

A MOHD.HAMID & ANR ETC.ETC.  
v.  
BADI MASJID TRUST & ORS.ETC.ETC.  
(Civil Appeal No(s). 5860-5861 of 2011)

JULY 20, 2011

[DR. MUKUNDAKAM SHARMA AND  
ANIL R. DAVE, JJ.]

**MOHAMMEDAN LAW:**

C *Shifting of a grave – HELD: There could be shifting of*  
Muslim grave from an unauthorised place to a place which  
is authorised by law for such burial – Besides, interring a  
corpse in an unauthorised place without permission or  
D *consent of the owner and lessee of the property amounts to*  
usurping somebody else's property – Shifting of such graves  
would not be un-Islamic nor would it be violative of Articles  
25 and 26 of the Constitution of India – In the instant case,  
E *the records clearly disclose that a group of people took law*  
into their own hands, took the dead body away forcibly from  
the place where it was proposed to be buried, forcibly entered  
the school premises and buried the dead body in the said  
school premises, without permission and without any authority  
– The entire action, therefore, was illegal, without jurisdiction  
and in violation of the law which brought in disturbances in  
F *the area and also created huge law and order problem for the*  
Government – It is directed that the dead body of the saint  
be exhumed from the place of its present burial and shifted  
to another appropriate place and buried in accordance with  
law with all dignity and respect and he shall be laid in peace  
G *for enabling his devotees to offer their prayers and respects*  
as and when they desire in accordance with law – Constitution  
of India, 1950 – Articles 226 read with Articles 25 and 26.

**Constitution of India, 1950:**

*Article 226 read with Articles 25 and 26 – Writ petition seeking redressal of grievances caused due to unauthorized burial of a saint in the school premises –HELD: The action done created disturbance of law and order and public order and in that situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted – Since there was statutory violation in the unauthorised action of burial of the saint, Article 226 was the only remedial measure available, which could be taken for immediate redressal of the grievances – Mohammedan Law – Code of Criminal Procedure, 1973 – s.133 – City of Nagpur Corporation Act – s.269.*

**Consequent upon the death of a Baba, when his dead body was taken to the burial ground where the necessary arrangements were made for the burial, some people took the body from the burial ground to the premises of the school run by respondent no. 7-Committee, and by forcibly entering into the school premises buried the dead body there. This created law and order and public order disturbances and curfew had to be imposed in the area. Writ petitions were filed before the High Court, which issued directions that appropriate steps be taken to exhume the body of Baba with full respect to his saintly-hood and to arrange for its appropriate honourable burial in accordance with law; and to forthwith take all appropriate steps to restore normalcy in the area.**

**In the instant appeals it was contended for the appellants that according to the Fatwa issued under Mohammden law, a dead body, once buried, could not be exhumed; and that the High Court acted illegally and without jurisdiction in entertaining the writ petitions and**

A it should have relegated the parties to the civil court for decision of their disputes.

Dismissing the appeals, the Court

B HELD: 1.1 Hanafi Law Relating to Wakf or Trusts, reveals at p.406, a Fatwa contained in Fatawi Alamgiri at page 556 in which it is stated under the heading "A burial-ground" that a body that has been buried in the ground, may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption". There is yet another Fatwa, namely, Fatwa C Rajviya Jild 4 Safah 119 in Hadis, which is recognised by Deoband Madarsa and which is known as 'Fatwa Darululoom Deoband (Mez 403), which states, if such D remove it and use the land for proper purpose. Besides, in the instant case, the burial and using the place as a burial ground is also against the specific condition of the Nazul Khasara by which the Government had leased out the land in favour of respondent no. 7. [para 16-17] [356- E C-G]

*Hanafi Law Relating to Wakf or Trusts*, p.406; and *Hadis, Fatwa Rajviya Jild 4 Safah 119* – referred to.

F 1.2 In *Abdul Jalil & Ors.\**, it was held that Muslim graves coming up unauthorisedly and illegally on others' land can be shifted in the larger interest of society for maintaining public order. It was also held that such action of shifting of graves would not be un-Islamic and also would not be violative of Articles 25 and 26 of the G Constitution of India. [para 19] [357-G-H; 358-A]

\**Abdul Jalil & Ors. Versus State of U.P. & Ors. (1984) 2 SCC 138*; and *Gulam Abbas & Others Versus State of U.P. & Ors 1984 (1) SCR 64 = (1984) 1 SCC 81* – relied on.

