

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

WP(C) No. 11/2022
CM No.13/2022.

Reserved on 19.05.2022.
Pronounced on 27.05.2022.

Mohammad Latief Magrey

..... petitioner (s)

Through :- Ms. Deepika Singh Rajawat,
Advocate.

V/s

Union of India and ors

.....Respondent(s)

Through :- Mr. T. M. Shamsi, ASGI.
Ms. Asifa Padroo, AAG.

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioner is father of one Mohd Amir Magrey who was amongst four persons who were killed in an encounter between the Police and Militants that took place on 15.11.2021 at Hyderpora area of District Budgam. As per the version of the respondents, Police Station Saddar received a written report along with seizure memo of arms/ammunitions from 2 RR Army Camp, Zainkote Srinagar through HC Chain Singh to the effect that at 5.15 P.M Army 2 RR received reliable information that some terrorists are hiding in a building within the jurisdiction of Police Station Saddar and have planned to attack security forces. Upon said information, Army cordoned the area and started search operation to nab the terrorists. During search operation, the terrorists hiding in the building opened indiscriminate firing upon the search party, which was retaliated and in the ensuing

encounter two terrorists and their two associates were killed. Some arms and ammunition was also recovered from the encounter site. On the basis of the aforesaid information, Police Station Saddar registered FIR No. 193/2021 under Sections 307/120-B IPC, 7/27 Arms Act, 16, 18, 20 ULA(P) Act and the investigation entrusted to SDPO Saddar Srinagar. During the course of investigation the Investigating Officer visited the site of encounter and recovered four bullet ridden unidentified dead bodies and the dead bodies were shifted to Police Hospital Srinagar for medico legal formalities. After conducting postmortem etc. the dead bodies were identified as a foreign terrorist Bilal Bhai @ Hyder @ Saqlain R/O Pakistan, Aamir Latief Magrey S/O Mohammad Lateef Magrey R/O Seeripora Tehsil Gool Ramban, Altaf Ahmad Bhat S/O Abdul Rehman Bhat R/O Old Barzulla Srinagar and Dr. Mudasir Gull S/O Ghulam Mohammad Rather R/O Parraypora Srinagar. All the four dead bodies were shifted to Handwara Zachaldara for burial.

2. It is the case of the respondents that the investigation conducted later on by Special Investigation Team (SIT) headed by DIG CKR Srinagar has collected sufficient evidence with regard to the active involvement of the son of the petitioner, Amir Latief Magrey in terrorist activities.

3. It is also not in dispute that the last rites of the son of the petitioner along with three others were performed through Auqaf Committee Wadder Payeen as per religious obligations. It also transpires from material on record that the bodies of the two of the four persons killed in the encounter were later on exhumed and handed over to their relatives for performing their last rites at the place of their choice. It appears that the parents of deceased Altaf Ahmad Bhat and Dr. Mudasir Gul approached the Deputy Commissioner Srinagar for handing over bodies of the deceased for performing their last

rites. The District Magistrate Srinagar vide his communication Nos. DMS/JUD/Misc/2840-2844/2021 and DMS/JUD/Misc/2845-2849/2021 dated 18.11.2021 recommended to the District Magistrate Kupwara to consider the request of the family members of the deceased Mohd Altaf Bhat and Dr. Mudasir Gul for handing over the dead bodies. The District Magistrate Kupwara vide his Order No. DCK/Ps/2021/232/9328-38 dated 18.11.2021 directed the Superintendent of Police Handwara to arrange exhumation of the bodies after proper identification and hand over the same to their legal heirs for performing their last rites as prayed by them. In compliance to the direction of the District Magistrate, Kupwara, the bodies of Mohd Altaf Bhat and Dr. Mudasir Gul were exhumed and after proper identification handed over to their legal heirs for performing last rites. The bodies of other two persons killed in the encounter i.e. Bilal Bhai, a foreign terrorist and son of the petitioner, who were buried through Auqaf Committee Wadder Payeen along with Altaf Ahmad Bhat and Dr. Mudasir Gull, were not exhumed and handed over to their legal heirs. With regard to deceased Bilal Bhai, a resident of Pakistan, nobody owned his body nor was there any demand for handing over of the dead body from any quarter. However, with regard to Amir Lateef Magrey, the petitioner claims that he approached all authorities for handing over the body of his deceased son but nobody listened to him and body of his deceased son was, without his presence, buried at Wadder Payeen graveyard.

