

**2022 LiveLaw (SC) 756**

**IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
SURYA KANT; J., J.B. PARDIWALA; J.**

September 12, 2022

CIVIL APPEAL NO. 6544 OF 2022 (@ SLP (C) NO.12743 OF 2022)

**MOHAMMAD LATIEF MAGREY versus THE UNION TERRITORY OF JAMMU AND KASHMIR & ORS.**

**Constitution of India, 1950; Article 21- The right to dignity and fair treatment under Article 21 of the Constitution is not only available to a living man but also to his body after his death. His family members also have a right to perform the last rites in accordance with the religious traditions. (Para 57)**

**Code of Criminal Procedure, 1973; Section 176(3) - The lawful authority for exhumation is contained in Section 176(3), CrPC, 1973. This activity is permitted for the purpose of crime detection and other such pressing situations. Whenever there is a suspicion of foul play like homicide, criminal abortion, disputed cause of death, poisoning etc. exhumation may be carried out for the purpose of postmortem examination. (Para 29)**

**Exhumation not a right - After a body has been buried, it is considered to be in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court. The law does not favour disinterment, based on the public policy that the sanctity of the grave should be maintained. Once buried, a body should not be disturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing of necessity that disinterment is within the interests of justice. Each case is individually decided, based on its own particular facts and circumstances. (Para 56)**

**Exhumation - Union of India may consider enacting an appropriate legislation on exhumation. (Para 59)**

*For Petitioner(s) Mr. Anand Grover, Sr. Adv. Ms. Deepika Singh Rajawat, Adv. Ms. Nupur Kumar, AOR Mr. Paras Nath Singh, Adv. Mr. Rohit Bhatt, Adv.*

*For Respondent(s) Mr. Ardhendumauli Kumar Prasad, Adv. Ms. Taruna Ardhendumauli Prasad, AOR Ms. Shreya Srivastava, Adv. Mr. Ashish Madaan, Adv. Mr. Aman Singh Bhadoria, Adv. Ms. Ananya Sahu, Adv. Ms. Neela Gokhale, Adv.*

**J U D G M E N T**

**J.B. PARDIWALA, J.**

1. Leave granted.

2. *“The dead are to rest where they have been lain unless reason of substance is brought forward for disturbing their repose.”*

*- Justice Cardozo Yome v. Gorman, 152 N.E. 126, 129 (N.Y. 1926).*

3. The leading case on disinterment in the United States is **Pettigrew v. Pettigrew**, 56 A. 878 (Pa. 1904) which was decided by the Supreme Court of Pennsylvania in 1904:

*“The presumption is against a change. The imprecation on the tomb at Stratford, “Curst be he that moves my bones,” whether it be Shakespeare’s own or some reverent friend’s, expresses the universal sentiment of humanity, not only against profanation, but even disturbance. When a case*

*comes into court, the chancellor will regard this sentiment, and consider all the circumstances in that connection.”*

4. This appeal is at the instance of the original writ applicant (father of the deceased, whose son, namely, Mohd. Amir Magrey was killed in an encounter between the police and militants) and is directed against the judgment and order passed by the High Court of Jammu & Kashmir and Ladakh at Srinagar in ***Union Territory of J & K and Others v. Mohammad Latief Magrey and Another***, 2022 SCC OnLine J&K 516 (the Letters Patent Appeal No. 99 of 2022 dated 01.07.2022) by which the Appeal Court modified the judgment and order passed by the learned Single Judge of the High Court in ***Mohammad Latief Magrey v. Union of India and Others***, 2022 SCC OnLine J&K 433 (the Writ Petition (C) No. 11 of 2022 decided on 27.05.2022) & thereby permitted the appellant herein and his family members (maximum up to 10 persons) to perform the Fatiha Khawani (religious rituals/prayers after burial) of the deceased at the graveyard while declining to grant permission to disinter the body of the deceased for the purpose of religious rituals.

### **Factual Matrix**

5. It appears from the materials on record that on 15.11.2021, there was an encounter between the militants and police at the Hyderpora area of Budgam in Kashmir. Four militants were shot dead including the son of the appellant herein. In connection with the said incident, a First Information Report No. 193/2021 was registered at the Saddar Police Station for the offences punishable under Sections 307/120-B IPC, 7/27 of the Arms Act and 16, 18, 20 respaly of the ULA (P) Act. During the course of the investigation, the Investigating Officer recovered four bullet ridden unidentified dead bodies at the site of the encounter. The dead bodies were shifted to the Police Hospital at Srinagar for the medico-legal formalities. After conducting the post-mortem etc., the dead bodies were identified as that of a foreign terrorist viz. Bilal Bhai @ Hyder @ Saqlain R/O Pakistan, Aamir Latief Magrey S/O Mohammad Latief Magrey R/O Seeripora Tehsil Gool Ramban, Altaf Ahmad Bhat S/O Abdul Rehman Bhat R/O Old Barzulla Srinagar and Dr. Mudasar Gull S/O Ghulam Mohammad Rather R/O Parraypora Srinagar. All the four dead bodies were shifted to the Handwara Zachaldara for burial.

6. The material on record further reveals that the bodies of the two out of the four persons killed in the encounter were later exhumed and handed over to their relatives for performing their last rites at the place of their choice. The bodies of the other two persons killed in the encounter i.e. Bilal Bhai @ Hyder and the son of the appellant herein buried through the Auqaf Committee, Wadder Payeen were not disinterred and handed over to their respective family members.