H 1.3 In the instant case, the situation which was

created and under which the burial had taken place within the school premises, created disturbances of public order and in order to maintain the public order, there could be shifting of Muslim grave from an unauthorised place to a place which is authorised by law for such burial. Besides, interring a corpse in an unauthorised place without permission or consent of the owner and lessee of the property amounts to usurping somebody else's property. The entire action was illegal, without jurisdiction and in violation of the law which brought in disturbances in the area and also created huge law and order problem for the Government. [para 14 and 20] [355-G-H; 356-A; 358-B]

2.1 Since there was statutory violation in the unauthorised action of burial of the saint, Article 226 of the Constitution of India was the only remedial measure available, which could be taken for immediate redressal of the grievances. There was statutory violation of s. 269 of the City of Nagpur Corporation Act and, as held by the High Court, there was also violation of s.133 of the Code of Criminal Procedure, 1973. The action done created disturbance of law and order and public order and in that situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted. [para 21] [358-C-E]

2.2 There is no reason to interfere with the orders passed by the High Court. It is directed that the dead body of the saint would be exhumed from the place of its present burial and shifted to another appropriate place and buried in accordance with law with all dignity and respect and he shall be laid in peace for enabling his devotees to offer their prayers and respects as and when they desire in accordance with law. [para 22] [358-F-G]

A

**Case Law Reference:**

1984 (1) SCR 64                      relied on                      para 18

(1984) 2 SCC 138                      relied on                      para 18

B

CIVIL APPELLATE JURISDICTION : Civil Appeal  
No.5860-5861 of 2011.

From the Judgment & Order dated 12.07.2011 of the High  
Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ  
Petition No. 3123 and 3177 of 2011.

C

U.U. Lalit, Manish Pitale, Shubail Farook, Wasi Haider,  
Chander Shekhar Ashri for the Appellants.

D

Shyam Divan, Rushikesh Marathe, Ravindra Keshavrao,  
Anand Parchure, Gopal Balwant Sathe, Huzefa Ahmadi, Ejaz  
Maqbool, Mrigank Prabhakar, Garima Kapoor, Shakil Ahmed  
Syed, S.A. Saud, Shuaibuddin, Parvez Dabas, Sanjay V.  
Kharde, Sachin J. Patil, Asha Gopalan Nair for the  
Respondents.

E

The following order of the Court was delivered

**O R D E R**

1. Application for permission to file SLP is allowed.

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2. Leave granted.

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3. These Appeals are directed against the judgment and  
order dated 12.7.2011 passed by the Bombay High Court,  
Nagpur Bench at Nagpur allowing the two writ petitions being  
Writ Petition No. 3123 of 2011 and Writ Petition No. 3177 of  
2011.

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4. By the said judgment and order, while allowing the writ  
petitions, the High Court issued certain directions contained in  
paragraph 49 and 50. One of the directions issued by the High  
Court was that appropriate steps would be taken by respondent

nos. 3 and 5 therein to exhume the body of late Baba with full respect to his saintly-hood and to arrange for its appropriate honourable burial in accordance with law, within a period of three days.

5. One of the other directions was to the respondent nos. 1, 2, 4 and 5 therein to forthwith take all appropriate steps within their powers to restore normalcy in the area so as to prevent the wrongdoers and mischief mongers from creating/continuing to affect the law and order situation, so that schools can be reopened and normal tempo of life is restored.

6. The aforesaid directions have been issued in the light of the facts that 'Mohd. Mustafa Mohd. Ansari', popularly known as "Baba" died on 28.6.2011 at about 00.30 hours and the burial was done about 5.30 a.m. on 29.6.2011. Said Baba, who was respected by the people of the locality, used to sit regularly outside the school area being managed by the respondent no. 7, Central Tanzeem Committee. The school authority had a hostel classrooms, playground, etc., within the aforesaid premises leased out to it by the State Government under a lease deed to which reference shall be made hereinafter. In the ground floor of the said hostel, there are certain shops facing the main road and in front of shop no. 11 and off the road, Baba used to sit regularly.

