonies and the Sunnis were restrained from performing

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A Chaddar ceremony and reading of Fathia at the graves on 9.1.1982 and it was made clear that this arrangement was without prejudice to the contention of Sunnis with regard to their above function which would be decided later on. On the occasion of 1982 Moharram festival this Court was required to pass an order on 4th October, 1982 that Chaddar function and reading of Fathia at the graves will not be permitted to be done or performed by the Sunnis on those dates on which the Shias were going to have their functions with a view to avoid clash between the two communities; by way of further clarification this Court on November 16, 1982, gave a further direction that the grave of Maulana Hakim Badruddin on plot No. 602/1133 abutting on the road would be the venue for the Sunnis to perform on that grave the Chaddar function and reading of Fathia between stated hours (8 a.m. to 1 p.m.) on 19th, 20th and 21st November, 1982 and that the Sunnis will have access to that grave only from the public road and the District Magistrate was directed to cordon off the area and make necessary security arrangements during those functions on the aforesaid dates and time at the cost of Sunnis. We are referring to these events that have transpired since after the rendering of our main decision in Writ Petition No. 4675 of 1978 because they clearly suggest that some permanent solution of this perennial conflict between the two sects over the performance of their religious ceremonies and functions is desirable so that their religious ceremonies and functions could be performed in future without any violence, breach of peace and disturbance of public order.

F With the aforesaid end in view by our order dated 4th October, 1982 we appointed a Committee of seven persons consisting of three nominees of the Shias, three nominees of the Sunnies under the Chairmanship of the Divisional Commissioner of Varanasi (present incumbent Shri S. K. Mukherjee) for going into and submitting its report to us on two questions :

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- “(i) Whether the two graves on plot No. 602/1133 could be shifted to some other convenient place; and
- (ii) If that is not possible whether the two graves could be cordoned off by a wall of sufficient height with an independent outlet (for entry and exit) ?
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It appears that the Committee held two meetings to deliberate on the two issues and the representatives of both the communities

expressed their views and after considering all the pros and cons the Chairman has submitted a report dated 9.12.1982 to this Court. The report states that Sunnis vehemently opposed the idea of shifting of any grave from its present site and even with regard to the proposal of the cordoning off the two graves by a wall they were not agreeable. The Chairman has, however, after undertaking a spot inspection of plot No. 602/1133 and the adjoining plots, opined that the suggestion to shift the two graves located on the northern side of plot No. 602/1133 to the south of the grave of Maulana Hakim Badruddin (situated in the same plot) is quite feasible as there is sufficient space in the suggested area and that such shifting of the two graves will totally separate the places of worship of Shias and Sunnies. C.M.P. No. 4939 of 1983 has been filed by the petitioners (Shias) for issuance of directions to implement the suggestion made by the Chairman of the Committee.

The Sunnis have raised two objections to the acceptance of the suggestion of the Chairman, namely, (a) the suggestion has not only hurt the sentiments of the majority community of Sunni Muslims but is destructive of their fundamental rights and fraught with dangerous consequences and (b) the suggestion in any event is outside the jurisdiction of the Court and the scope of the proceedings before it. In our view, there is no substance in either of the objections.

At the out-set it needs to be clarified that the question whether the two graves in plot No. 602/1133 could be shifted to some other convenient place was mooted by this Court not with a view to hurt the sentiments of Sunni Muslims, who constitute a majority community in Mohalla Doshipura, Varanasi, but purely for the purpose of finding out some permanent solution to this perennial conflict between the two communities and to ensure smooth and peaceful performance of their religious ceremonies and functions in future in an atmosphere of cordiality and amity between them and a Committee was appointed to ascertain feasibility of the proposal. Further, the proposal has now been found to be feasible by the Chairman of the Committee and the same cannot be regarded as destructive of any fundamental rights of the Sunnis as contended. Articles 25 and 26 of the Constitution, on which strong reliance was placed by counsel for the contesting respondents representing the Sunni community in that behalf, undoubtedly guarantee (a) to all persons freedom of conscience and free profession, practice and