7. It appears that so far as the deceased, namely, Bilal Bhai, a resident of Pakistan is concerned, nobody claimed his body nor was there any demand for handing over of the dead body from any quarter. However, it is the case of the appellant herein that so far as the dead body of his son Amir is concerned, he had approached various authorities with a request to hand over the body but none listened to him and ultimately the body of his son (deceased) was buried at the Wadder Payeen Graveyard. It is his case that he was informed by the Police Station at Gool on 16.11.2021 that his son Amir had been killed in an encounter in Kashmir and that he should proceed to Kashmir to identify the body. On 16.11.2021, the appellant along with his family members reached the Police Station at Saddar, where he was told that his son Amir Magrey was a militant and was

killed along with three other associates at the Hyderpora and the dead body of Amir had been buried.

8. In such circumstances referred to above, the appellant herein preferred the Writ Petition (C) No. 11 of 2022 in the High Court and prayed for 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.”*

9. A learned Single Judge of the High Court adjudicated the writ application and allowed the same directing the respondents herein to make necessary arrangements for the disinterment of the body/remains of the deceased Amir Magrey from the Wadder Payeen Graveyard in the presence of the appellant herein.

10. The learned Single Judge while allowing the writ application filed by the appellant herein, held as under:

*“15. The right of the next of kin of the deceased to have their dear one cremated or buried as per the religious obligations and religious belief that the dead person professed during his life time, is part and parcel of right to life guaranteed under Article 21 of the Constitution of India. The parents and close relations of the deceased are well within their right to demand the dead body of their dear one to be cremated or buried as per their traditions, religious obligations and religious belief. This right would also include the choice of the relatives to have the dead body cremated or buried at his native place. It is not uncommon that the graves of the dead are maintained by their relatives and are visited by their relations and close friends to pay respect and homage on certain occasions.*

*16. Without dilating much on the issue, it can be said to be well settled that right to life and liberty guaranteed to a citizen by Article 21 of the Constitution of India includes right of the citizen to live with human dignity and this right to live with human dignity even extends after death though in a limited extent. Viewed thus, the right of the petitioner to claim the dead body of his son for performing last rites in his own way and in accordance with local traditions, religious obligations and religious faith, which the deceased professed during his life time, cannot be disputed. But the question that needs to be addressed in the context of present controversy is whether the State can deny this right in the name of preventing law and order situation going out of hand.*

*17. It is vehemently contended by the respondents that the decision not to hand over the body of the deceased to the petitioner for performing his last rites, was taken in the larger public interest and to prevent the situation of law and order going out of hand. It is submitted that respondents have witnessed such situations in the past and, therefore, have decided not to handover the dead bodies of the terrorists killed in encounters to their next of kin for cremation or burial to prevent the law and order situation getting worsened. The respondents, however, have not come clear as to why the dead bodies of two of the four killed in the encounter, namely, Altaf Ahmad Bhat and Dr. Mudasir Gul were exhumed and handed over to their relatives for their last rites in the graveyards of their choice and why the similar right claimed by the petitioner was denied. The respondents have tried to draw distinction by submitting that as per the investigation conducted by the SIT, the deceased son of the petitioner was a confirmed terrorist whereas the other two killed, namely, Altaf Ahmad Bhat and Dr. Mudasir Gul were only associates of the terrorists. I do not find any logic or sense in distinction so made by the respondents. It transpires that due to public pressure and demand by the relatives of the two deceased namely, Altaf Ahmad Bhat and Dr. Mudasir Gul, the respondents relented and permitted their dead bodies to be exhumed and handed over to their relatives. Since the petitioner was a resident of Gool, a remote village in Jammu Province and did not much say in the Valley and, therefore, his request was arbitrarily turned down. The action of the respondents is not traceable to any procedure established by law which is just, fair and equitable. At least none was brought to the notice of this Court. The decision of the respondents not to allow the petitioner*

to take away dead body of his son to his native village for last rites was per-se arbitrary and falls foul of Article 14 of the Constitution of India.

**18.** *Much has been said by the respondents with regard to the status of the body lying buried since 15.11.2021. While it cannot be disputed that the body of Amir Latief Magrey buried on 15.11.2021 in Wadder Payeen Graveyard may have putrefied by now but that alone cannot be a reason not to handover the remains of the dead body to the petitioner who is clamoring at the top of his voice to get even the remains of the dead body of his son so that he could bury him in his native graveyard in the presence of relatives and after following all religious obligations. The apprehension of law and order getting vitiated at this point of time also appears to be illusory. When the respondents could maintain the law and order situation when the dead bodies of two, namely, Altaf Ahmad Bhat and Dr. Mudansir Gul were exhumed and handed over to their relatives for last rites on 18.11.2021, it is not difficult for the respondents to make necessary arrangements for exhumation of the dead body of Amir Latief Magrey, the son of the petitioner and transport the same in proper escort to Village Thatharka Seripora Tehsil Gool District Ramban. The respondents can make appropriate arrangements to ensure that law and order situation does not get vitiated in any manner. The petitioner, as is fervently contended by his counsel, is even ready to undertake that he will abide by all the terms and conditions that may be imposed by the respondents with regard to exhumation, transportation and according of burial to the dead body.”*