4. It is submitted by the petitioner that it was only on 16.11.2021 he was informed by Police Station Gool that his son Amir Latief Magrey had been killed in an encounter in Kashmir and that he should go to Kashmir to identify the body. On 16.11.2021 the petitioner along with his family

members reached Police Station Saddar where he was told that Amir was a militant and was killed along with two other associates at Hyderpora and that the dead body of Amir has been buried. The petitioner claims that he was totally unconvinced with the respondents' claim that Amir was a militant and was killed in an encounter and, therefore, approached the authorities for intervention. Following relentless protests, the Jammu and Kashmir Lieutenant Governor ordered probe into the matter on 18.11.2021. It is on the same day, the petitioner claims, the dead bodies of two other persons, namely, Altaf Ahmad Bhat and Dr. Mudasir Gull were exhumed and handed over to their families.

5. It is claimed by the petitioner that his entire family has all along remained associated with Indian Army and other security agencies and were instrumental in elimination of militants in his area. The petitioner relies upon certificate of commendation issued in his favour by the General Officer Commanding In Chief, Head Quarter CIF (U) C/O 56 APO dated 23.01.2006 and State award for bravery for the year 2012 conferred by the State Government upon the petitioner for having shown exemplary courage of killing a militant on spot who had attacked and shot dead one Abdul Qayoom. The petitioner has also placed on record other citations and commendation certificates to make good his point that the petitioner being a nationalist and loyal to army and security forces, was even deprived to have and bury the dead body of his son as per traditions, religious obligations and religious faith, which the deceased professed during his life time. There was even deprivation of giving burial to his son in the native graveyard. It is the grievance of the petitioner that the respondents have very conveniently put

the tag of terrorist on his son and have denied even decent burial to the dead body.

6. The petitioner claims to have approached Deputy Commissioner Srinagar, who was heading the magisterial enquiry as also the Lieutenant Governor of the State for expediting the probe and handing over the dead body of his son Amir so that he could perform his last rites as per his belief and traditions. Having faced reluctance from every quarter, the petitioner decided to knock the doors of this Court and therefore this writ petition.

7. In this petition, the petitioner, claiming his right to give decent burial to the dead body of his son, has prayed for a direction to the respondents to exhume and handover the body of late Amir Latief Magrey killed in an encounter with the police on 15.11.2021 at Hyderpora area of District Budgam.

8. The writ petition is resisted by the respondents. It is submitted by the respondents that the demand of return of the dead body in the instant case is not a demand for a dead body of an ordinary citizen killed in an action of security forces but it is a dead body of a terrorist, who has been killed during encounter. If, for any reason, the return of dead body of terrorist like the son of the petitioner, is considered, not only it will send wrong message in the society but it would also lead to greater law and order and security concerns. It is thus submitted that the SIT, which conducted the investigation in the instant case, has firmly established the role of late Amir Latief Magrey in the terrorist related activities and conspiracies. Thus in terms of previous practice and procedure and also to avoid adverse effect upon law and order situation, the respondents shifted the dead body of the son of the petitioner and three others and buried at Wadder Payeen graveyard with all religious obligations

performed by Auqaf Committee in the presence of Executive Magistrate Zechaldara. It is thus urged by the respondents that though they do not deny that right to life with human dignity extends even beyond death, yet such right does not come without restrictions. It is thus contended that right of the petitioner to have the dead body of his son to accord decent burial at his native graveyard must yield to larger public interest and the public interest demands that the dead body of the deceased son of the petitioner, which has been laid to rest at Wadder payeen Graveyard, is not exhumed and handed over to the petitioner at this stage, for doing so may incite violence and create law and order problem. The respondents have shared certain documents with this Court in a sealed cover, perusal whereof indicates that all the four dead bodies of the persons killed in the encounter were buried on 15.11.2021 at Wadder Payeen graveyard with all religious obligations performed through Auqaf Committee of the area in presence of the Executive Magistrate Zechaldara. It further comes out from the documents submitted in a sealed cover that the bodies of two, namely, Mohd Altaf Bhat and Dr. Mudasir Gul were exhumed after two days on the directions of District Magistrate Kupwara and handed over to their next of kin for performing burial and last rites in their own way.