A propagation of religion and (b) to every religious deomination or any section thereof freedom to manage its' own affairs in matters of religion but both these fundamental rights have been expressly made "subject to public order, morality and health". In other words, the exercise of these fundamental rights is not absolute but must yield or give way to maintenance of public order and the impugned suggestion was mooted by the Court and has now been found to be feasible by the Chairman of the Committee 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 function by members of both the sects. Over several years in the past experience has shown that such performance of their religious ceremonies and functions was and has been invariably accompanied by ugly incidents of violence, damage or destruction to life and property putting public order in great jeopardy or the performance by members of both the sects was required to be prohibited by order under s. 144 Cr. P.C. The latter course benefits neither and obviously members of neither community could be permitted to exercise their fundmental rights under Arts. 25 and 26 so as to put public order in jeopardy and as such there is no question of the impugned suggestion being destructive of any fundamental rights of the Sunnis. If the Court finds the implementation of the suggestion to be eminently fit in the interest of maintenance of public order consent of either party would be immaterial. Moreover, in the instant case, admittedly only one old grave of Maulana Hakim Badruddin was found to be existing in plot No. 602/1133 since 1307 Hazri when Suit No. 424 of 1931 came to be decided and obviously the two graves in question have come up on the northern side of the same plot in breach and defiance of the Court's order, and surely the Sunni Muslims cannot claim any right to retain them on the plot, much less a right to perform Chaddar function or recitation, of Fatia over those graves. However, the impugned suggestion merely seeks to shift those two graves from their present location to the Southern side of the grave of Maulana Hakim Badruddin and if taken in proper spirit it would in a sense amount to respecting the sentiments of the Sunni Muslims, for, after placing them to the grave of Maulana Hakim Badruddin, the Chaddar functions and recitation of Fathia could be undertaken by them atall the three graves instead of only at the grave of Maulana Hakim Badruddin.

H Counsel for the Sunnis relied upon five 'Futwas' issued by their religious heads (Head Muftis and Shahi Imams) from Delhi,

Banaras and Patna stating the position under Sheriat Law. The common theme in all these Futwas is that under Sheriat Law respecting of graves is the religious obligation of every Muslim, that shifting of dead bodies after digging old graves in which they are lying buried is not permissible and to do so would amount to interference with their religious rights. True, this position under Sheriat law cannot be doubted but as explained earlier the religious rights of every person and every religious denomination are subject to "public order", the maintenance whereof is paramount in the larger interest of the society. For instance, the ecclesiastical edict or right not to disturb an interred corpse is not absolute as will be clear from the sec. 176 (3) of Criminal Procedure Code which permits its exhumation for the purpose of crime detection and this provision is applicable to all irrespective of the personal law governing the dead. In fact, quoting a Hadit, one of the Fatwas relied upon by the contesting respondents states "unnecessary shifting of graves is also not permissible". The edict clearly implies that it may become necessary to shift graves in certain situations and exigencies of public order would surely provide the requisite situation, especially as the fundamental rights under Articles 25 and 26 are expressly made subject to public order. In the circumstances in directing the shifting of two graves in question for the purpose of maintaining public order which would be in the larger interest of the society, we do not think that we are doing anything irreligious. In the circumstances the first objection is overruled.

As regards the second objection, we fail to appreciate as to how the impugned suggestion of the Chairman of the Committee is beyond the powers of this Court or outside its jurisdiction or outside the scope of the proceedings before us. The main decision rendered by this Court and the directions issued by it have to be implemented removal of any impediment or obstruction in that behalf cannot be said to be beyond the powers or jurisdiction of this Court and since the acceptance and implementation of the suggestion of the Chairman of the committee would facilitate the carrying out of the main judgment of this Court the issuance of directions sought by the petitioners would obviously fall within the scope of the present proceedings. C.M.P. has, therefore, to be allowed.

A plan marked Annexure 'A' hereto and made a part of this order clearly indicates the boundary wall that has to be constructed surrounding some of the plots over which the Shias have to perform

A their functions, ceremonies, rites, practices and observances as also the exact location of the spots where the two graves in question are to be installed after shifting them from their present site, being two spots to the south of the old grave of Maulana Hakim Badruddin with exact dimensions of open spaces surrounding the three graves that are required to be maintained and cordoned off by a wall of 12 ft. in height. On the shifting of the two graves in question to the south of the Maulana Hakim Badruddin's give the three graves would be abutting the road on west as indicated in the plan. We direct that the aforesaid operation of constructing the boundry wall and shifting the two graves in question and installing them at the spots indicated in the plan should be carried out by the District Magistrate of Varanasi under the direction and supervision of the Divisional Commissiner, Varanasi and in the presence of the representatives of the Shia and Sunni communities (being the members of the Committee) and the operation should be completed in all solemnity and with due regard to rituals, if any, without any delay and preferably before the advent of Moharram festival of 1983. Co-operation of members of the communities should be secured by the Divisional Commissioner and in case any one of the sects or its members refuse to co-operate, the members of that sect are restrained from causing any obstruction to the aforesaid operation. The petitioners and members of Shia community have undertaken to bear and pay the entire cost of aforesaid operation.

F It is clarified that the order and directions hereby given are intended to bind the parties hereto and all members of Shia and Sunni Muslims of Varanasi but will not affect the rights, if any of third parties such as the Maharaja of his heirs of legal representatives over the plots in question.

H.S.K.

Petition allowed.