**11.** The learned Single Judge issued the final directions in para 19, which reads thus:

*“19. For the foregoing reasons, I am inclined to allow this petition of the father of the deceased Amir Latief Magrey and direct the respondents to make arrangements for exhumation of the body/remains of the deceased Amir Latief Magrey from the Wadder Payeen graveyard in presence of the petitioner. The respondents shall also make appropriate arrangement for transportation of the dead body to the village of the petitioner for according burial in his native graveyard in accordance with the traditions, religious obligations and religious faith which the deceased professed during his life time provided it is in deliverable state. The respondents are free to impose any reasonable terms and conditions in respect of exhumation, transportation and burial of the dead body of Amir Latief Magrey, the son of the petitioner. Since the dead body of the deceased must be in advance stage of putrefaction, as such, it would be desirable that the respondents act with promptitude and do not waste any further time. However, if the body is highly putrefied and is not in deliverable state or is likely to pose risk to public health and hygiene, the petitioner and his close relatives shall be allowed to perform last rites as per their tradition and religious belief in the Wadder Payeen graveyard itself. In that situation, the State shall pay to the petitioner a compensation of Rs. 5 lakhs for deprivation 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.”*

**12.** Thus, the learned Single Judge addressed himself essentially on the following issues:

a. The State could not have denied the right of the appellant to claim the dead body of his son for performing the last rites in accordance with his religious faith on the ground of likelihood of disturbance of public order. According to the learned Single Judge, such right as asserted by the father is enshrined under Article 21 of the Constitution.

b. Why the dead bodies out of the four killed in the encounter were permitted to be exhumed and handed over to their relatives for their last rites?

c. The action on the part of the respondents in not allowing the appellant to take away the dead body of his son to his native village was violative of Article 14 & 21 resply of the Constitution.

**13.** The Union Territory of Jammu & Kashmir and others being dissatisfied and aggrieved with the aforesaid order passed by the learned Single Judge of the High Court

challenged the same by filing the Letters Patent Appeal No. 99 of 2022. The Appeal Court disposed of the appeal holding as under:

*“15. Learned Advocate General while making his submission in line with the contentions raised and grounds urged would contend that the impugned judgment 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 judgment 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.*

*16. 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.*

*17. 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.*

*18. 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.*

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

*20. 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.”*

**14.** The Appeal Court issued the following directions in para 21, as under:

*“21. 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 familymembers (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.”*

**15.** Thus, from the aforesaid, it is evident that the Appeal Court did not approve the decision of the learned Single Judge to direct the respondents herein to exhume the body of the deceased and thereby permit the family members to shift and bury at their native graveyard in accordance with the religious practice.

**16.** The appellant (father of the deceased) being dissatisfied with the order passed by the High Court is here before us with the present appeal invoking Article 136 of the Constitution.

### **Submissions on behalf of the Appellant**

**17.** Mr. Anand Grover, the learned senior counsel appearing on behalf of the appellant, at the outset, submitted that he would like to confine his prayer to the extent of directing the respondents to disinter the body so as to enable the appellant as a father and other family members to perform the prayers/rituals to their satisfaction. Mr. Grover submitted that the body is now buried past almost more than eight months. In such circumstances, the family members of the deceased would not like to disturb the remains of the dead body and once the prayers are offered, the body may be once again buried. However, Mr. Grover clarified that the appellant would like to wash the body with water and wrap it up with a new white cloth.

**18.** Mr. Grover further submitted that the Appeal Court ought not to have disturbed the order passed by the learned Single Judge directing the respondents to exhume the body. He would submit that the appellant as a father still believes that his son was not a terrorist or a militant and was killed in a fake encounter. Mr. Grover would submit that assuming for a moment without admitting that the deceased was a militant, the police should have handed over the dead body to the family members and could not have buried the body discreetly at the Wadder Payeen Graveyard.

**19.** The entire line of argument of Mr. Grover is that the appellant has a fundamental right under Article 21 of the Constitution to perform the last rites of his dead son in accordance with the rituals prevailing in Islam. The appellant as a father could not have been deprived of such fundamental right. He would submit that as the appellant was not permitted or rather given an opportunity to perform the last rites of his dead son, there is no other option but to pray for exhumation of the dead body.

**20.** In support of his aforesaid submissions, Mr. Grover seeks to rely upon the following decisions:

- (1) **Pt. Parmanand Katara, Advocate v. Union of India**, (1995) 3 SCC 248,
- (2) **S. Sethu Raja v. The Chief Secretary, The Chief Secretary, Government of Tamil Nadu and Ors.**, WP(MD) No.3888 of 2007 decided on 28.08.2007,
- (3) **Ramlila Maidan Incident, In Re**, (2012) 5 SCC 1,
- (4) **Jakir Sk. v. The State of West Bengal & Ors.**, 2017 SCC OnLine Cal 3354,
- (5) **Vineet Ruia v. Principal Secretary, Ministry of Health and Family Welfare, Government of West Bengal**, AIR 2020 Cal 308,
- (6) **Ram Sharan Autyanuprasi v. Union of India**, AIR 1989 SC 549,
- (7) **Ashray Adhikar Abhiyan v. Union of India**, (2002) 2 SCC 27,
- (8) **Pradeep Gandhi v. State of Maharashtra**, 2020 SCC OnLine Bom 662.

21. In such circumstances referred to above, Mr. Grover prays that there being merit in his appeal, the same may be allowed and appropriate relief may be granted.

### **Submissions on behalf of the Respondents**

22. On the other hand, this appeal has been, vehemently, opposed by Mr. Ardhendumauli Kumar Prasad, the learned counsel appearing for the respondents submitting that no error, not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order. The learned counsel would submit that the impugned order passed by the High Court is a balanced order keeping all the relevant aspects of the matter in mind, more particularly, the issues relating to public order etc. and no interference is warranted at the end of this Court in exercise of jurisdiction under Article 136 of the Constitution.

23. The learned counsel would submit that the appellant as a father of the deceased cannot assert that he has a fundamental right under Article 21 of the Constitution to seek exhumation of the body for the purpose of performing the necessary rituals.