7. On his death, his body was taken to Tajbagh. After performing some religious functions there, a group of persons decided to take the dead body to Mominpura burial ground on 29.6.2011, where necessary arrangements were also made for his burial. However, all of a sudden, some people took a decision otherwise and took the body of Baba and forcibly entered into the premises of Respondent no. 7, dug portion of the land in the playground of the school and buried the dead body there. The aforesaid action was done by the said group of persons by forcibly occupying the area by breaking open the lock of the school and also despite opposition from the lessee, namely, Respondent no. 7, who informed the police about the

A illegal action committed by the said group of people. As a result of the aforesaid act, and forcible action taken by the group of people, there was disturbance of law and order in the locality and consequently there was also disturbance of the communal harmony amongst two sects at Mominpura.

B 8. Since no action could be taken by the police, some writ petitioners filed three writ petitions in the High Court. The first writ petition came to be filed which was registered as Criminal Writ Petition No. 375 of 2011. The said writ petition was disposed of with certain directions on 1.7.2011.

C 9. However, as the situation did not improve, two other writ petitions came to be filed, which were registered as W.P. No. 3123 of 2011 and W.P. No. 3177 of 2011. All the parties entered appearance and thereafter the writ petitions were heard in presence of all the parties and they were allowed and disposed of in terms of the observations made therein referred to earlier.

D 10. Being aggrieved by the aforesaid findings recorded, the Appellants are before this Court by filing the present  
E Appeals, in which we have heard the learned counsel appearing for the contesting parties.

F 11. Counsel appearing for the parties have drawn our attention to various documents on record and also drawn our attention to two judgments of this Court to which reference shall be made hereinafter. One of the contentions that is raised by Shri Lalit, the senior counsel appearing for the Appellants is that the High Court acted illegally and without jurisdiction in entertaining the writ petition in the manner in which it was entertained and that the High Court should have relegated the parties to the civil court for deciding the disputes between the parties. The next contention which is raised by him is that according to the Fatwa issued under Mohammedan law, a dead body, once buried, cannot be exhumed and in support of the same, he has referred to certain passages from the Fatwas,  
G which are annexed in the present appeals.  
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12. The aforesaid submissions of the counsel appearing for the appellants are refuted by the counsel appearing for the respondents, who have also placed reliance on similar but other Fatwas and also on the two decisions of this Court. A

13. Having considered the said submissions, we propose to dispose of these appeals by giving our reasons. B

14. Records placed before us clearly disclose the very fact that a group of people took law into their own hands, took the dead body away forcibly from where it was proposed to be buried and proper arrangements were made to give a proper burial with honour and dignity and after taking it to the school premises, which is leased out in favour of the respondent no. 7 herein, broke open forcibly the lock of the door of the school in the entry point and thereafter forcibly occupied the area concerned and buried the dead body in the said school premises, without permission and without any authority. The justification that is sought to be given now for the aforesaid illegal action is that Baba used to sit at that place where he has been buried. That position is also not borne out from the records as Baba was not sitting at the place where he has been buried but he was sitting at a place away from that place, outside the school premises and off the road and in front of shop no. 11. No permission was taken by the said group of people from the concerned authority, namely, the Government, the owner and the respondent No. 7, the lessee. The said land was given by the Government to Respondent no. 7 for the purpose of establishing a Sarai. In column no. 12 of the Nazul Khasra of the land in dispute, it is recorded that land cannot be used for any purpose other than Dharamshala and Garden. Even the lessee, namely, Respondent No. 7, could not have given any permission for any burial within the aforesaid premises, which was leased out by the Government in favour of Respondent No. 7. Despite the fact, the group of persons forcibly occupied the said place and buried the body of the Baba at an unauthorised place without any authority. The entire action, therefore, was illegal, without jurisdiction and in violation of the law which brought in H

A disturbances in the area and also created huge law and order  
problem for the Government.

15. We are informed that curfew had to be imposed in the  
area in order to maintain law and order and peaceful  
atmosphere. Same situation, namely, curfew, is still being  
B imposed even today for a particular period of time.

