

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

....

LPA no.99/2022

Reserved on: 29.06.2022

Pronounced on: 01.07.2022

Union Territory of J&K and others

.....Appellant(s)

Through: Mr D. C. Raina, Advocate General with
Ms Asifa Padroo, AAG and Mr Sajad Ashraf GA

Versus

Mohammad Latief Magrey and another

.....Respondent(s)

Through: Ms Deepika Singh Rajawat, Advocate with
Ms Zarin Ali and Ms Yasmeen Wani, Advocates for
respondent no.1
Mr T. M. Shamsi, ASGI for respondent no.2

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

1. The instant Letters Patent Appeal is directed against the judgement dated 27th May 2022, passed in a writ petition, bearing WP(C) no.11/2022, titled as *Mohammad Latief Magrey v. Union of India and others*.
2. The background facts, under the cover of which the instant appeal has arisen, are that writ petitioner – respondent no.1 herein, instituted the petition supra praying therein the following relief:

“In view of the submissions made herein above and those to be urged at the time of hearing, this Hon’ble Court is humbly

requested to direct the respondents to handover the body of Late Mohammad Amir Magray, who was killed in a joint encounter by them on 15.11.2021 at Hyderpora area of Budgam in Kashmir to the petitioner who happens to be his biological father on the facts and grounds mentioned above.”

The reliefs, as aforesaid, have been sought by writ petitioner/respondent no.1 herein on the premise that his son, namely, *Mohammad Amir Magray*, got killed in an encounter carried by writ-respondents/appellants herein on 15th November 2021 at Hyderpora, Budgam, Kashmir, and that the dead body of his deceased son was not handed over to him by appellants for burial as per religious rites and practices, thus, resulting into infringement of rights guaranteed under Article 21 of the Constitution of India, in that, the Article 21 extends as well to the right to have decent burial as per religious ceremonies.

The writ petitioner/respondent no.1 herein had contended in the petition supra that he has been instrumental in fighting and curbing the militancy in his native place, i.e., Gool Singaldan, Ramban, along with Indian Army and in this regard he had cited an incident, in which on 6th August 2005, he and his wife caught hold a LeT militant, who had barged into their house and opened indiscriminate firing, thereby killing his cousin brother, namely, Abdul Qayoom and in the said militant attack, despite writ he having suffered injuries, hit the said militant with a stone, and his deceased son and wife snatched a rifle from the said militant after the militant had lost his conscious owing to the hit suffered by the said stone. Writ petitioner/ respondent no.1 is stated to have been conferred with the State Award for Bravery for the said incident by the then Government of Jammu and Kashmir in the year

2012. Respondent no.1 even was stated to have been well appreciated by the Indian Army and for the services rendered by him in eradicating the militancy in his native area, Gool Sangaldan, Ramban.

It had also been stated in the petition by respondent no.1 that his whole family, including deceased son, had been associated in fight against militancy in the area. It had been further stated in petition that owing to financial constraints, the deceased son of respondent no.1 could not continue to pursue his studies and, as such, in order to support the family, shifted to sister's house in Kashmir and got a job of helper in the office of one, Dr. Mudasir. During this period, the respondent no.1 was stated to have remained in constant touch with deceased son, who used to work with the said Dr. Mudasir till 14th November 2021.

It had been next stated in the petition by respondent no.1 that on 16th November 2021, he received a call from police station Gool that his son got killed in an encounter in Kashmir; whereupon respondent no.1 along with his family members immediately reached police station Saddar, Srinagar, where he was told that his son, in fact, was a militant and had got killed along with his two other associates and had been buried by appellants.

Respondent no.1 had further stated in the petition that he approached respondents and requested them for return of dead body of his son for performing his decent burial in his home town, which request, however, was turned down by respondents for the reason that he was a militant. Respondent no.1 has further stated in the petition that dead bodies of two other persons, killed in the encounter, namely, Dr.

Mudasir Gul and Altaf Bhat, however, had been returned back to their families following relentless protests. It had been further stated that a magisterial probe regarding the encounter had been ordered by the Lieutenant Governor of J&K on 18th November 2021. Respondent no.1 had further stated in the petition that upon failure of respondents to hand over dead body of his son to him, he met the Lieutenant Governor on 7th December 2021 and requested him for completion of magisterial probe, besides seeking return of the body of his son and the said meeting was stated to have yielded no results, compelling respondent no.1 to move the petition supra, urging therein that he and his family were put under constant grieving on account of non-return of dead body of his deceased son, and sought various reliefs on multiple grounds coupled with the principles of law laid down by various High Courts and the Supreme Court in various judgements, referred in the petition itself, including that right to live with human dignity extends even beyond death and the said dignity has to be given to the dead by providing a proper death procedure, being fundamental right as per religious rules.