24. The learned counsel invited the attention of this Court to the averments made in the affidavit in reply filed for the purpose of opposing the present appeal. We quote the relevant averments, as under:

"4. *It is respectfully submitted that in the previous round of before this Hon'ble Court in SLP(C) No. 10760 of 2022, the Petitioner submitted that he does not press for the relief regarding exhumation and handing over of the body remains of his deceased son. Relevant extract of the order dated 27.06.2022 passed by this Hon'ble Court in SLP(C) No. 10760/2022 are reproduced herein below:*

*"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."*

5. *Pursuant to the above, the Hon'ble High Court after considering the said submission of the petitioner herein passed the present Impugned Order. Relevant extract of the Impugned Order dated 01.07.2022 passed by the Hon'ble High Court is reproduced herein below:*

*"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."*

6. *Further, the Hon'ble High Court whilst passing the present impugned order was pleased to allow the petitioners herein and his family members (maximum 10 persons) to perform Fatiha Khawani (religious rituals/prayers after burial) of the deceased at Wadder Payeen Graveyard, on*

the date and time to be decided in consultations with respondent no. 1, subject to taking into account security measures which may be required to be put in place in as much as the COVID-19 guidelines.

7. *It is submitted that the respondent is agreeable to the abovementioned relief granted by the Hon'ble High Court with regards to performing Fatiha Khawani (religious rituals/prayers after burial) subject to reasonable conditions being imposed by the concerned District Magistrate in the interest of public health, security and maintenance of law and order.*

8. *It is humbly submitted that further relief sought by the Petitioner before this Hon'ble Court regarding exhumation of the body of the deceased and offering prayer thereat is opposed by the answering respondent authorities on the ground of state security, law and order, public health & hygiene apart from the fact that the same will open a floodgate of similar requests and will raise serious security concerns and threat to public order and health. In this regard detailed averments have already been submitted by the answering respondent before single bench and Divisional Bench of JK High Court.*

9. *It is respectfully submitted that the deceased was a hard core terrorist associated with a terrorist group and was killed in an encounter with the security forces on 15.11.2021 along with Pakistan based terrorist with whom he was hatching different terror conspiracies.*

10. *That pursuant to the fierce gun battle/encounter that led to killing of the deceased terrorist, authorities have performed the last rites of the deceased as per his religious beliefs and practices and buried the dead body as per the religious customs. It is respectfully submitted that the Hon'ble High Court has nowhere observed that there has been any violation of practice of religious customs during the last rites of the deceased.*

11. *It is respectfully submitted that it has been more than 8 months from the date of burial of the dead body and as of now the same would have decomposed hence, no purpose would suffice by exhuming the same as the same may lead to adverse public health issues. This factual position is also elaborately admitted by the petitioner in its pleadings as well before the Hon'ble High Court of J&K, Srinagar.*

12. *That, it is further respectfully submitted that pursuant to the encounter of terrorist namely Burhan Wani, a disturbing trend of glorification of the deceased terrorists was witnessed in the valley wherein antinational emotions were stoked in the youth and they are instigated against the Indian Republic to join various terror groups. It is respectfully submitted that in exhuming the remains of the deceased, such emotions may be flared and such activities shall be revived which may lead to a further threat to national security and glorification of terrorism.*

13. *It is respectfully submitted that the valley is affected by terror activities and there are regular gunbattle/encounters between the security forces and terrorists. Any direction of exhumation of the body will lead to similar requests from the family of other killed terrorists, which may adversely affect security of nation and public order in the entire Union Territory of JK, as mentioned above and averments already submitted before the Honourable High Court.*

14. *Therefore, in light of the submissions made herein-above, it is respectfully submitted that the prayer of exhumation of the mortals of the deceased may not be granted and the direction of allowing the petitioners herein and family (maximum 10 persons) to perform Fatiha Khawani (religious rituals/prayers after burial) of the deceased at Graveyard, on the date and time to be decided in consultations with respondent no. 1, subject to taking into account security measures which may be required to be put in place in as much as the COVID-19 guidelines may be allowed and the present Special Leave Petition may be dismissed.” [Emphasis supplied]*

25. In such circumstances referred to above, the learned counsel appearing for the respondents prayed that there being no merit in this appeal, the same may be dismissed.

## **Analysis**

26. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for the consideration of this Court:

- a. Whether the appellant (father of the deceased) can pray for exhumation of the dead body of his son from the graveyard asserting that it is his fundamental right as enshrined under Article 21 of the Constitution to perform the last rites of his slain son?
- b. Will it be in the fitness of the things, more particularly, having regard to the fact that the body is now buried past more than eight months to order, exhumation so as to enable the appellant and his family members to perform the rituals as followed in Islam?
- c. Assuming for a moment that it is the fundamental right of the father under Article 21 of the Constitution to perform the last rites and rituals of his son with dignity before being buried in a graveyard, should this Court in exercise of its jurisdiction under Article 136 (1) of the Constitution disturb the impugned order passed by the High Court at the risk & peril of public order, health etc. and grant the relief of exhumation after almost nine months?
- d. Whether the High Court in appeal committed any substantial error in passing the impugned order?

## **Exhumation of Body**

27. Exhumation involves opening up a grave (or occasionally a vault) and removing the human remains already buried there. Also known as 'disinterment', exhumation is controversial – even if the intent is usually to rebury the displaced remains elsewhere. Most societies and cultures that embrace burial as a means of bodily disposal exhibit an entrenched reluctance to disturb the dead's earthly repose mainly for two reasons. The first is public health concerns around the potential transmission of disease from the decaying corpses. Secondly, and more fundamentally, exhumation offends the basic moral premise of allowing the dead to 'rest in peace' and is generally regarded as a forbidden or sacrilegious act.