16. Counsel appearing for the Appellants also submitted  
that the dead body cannot be exhumed under the Muslim law,  
once it is buried at a particular place. In order to appreciate  
C the aforesaid contention, we have looked into the records. The  
High Court has also referred to some of the religious authorities,  
which were placed before it by the parties hereto. Page 406  
of Hanafi Law Relating to Wakf or Trusts was also placed  
before the High Court and has also been placed before us by  
D the counsel appearing for the Respondents. Page 406 of the  
said law reveals a Fatwa contained in Fatawi Alamgiri at page  
556, in which it is stated under the heading "A burial-ground"  
in the following manner:

E "When a body has been buried in the ground,  
whether for a long or short time, it cannot be exhumed  
without some excuse. But it may lawfully be exhumed when  
it appears that the land was usurped, or another is entitled  
to it under a right of pre-emption".

F 17. There is yet another Fatwa referred to by the High  
Court in paragraph 29 of the judgment which is Fatwa Rajviya  
Jild 4 Safah 119 in Hadis, which is recognised Deoband  
Madarsa and which is known as 'Fatwa Darululoom Deoband  
(Mez 403). According to the said Fatwa, if such burial is without  
G consent of land owner, land owner is entitled to remove it and  
use the land for proper purpose. Besides, the aforesaid burial  
and using the place as a burial ground is also against the  
specific condition of the Nazul Khasara by which the  
Government had leased out the land in favour of the respondent  
no. 7.

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18. In this connection, we may also refer to the decision of this Court in *Gulam Abbas & Others Versus State of U.P. & Ors* reported in (1984) 1 SCC 81. In the said decision, this Court has considered the scope and ambit of Articles 25 and 26 of the Constitution of India and also the jurisdiction of this court under Article 32 of the Constitution of India. In the said decision, the question which arose for consideration was that whether two graves could be shifted to some other place for the purpose of finding out some permanent solution to perennial problem of clashes between the two religious communities. While dealing with the aforesaid issue, this Court considered various Fatwas issued by religious heads, namely, Head Muftis and Shahi Imams from Delhi, Banaras and Patna stating the position of law for shifting the graves under the Sheriat law. After going through all those Fatwas, this Court found that the common theme in all these Fatwas 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. It was further found that such religious rights of every person and every religious are, however, subject to "public order", the maintenance whereof is paramount in the larger interest of the society. It was also held that if it becomes necessary to shift graves in certain situations and exigencies of public order, the same would surely provide a requisite situation, especially as the fundamental rights under Articles 25 and 26 are expressly made subject to public order.

19. However, another decision which may also have relevance is one which arises out of the same subject matter and heard subsequently in another writ petition filed in this Court between *Abdul Jalil & Ors. Versus State of U.P. & Ors.* Reported in (1984) 2 SCC 138, wherein it was held that Muslim graves coming up unauthorisedly and illegally on others' land can be shifted in the larger interest of society for maintaining public order. It was also held that such action of shifting of

A graves would not be un-Islamic and also would not be violative of Articles 25 and 26 of the Constitution of India.

B 20. The situation which was created and under which the aforesaid burial had taken place within the school premises created disturbances of public order and in order to maintain the public order, there could be shifting of Muslim grave from an unauthorised place to a place which is authorised by law for such burial. Besides, interring a corpse in an unauthorised place without permission or consent of the owner and lessee of the property amounts to usurping somebody else's property.

C 21. Since there was statutory violation in the unauthorised action of burial of the saint, in our considered opinion, Article 226 of the Constitution of India was the only remedial measure available, which could be taken for immediate redressal of the grievances. There was statutory violation in the instant case of D Section 269 of the City of Nagpur Corporation Act and as held by the High Court, there was also violation of Section 133 of the Code of Criminal Procedure. The action done created disturbance of law and order and public order and in that E situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted.

F 22. In that view of the matter, we find no reason to interfere with the orders passed by the High Court and dismiss these appeals. We also direct that the dead body of the saint would be exhumed from the place of its present burial and shifted to another appropriate place and buried in accordance with law with all dignity and respect and he shall be laid in peace for enabling his devotees to offer their prayers and respects as and G when they desire in accordance with law.

23. With the aforesaid observations, these appeals are dismissed but leaving the parties to bear their own costs.

R.P.

Appeals dismissed.

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