3. Writ respondents 3&4 – appellants 3&4 herein, responded to the petition of respondent no.1 herein, resisting and opposing the same on the premise that the demand of return of dead body of deceased made by respondent no.1 was not that of an ordinary citizen but of a terrorist having got killed in an encounter with security forces and return of dead body would lead to law and order and security problems. The deceased was stated to have been found to be a terrorist involved in terrorist

related conspiracies by the Investigating Agency, being SIT constituted in this behalf, headed by DIG Rank Officer, and that in terms of previous practice and procedure in order to avoid larger ramifications and adverse impact upon law and order situation inasmuch as the security concerns, the dead body of deceased was shifted and was buried by Auqaf Committee in accordance with all religious obligations at Wadder Payeen Graveyard, performed in presence of Executive Magistrate, Zachaldara. A proper procedure was stated to have been followed by appellants while dealing with the dead body of deceased in the matter of his burial with religious rites. The return of the dead body of deceased was stated to have caused alarming situation and law and order problem; therefore, necessitating not handing over the dead body of deceased and his burial undertaken by appellants for protecting larger interests of security and sovereignty of India. The dead bodies of other two persons, killed in the encounter being not found to be terrorists, were stated to have been returned back to their families after taking adequate security measures. It had been reiterated in the reply by appellants that last rites of deceased son of respondent no.1 were done through Auqaf Committee Wader Payeen as per religious rites as it had been previously found that during burial of terrorists, a scenario was being created by vested elements during funeral processions, to glorify terrorism and incite the youth to join militancy.

It had been further stated by appellants in their reply that the reason for returning and handing over the dead bodies of other two persons, namely, Dr Mudasir Gul and Altaf Bhat, to their families after

being exhumed, is that during investigation carried, it had got transpired during investigation that deceased, Dr Mudasir Gul, was shot by foreign militant, namely, Bilal Bhai @ Hyder @ Saqlain and deceased, Altaf Bhat, had got killed during cross firing in the encounter.

4. Based on the pleadings of the parties, the Writ Court allowed the writ petition in terms of impugned judgement and directed respondents to make arrangements for exhumation of the body of deceased from Wadder Payeen graveyard in presence of writ petitioner/respondent no.1 herein, inasmuch as to make appropriate arrangements for transportation of dead body to the village of respondent no.1 for according burial in accordance with the traditions, religious obligations and religious faith which the deceased professed during his life time provided it was in deliverable state. The respondents had been directed to be free in the process of imposing any reasonable terms and conditions in respect of exhumation, transportation and burial of dead body of deceased son of respondent no.1. The respondents had been further directed, in view of advance stage of putrefaction, to act with promptitude without wasting any time. The Writ Court had further provided in the impugned judgement that if the body is highly putrefied and not in deliverable state and pose risk to public health and hygiene, writ petitioner/respondent no.1 herein and his close relatives shall be allowed to perform last rites of the deceased as per their tradition and religious belief in Wadder Payeen graveyard itself. The Writ Court also awarded an amount of Rs.5.00 Lakhs as compensation to respondent no.1 to be payable by appellants for having deprived respondent no.1

of his right to have the dead body of his son and give him decent burial as per family traditions, religious obligations and faith which the deceased professed when he was alive.

5. Upon coming of the instant appeal for consideration on 3rd June 2022, and after hearing learned Advocate General appearing for appellants as also counsel for respondent no.1, being on caveat, the operation of impugned judgement was stayed by way of an interim relief. Respondent no.1, however, questioned the order dated 3rd June 2022 before the Apex Court in Special Leave to Appeal (C) no.10760/2022, which came to be disposed of in terms of Order dated 27th June 2022 in terms of following order:

“Learned counsel for the petitioner at the outset states that he does not press for the first relief granted by the learned Single Judge of the High Court regarding exhumation and handing over of the body-remains of his deceased son.

The petitioner, however, wants to perform the last rites as per their religious practices at the Wadder Payeen Graveyard where his son was buried.

He also seeks the alternative relief of payment of compensation as granted by the learned Single Judge.

Since the Letters Patent Appeal is listed for hearing before the Division Bench of the High Court on tomorrow i.e. on 28.06.2022, we dispose of this SLP without expressing any views on merits with a request to the High Court to consider the above-mentioned alternative reliefs, sought by the petitioner on the date fixed i.e. tomorrow on 28.06.2022 or preferably within one week thereafter.

Further, learned senior counsel for the petitioner shall be at liberty to assist the High Court through Video Conferencing.

With these observations, the Special Leave Petition is disposed of at this stage.

Pending application, if any, shall stand disposed of.”

In compliance to the aforesaid order of the Apex Court, the matter was, as such, taken up for consideration and disposal.