28. Ordinarily, the request for exhumation would fall into two broad categories: "public interest and personal reasons."

29. The lawful authority for exhumation is contained in Section 176(3), CrPC, 1973. This activity is permitted for the purpose of crime detection and other such pressing situations. Whenever there is a suspicion of foul play like homicide, criminal abortion, disputed cause of death, poisoning etc. exhumation may be carried out for the purpose of postmortem examination.

30. In the instant case, after the deceased was killed in the Hyderpora encounter, the authorities performed the last rites of the deceased with all dignity with the aid of the Auqaf Committee as per the religious beliefs and practices and buried him in J&K on 15.11.2021.

31. The stance of the State on oath is, that the dead body of deceased was shifted and buried by the Auqaf Committee in accordance with all the religious obligations at the Wadder Payeen Graveyard, in presence of the Executive Magistrate, Zachaldara. The last rites of the deceased had been performed as per the Islamic Religious practices by giving a wash/cleaning of dead body, shrouding/systematic wrapping of the body with

two white pieces of cloth, covering the whole body followed by the Janaza prayers and consequent burial of the deceased in the grave, reciting the verses from the Holy Book Quran. However, the appellant asserts that it was his privilege to perform the last rites of his son as a father.

### **Scope of Articles 25 & 26 resply of the Constitution**

**32.** In *Mohd. Hamid and Another v. Badi Masjid Trust and Others*, (2011) 13 SCC 61, this Court held that:

*“10. ....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 the counsel appearing for the respondents. Page 406 of the said law reveals a fatwa contained in Fatawa-e-Alamgiri at p. 556, in which it is stated under the heading “A burial ground” in the following manner:*

*“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.”*

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**12.** In this connection, we may also refer to the decision of this Court in *Gulam Abbas v. State of U.P.* [(1984) 1 SCC 81 : 1984 SCC (Cri) 35] 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 the 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 Shariat law.

**13.** After going through all those fatwas, this Court in *Gulam Abbas* [(1984) 1 SCC 81 : 1984 SCC (Cri) 35] found that: (SCC p. 86, para 6)

*“6. ... The common theme in all these fatwas is that under the Shariat 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 religion 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.”*

[Emphasis supplied]

**33.** In *Gulam Abbas and Others v. State of U.P. and Others*, (1984) 1 SCC 81, this Court held that:

*“5. ....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 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”. 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 functions by members of both the sects.....*

6. Counsel for the Sunnis relied upon five Fatwas 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 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. 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 Section 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” .....

[Emphasis supplied]

34. In **Adi Saiva Sivachariyargal Nala Sangam and Others v. Government of Tamil Nadu and Another**, (2016) 2 SCC 725, this Court held that:

“43. ....The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the constitutional court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right is in conformity with public order, morality and health and in accord with the indisputable and unquestionable notions of social welfare and reforms. A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.”

[Emphasis supplied]

35. Thus, from the aforesaid, it is evident that the religious rights of every person and every religion are, however, subject to the “public order”, the maintenance whereof is paramount in the larger interest of the society. Both these fundamental rights have been expressly made “subject to public order, morality and health”. The exercise of these fundamental rights is not absolute but must yield or give way to maintenance of public order, morality and health.

### **Right to have a decent burial as enshrined under Article 21 of the Constitution**

36. In **Pt. Parmanand Katara** (supra), this Court observed that:

“3. ....right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death.....”

37. In **Ashray Adhikar** (supra), this Court held that:

“1. ....On the basis of that letter, an important question as to the right of homeless deceased, to have a decent burial, as per their religious belief and the corresponding obligation of the State towards such people having arisen, the letter was treated as a writ petition and was listed for hearing. The letter prayed for an intervention by this Court and to issue necessary directions to all those

concerned, so that a person dying on the road, can at least claim for a decent burial or cremation as a person belonging to the society. On the basis of that letter, notices have been issued. The Deputy Commissioner of Police (Headquarters) has filed a counter-affidavit, indicating the role of the police in such matters. On behalf of Municipal Corporation of Delhi, Dr Satpal, Deputy Municipal Health Officer has filed an affidavit, indicating therein that when a person dies on the streets and the dead body remains unclaimed, it is handed over to MCD by the Delhi Police and thereafter the dead body is cremated at electric crematorium, Bela Road by the Health Department of MCD, free of cost. In case the dead body is that of a Muslim, then the same is buried in a burial ground near Delhi Gate by the Waqf Board and Municipal Corporation of Delhi bears the expenses. On behalf of the Ashray Adhikar Abhiyan, a rejoinder-affidavit was filed. In course of hearing, the Court wanted from the petitioner, as to what guidelines the petitioner wants from the Court and pursuant to the same, the proposed guidelines were submitted by the petitioner. On going through those guidelines, we find that apart from claiming a decent burial, the proposed guidelines cover a vast field, which we apprehend, would not come within the purview of the original prayer.....”

**38.** In **Ram Sharan Autyanuprasi** (supra), this Court opined that:

**13.** .....It is true that life in its expanded horizons today includes all that give meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure would certainly come within the compass of an expanded concept of Article 21 of the Constitution. Yet, when one seeks relief for breach of Article 21, one must confine oneself to some direct, overt and tangible act which threatens the fullness of his life or the lives of others in the community.”

**39.** In **Vineet Ruia** (supra), the Calcutta High Court held that:

**“20.** By and large, whether it is for a theist or atheist, freedom of conscience and free profession and practice of religion is protected under Clause (1) of Article 25 of the Constitution. The term “religion” in that Clause need not necessarily be linked to any particular religion as is understood as a religious denomination. It is a matter of faith and of one's own conscience which could trigger the profession and practice of what may be religion in the larger sense to a particular individual. With this concept in mind, it needs to be delineated that it is not the religious practices of the different religious denominations which matter in such instances. It is a matter of connectivity with the person who has died and the near relatives may be in whatever degree of relationship. Fundamentally, human relationship between the parent and child, husband and wife, grandparent and grandchild, etc. is not based on any religious tenet. It is a matter of faith and conscience of every individual. If such a person is to take recourse to any practice and free profession on the foundation of freedom of conscience in terms of Clause (1) of Article 25 of the Constitution of India, it could get abridged only by the reciprocal covenant that such activity should be subject to public order, morality and health and to other provisions of Part III of the Constitution. This is the inbuilt mode of controlling such activities even in terms of Clause (1) of Article 25. The eligibility of a person to perform the funeral rites, be it connected to cremation or burial, may be sometimes guided by factors which may be akin to accepted practice even in religious denominations. If we were to look at the varied practices among the Hindus as a whole or different denominations of Hindus, one thing is clearly certain; the facility to provide ritualistic offerings by way of water, flowers or even certain grains are quite often seen as fundamentally for the satisfaction of the person making such offer to the dead before burial/cremation, as the case may be. Post cremation rites including, receiving the mortal remains in the form of ashes and bones which are treated as sacred to the near relatives of the departed and further handling of those materials in accordance with faith and belief also stands accepted in such communities (profitable reading in this regard can be had from Garuda Purana, Vishnu Purana and other ancient Hindu texts and scriptures). In so far as Christians are concerned, if one were to look at different denominations, it can be seen that there are practices, which may with slight variations, generally provide for prayers before the dead bodies are disposed of by burial and by offering prayers even after disposal on different dates and times depending upon the faith, belief and practice in different Churches. A perusal of canons would show that different ritualistic processes are delineated for such matters. We have mentioned it only to indicate that there are different practices available. In so far as the Muslims are concerned, whatever be the difference in

beliefs and practices among the Hanafis, who are treated as a majority group of Sunnis in India, on one hand, and the Shias on the other hand, one clear thread of connectivity is the faith and belief that the disposal of human remains is a must as well as post Kabar (Burial) rituals (Certain passages from Al-Bahr-ur-Raiq will buttress this aspect). The family also intends to have its own practices carried forward to the extent it relates to their faith and belief. We refer to all these only to demonstrate that by and large the Indian community always has the desire for intricate practices in the form of rituals with the participation of near relatives of a deceased, following what could be permissible under given circumstances.....

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23. ....the right of the family of a Covid-19 victim to perform the last rites before the cremation/burial of the deceased person is a right akin to Fundamental Right within the meaning of Article 21 of the Constitution of India. While exercising their power to impose restrictions on citizens in their way of life in the wake of outbreak of an endemic like Covid-19, a fine balance must be struck by the State and the local self-government institutions so that the aforesaid right of a citizen to perform the obsequies of his near and dear ones does not stand abridged or abrogated excepting for very compelling reasons.....”

[Emphasis supplied]

**40.** In **Anandhi Simon v. State of Tamil Nadu, Represented by Chief Secretary to Government and Others**, (2021) 3 Mad LJ 479, the Madras High Court held that:

“16. The protection of life and personal liberty which is guaranteed under Article 21 of the Constitution of India has been interpreted by the Hon'ble Supreme Court in many cases. There are lot of rights which are included in Article 21 such as right to privacy, right against solitary confinement, right to legal aid, right to speedy trial etc. The Hon'ble Supreme Court in many cases has also observed and interpreted that right to have a decent burial is also included in Article 21 of the Constitution of India. The right to human dignity is not restricted to living human being but is available even after the death also.....

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34. Insofar as the exhumation for the purpose of enabling the family members of the deceased to perform their religious ceremonies and to bury the dead body at an appropriate place of their choice is concerned, there is a legislative vacuum. Even though under Section 176 Cr.P.C. and Section 174(1) Cr.P.C, the Magistrate and the Officer-in-charge of the Police Station are having the powers to order for exhumation, those cases do not deal with the case on hand, where the buried person or his family members are not involved in any criminal offence.

35.(d) In *Common Cause v. Union of India* reported in (2008) 5 SCC 511, the Hon'ble Supreme Court observed that if there is a buffer zone unoccupied by the legislature or executive which is detrimental to the public interest, judiciary must occupy the field to subserve public interest.

36. The case on hand also falls under the aforementioned category where there is a legislative vacuum. There is no legislation in India dealing with cases where family members seek for exhumation of the dead body for the purpose of burying the same and for performing the ceremonies in the place meant for their religious faith.”

[Emphasis supplied]

**41.** In **Pradeep Gandhi** (supra), the Bombay High Court held that:

“38. ....In the system of governance prevailing in our country, it is highly unlikely that a Governmental decision would please each and every citizen. While dissent on valid grounds could contribute to newer developments in the matter of framing of policies, resentment of the nature put forth by the Petitioners in WP-I leaves a bad taste in the mouth. We have found the petitioners to be rather insensitive to others' feelings. The founding fathers of the Constitution felt that the people of India would strive to secure to all its citizens FRATERNITY, assuring the dignity of an individual.