6. Heard learned counsel for parties and perused the record.

7. Indisputably, respondent no.1 herein has given up first relief, granted by the Writ Court, before the Apex Court as regards exhumation and handing over of the body-remain of his deceased son. As such, the appearing counsel for parties were heard on the rest of the reliefs identified in the order of the Apex Court.
8. Learned Advocate General while making his submission in line with the contentions raised and grounds urged would contend that the impugned judgement is not legally sound and that writ petitioner was not entitled to any of the reliefs prayed in the petition including the reliefs sought now. According to the learned Advocate General, the writ court misdirected itself while considering the controversy and did not consider the matter in its right and correct perspective, warranting as such, setting aside of the impugned judgement and dismissal of the petition. The learned Advocate General, however, would fairly contend that having regard to facts and circumstances of the case, respondent no.1 and his family members can be allowed to perform *Fatiha Khawani* (prayers after burial) at the grave of the deceased subject to security measures as may be required to be put in place by appellants, as according to him, the last rites of deceased had been performed as per Islamic Religious practices by giving a washing/cleaning of dead body, shrouding/systematic wrapping of the body with two white pieces of cloth, covering the whole body followed by *Janaza* prayers and consequent burial of the deceased in the grave, reciting verses from the Holy Book Quran.

9. Learned counsel for writ petitioner/respondent no.1, however, would controvert the contentions raised and grounds urged by learned Advocate General inasmuch as the aforesaid offer made by learned Advocate General, and would insist for exhumation of the body of the deceased for performance of last rites by the writ petitioner/respondent no.1 herein.

10. In view of giving up of the relief of exhumation of the body of the deceased for performance of last rituals by writ petitioner/respondent no.1 before the Apex Court inasmuch as in view of uncontroverted/unopposed stand taken by appellants before the Writ Court, that last rites of deceased stand already performed while burying deceased at Wadder Payeen Graveyard, the contention of the counsel for respondent no.1 in fact pales into insignificance and is not acceptable.

11. The prayer of counsel for respondent no.1 made during the course of arguments that respondent no.1 and his family members be permitted to see the face of deceased by opening the grave of the deceased, cannot be accepted and permitted, firstly, in view of pleading of writ petitioner that the dead body would start decomposing immediately after burial, and secondly in view of the statement made by the writ petitioner before the Apex Court while giving up the prayer of exhumation of the dead body of the deceased.

The aforesaid offer made by learned Advocate General seemingly is fair and reasonable in the facts and circumstances of the present case.

Insofar as alternative relief, pressed by respondent no.1 before the Apex Court qua payment of compensation as granted by the Writ Court is concerned, it needs to be appreciated that appellants admittedly did not provide opportunity to respondent no.1 and his family to associate in the burial and performance of last religious rites of the deceased. Appellants prima facie have acted unfairly inasmuch as unreasonably in this regard notwithstanding the allegation of appellants that person of deceased was a terrorist even if it may be assumed, as such, that the deceased relinquished his right to be buried after performance of last rites performed by his family members in accordance with the faith professed by him, yet the said right of burial and performance of last religious rituals of deceased available to respondent no.1 and his family members could not have been denied. Admittedly, respondent no.1 and his family manifestly has been subjected to emotional and sentimental melancholy. Respondent no.1 and his family have been deprived by appellants of the right to perform last rites and rituals of deceased by the appellants admittedly without there being any policy/guideline, as such cannot be endorsed in law, in that, ours is a Welfare State acknowledged by the whole globe. The appellants herein also could not have overlooked the background of the family of respondent no.1 and his family's role in fighting terrorism. The Writ Court having regard to the aforesaid position has rightly awarded the compensation to the respondent no.1 for such deprivation and the award of said compensation seemingly is appropriate.

12. For all what has been observed, considered and analysed above, and having regard to the peculiar facts and circumstances of the present case, the instant appeal is disposed of as follows:

- (i) Appellants to allow respondent no.1 and his family members (maximum 10 persons) to perform *Fatiha Khawani* (religious rituals/prayers after burial) of deceased at Wadder Payeen Graveyard, on the date and time to be decided in consultation with respondent no.1, subject to taking into account security measures which may be required to be put in place inasmuch as the COVID-19 guidelines.
- (ii) Appellants to pay compensation of Rs.5.00 Lakhs, awarded by the Writ Court, to respondent no.1 is maintained. It is made clear that the payment of said compensation by appellants to respondent no.1 shall not form a precedence for future in view of the fact that the said compensation stands awarded to the writ petitioner/respondent no.1 in view of the peculiar facts and circumstances of the instant case.

13. **Disposed of** as above.

(Javed Iqbal Wani)
Judge

(Pankaj Mithal)
Chief Justice

Srinagar
01.07.2022
Ajaz Ahmad, PS

Whether approved for reporting? Yes / No.