*That is the preambular promise..... we find little reason to deprive the dead of the last right, i.e., a decent burial according to his/her religious rites.....”*

**42.** In **S. Sethu Raja** (supra), the Madras High Court held that:

*“18. The fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution has been given an expanded meaning by Judicial pronouncements. The right to life has been held to include the right to live with human dignity. By our tradition and culture, the same human dignity (if not more), with which a living human being is expected to be treated, should also be extended to a person who is dead. The right to accord a decent burial or cremation to the dead body of a person, should be taken to be part of the right to such human dignity...”*

**43.** In **Vikash Chandra @ Guddu Baba v. The Union of India & Ors.**, 2008 SCC OnLine Pat 905 : (2008) 2 PLJR 127, the Patna High Court held that:

*“5. ....It is expected that Patna Medical College & Hospital Officials or the State Officials will see to it that the disposal of unclaimed and unidentified dead bodies are done in accordance with law with utmost respect to the dead and in case it is verifiable the last rites may be in accordance with known faith of the deceased.”*

**44.** In **Ramji Singh @ Mujeeb Bhai v. State of U.P. & Ors.**, (2009) 5 All LJ 376, the Allahabad High Court held that:

*“17. We thus find that the word and expression ‘person’ in Art 21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition culture and the religion, which he professed. The State must respect a dead person by allowing the body of person to be treated with dignity and unless it is required for the purposes of establishing a crime to ascertain the cause of death and be subjected to postmortem or for any scientific investigation, medical education or to save the life of another person in accordance with law, the preservation of the dead body and disposal in accordance with human dignity.”*

### **Scope and Powers of the Supreme Court under Article 136 of the Constitution**

**45.** Article 136 of the Constitution empowers the Supreme Court to grant special leave in its discretion against any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal except by any court or tribunal constituted by or under any law relating to the armed forces. It reads as under:

*“136. Special leave to appeal by the Supreme Court.—(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

*(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”*

**46.** The jurisdiction conferred by Article 136 is divisible into two stages: the first stage is upto the disposal of prayer for the special leave to file an appeal and the second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal. The legal position as summarised by this Court in **Kunhayammed v. State of Kerala**, (2000) 6 SCC 359; affirmed in **Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.**, (2019) 4 SCC 376, regarding the scope of two stages reads as under:

*“(a) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not*

to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave.

(b) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the court was not made out.

(c) If leave to appeal is granted, the appellate jurisdiction of the court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(d) In spite of a petition of special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge. [ *Id*, 372, para 14.]”

**47.** In ***Pritam Singh v. State***, AIR 1950 SC 169, the Constitution Bench of this Court has explained the scope and powers of this Court under Article 136 of the Constitution in detail:

“9. On a careful examination of Article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases. The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist. The Privy Council have tried to lay down from time to time certain principles for granting special leave in criminal cases, which were reviewed by the Federal Court in *Kapildeo v. King*. It is sufficient for our purpose to say that though we are not bound to follow them too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with us, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this Court in granting special leave. Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. Since the present case does not in our opinion fulfil any of these conditions, we cannot interfere with the decision of the High Court, and the appeal must be dismissed.”

[Emphasis supplied]

**48.** A three-Judge Bench of this Court in the case of ***Hem Raj, Son of Devlal Mahajan of Bijainagar, Condemned Prisoner, at Present Confined in the Central Jail, Ajmer v. State of Ajmer***, AIR 1954 SC 462, held as under:

“2. Unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, this Court does not exercise its overriding powers under Article 136(1) of the Constitution and the circumstance that because the appeal has been admitted by special leave does not entitle the appellant to open out the whole case and contest all the findings of fact and raise every point which could be raised in the High Court. Even at the final hearing only those points can be urged which are fit to be urged at the preliminary stage when the leave to appeal is asked for. The question for consideration is whether this test is satisfied in either of these two

*appeals. After hearing the learned counsel in both the appeals we are satisfied that none of them raise any questions which fall within the rule enunciated above.”*

[Emphasis supplied]

**49.** The Constitution Bench of this Court in the case of ***P.S.R. Sadhanantham v. Arunachalam and Another***, (1980) 3 SCC 141, has explained the Article 136 of the Constitution as under:

*“7. ....In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the court. The question is whether it spells by implication, fair a procedure as contemplated by Article 21. In our view, it does. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limit, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? We have hardly any doubt that here is a procedure necessarily implicit in the power vested in the summit court. It must be remembered that Article 136 confers jurisdiction on the highest court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed: [Benjamin Cardozo : The Nature Of The Judicial Process, Yale University Press (1921)]*

*“The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. It is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’. Wide enough in all conscience is the field of discretion that remains.”*

**8.** *It is manifest that Article 136 is of composite structure, is power-cum-procedure — power in that it vests jurisdiction in the Supreme Court, and procedure in that it spells a mode of hearing. It obligates the exercise of judicial discretion and the mode of hearing so characteristic of the court process. In short, there is an in-built prescription of power and procedure in terms of Article 136 which meets the demand of Article 21.*

**9.** *We may eye the issue slightly differently. If Article 21 is telescoped into Article 136, the conclusion follows that fair procedure is imprinted on the special leave that the court may grant or refuse. When a motion is made for leave to appeal against an acquittal, this Court appreciates the gravity of the peril to personal liberty involved in that proceeding. It is fair to assume that while considering the petition under Article 136 the court will pay attention to the question of liberty, the person who seeks such leave from the court, his motive and his locus standi and the weighty factors which persuade the court to grant special leave. When this conspectus of processual circumstances and criteria play upon the jurisdiction of the court under Article 136, it is reasonable to conclude that the desideratum of fair procedure implied in Article 21 is adequately answered.*

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**11.** *The wider the discretionary power the more sparing its exercise. Times out of number this Court has stressed that though parties promiscuously “provoke” this jurisdiction, the court parsimoniously invokes the power. Moreover, the court may not, save in special situations, grant leave to one who is not eo nomine a party on the record. Thus, procedural limitations exist and are governed by well worn rules of guidance.*

[Emphasis supplied]

50. Thus, the principles of law discernible from the aforesaid are that unless, it is shown that exceptional and special circumstances exist; that substantial and grave injustice has been done and the case and question presents features of sufficient gravity to warrant a review of the decision appealed against, this Court would not exercise its overriding powers under Article 136 (1) of the Constitution. The wide discretionary power with which this Court is invested under Article 136 is to be exercised sparingly and in exceptional cases only. Keeping these principles in mind, we need to decide whether the relief prayed for by the appellant should be granted or not?

### **Condition of the Body after Burial**

51. Even the writ court had allowed disinterment subject to the condition that the body should be found to be in a deliverable state. It further stated that if the body is found to be highly putrefied then it may pose a risk to public health and hygiene. In such a situation the family of the deceased would only be allowed to perform the last rites in the graveyard itself.

52. It has been argued on behalf of the appellant that the respondents themselves had disinterred the dead bodies of two persons, who were killed along with the appellant's son. One of them was shot dead by a foreign militant, while the other was killed during the crossfire and they were disinterred within two days of burial on the directions of District Magistrate Kupwara and handed over to their next of kin for performing their last rites in their own way. It can be easily assumed that the bodies must not have decomposed much in two days thereby leaving them in a deliverable state.

53. The appellant himself has relied on an expert, namely, Dr. Arpad A. Vass, a Senior Staff Scientist at the Oak Ridge National Laboratory and Adjunct Associate Professor at the University of Tennessee in Forensic Anthropology, who has stated that decomposition of the human body begins around 4 minutes after a person dies. The expert has said that the body starts to liquify after one 1 month of decomposition. As each day passes by, more putrefaction is undergone by the body. Even the learned Single judge by order dated 27.05.2022, had mentioned that the dead body of the deceased must be in advanced stage of putrefaction. Almost 9 months have passed post burial which is suggestive that the body may not be in a deliverable state. It will be too much at this stage to disinter the body. The dead should not be disturbed and some sanctity should be attached to the grave.

54. It goes without saying that the right to live a dignified life as enshrined under Article 21 of the Constitution is not only available to a living person but also to the "dead". Even a dead person has the right of treatment to his body with respect and dignity which he would have deserved had he been alive, subject to his tradition, culture and religion which he professed. These rights are not only for the deceased but, his family members also have a right to perform the last rites in accordance with the religious traditions. We are of the view that it would have been appropriate and in fitness of things to hand over the dead body of the deceased to the family members, more particularly, when a fervent request was made for the same. It is of course true that for any compelling reasons or circumstances or issues relating to public order etc. more particularly in cases of encounter with the militants the agency concerned may decline to part with the body. These are all very sensitive matters involving security of nation and as far as possible the court should not interfere unless substantial & grave injustice has been done. Although, for some reason or the other, the body of the deceased was not handed over

to the family members yet the same was buried with respect & dignity, with the help of the Auqaf Committee at the Wadder Payeen Graveyard. We are convinced of one thing that the body was buried with dignity. There is nothing on record to indicate that the dead body was dealt with in any manner insulting or hurting the religious feelings of the family members.

55. However, what is not appealing to us is the vociferous submission on behalf of the appellant that with a view to remedy the wrong, as alleged, this Court should direct the respondents to exhume the body and permit the appellant and his family members to thereafter perform the rituals. It is for this very wrong as alleged that the High Court has awarded a monetary compensation of the amount of Rs. 5,00,000/-.

56. After a body has been buried, it is considered to be in the custody of the law; therefore, disinterment is not a matter of right. The disturbance or removal of an interred body is subject to the control and direction of the court. The law does not favour disinterment, based on the public policy that the sanctity of the grave should be maintained. Once buried, a body should not be disturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing of necessity that disinterment is within the interests of justice. Each case is individually decided, based on its own particular facts and circumstances.

57. The respondents have stated on oath that the body of the deceased was buried with all honour. The body was first washed and thereafter wrapped in a fresh white cloth. The prayers were also performed at the time of the burial. There is nothing to indicate that the deceased was not given a decent burial as enshrined under Article 21 of the Constitution. The right to dignity and fair treatment under Article 21 of the Constitution is not only available to a living man but also to his body after his death. We, as a court of law, respect the emotions and sentiments expressed by the appellant as the father of the deceased. However, the court of law should not decide the rights of the parties considering their sentiments. The court of law has to decide the matter in accordance with law, more particularly, keeping in mind the doctrine of Rule of Law.

58. We take notice of the fact that India has no legislation relating to exhumation except Section 176(3) of the CrPC. As noticed by the Madras High Court in the case of **Anandhi Simon** (supra), very few countries are having a legislation in regard to exhumation. One such legislation available is in Ireland under Section 46 of the Local Government (Sanitary Services) Act, 1948 as amended by Section 4 (2) and the Second Schedule of the Local Government Act, 1994.

59. The Union of India may consider enacting an appropriate legislation on exhumation so as to tackle the situations like the one on hand.

60. We are of the view that the relief granted by the High Court as contained in para 21 of the impugned judgment can be termed as just, proper and equitable. We direct the respondents to comply with the directions issued by the High Court, as contained in para 21 of the impugned judgment and order.

61. In the result, this appeal fails and is hereby dismissed with no order as to costs.

62. Pending application, if any, also stands disposed of.