9. From the reply of the respondents as also from the documents submitted in sealed cover it is not coming forth as to why the request of the petitioner for return of body of his son Amir Latief Magrey was not conceded and his body exhumed along with Mohd Altaf Bhat and Dr. Mudasir Gul.

10. Having heard learned counsel for the parties and perused the record, it is necessary to advert briefly to the legal position with regard to right of the

deceased person to have his body cremated or buried according to the religious belief that he professed during his life time.

11. The issue has been dealt with by the Madras High Court in **S. Sethu Raja v. The Chief Secretary, Government of Tamil Nadu and ors**, WP (MD) No. 3888/2007 decided on 28.08.2007. Relying upon the judgments of Hon'ble the Supreme Court and having regard to the right to life and liberty enshrined in Article 21 of the Constitution of India, the Bench of Madras High Court in paragraph nos. 18 and 19 of the judgment held thus:-

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. As a matter of fact, the Supreme Court held in *Ram Sharan Autyanuprasi Vs. Union of India* (AIR 1989 Supreme Court 549) that the right to life enshrined in [Article 21](#) of the Constitution would include all that gives meaning to a man's life namely, his tradition, culture, heritage and protection of that heritage in its full measure. The relevant portion of the judgment of the Supreme Court in para 13 of the said judgment reads as follows:

"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 encompass of an expanded concept of [Art.21](#) of the Constitution."

19.That the right to human dignity is not restricted to a living human being but available even after death, appears to have been recognised by the Apex Court, first in a public interest litigation filed by an Advocate in 1995. An Advocate by name Pandit Parmanand Katara filed a writ petition under [Article 32](#) of the Constitution in public interest challenging the method of execution of death sentence by hanging under the Punjab Jail Manual as inhuman and violative of [Article 21](#) of the Constitution. He also assailed para 873 of the Jail Manual which required the body of a condemned convict to remain suspended for a period of half an hour, (after hanging) as offending the right to dignity. Though the Supreme Court rejected the challenge to the method of execution of death sentence by hanging, the contention of the petitioner in the said case regarding para 873 of the Jail Manual was upheld. While doing so, the Supreme Court held in the said case namely, *Pt.Parmanand Katara Vs. Union of India* (1995 (3) SCC 248), as follows:

"We agree with the petitioner that 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."

12. Close on heels is another judgment of High Court of Madras in the case of **Anandhi Simon v. The State of Tamil Nadu and ors, (2021) 3 MLJ 479** wherein the Madras High Court, while dealing with right of a person who had died on account of COVID-19 infection to have decent burial, observed in paragraph nos. 16 and 17 as under:-

“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. This view was recognized by the Apex Court for the first time in a Public Interest Litigation filed by an Advocate in the case of [Pt.Parmanand Katara vs. Union of India](#) reported in 1995 (3) SCC 248. Later in many cases, the Court held that the right to human dignity is also a right under [Article 21](#) of the Constitution of India.

17. [In Ashray Adhikar Abhiyan vs. Union of India](#) reported in 2002 (2) SCC 227, the Hon'ble Supreme Court held that it is the obligation of the State to give a decent burial to a deceased person as per their Religious beliefs. The Madras High Court in the case of [S.Sethuraja vs. Chief Secretary \(W.P.MD.No.3885 of 2007\)](#) delivered on 28.10.2007 has also held that in our tradition and culture, the same human dignity (if not more) with which a living human being is expected to be treated is also extended to a person who is dead.”

13. Reliance was placed by Madras High Court on the judgment of Hon'ble the Supreme Court in **Ashray Adhikar Abhiyan vs. Union of India, 2002 (2) SCC 227.**

14. From the legal position as adumbrated in the aforesaid two judgments, which are based upon the Supreme Court judgments on the point, following principles can be culled out:-

- (i) That right to life as guaranteed by Article 21 of the Constitution of India includes right to live with human

dignity and decency and would extend to treat his dead body with respect.

- (ii) That right to decent burial to the dead body as per the religious obligations and religious belief that the deceased professed during his life time, is concomitant of right to live with dignity, which right, as is held by Supreme Court in the case of **Ramsharan Autyanuprasi & Anr vs Union Of India & Ors**, AIR 1989 SC 459, extends to person after his death in the limited sense of treating the dead body with dignity and respect.
- (iii) That the right guaranteed by Article 21 of the Constitution is subject to deprivation in accordance with procedure established by law. And, as held by Apex Court in **Maneka Gandhi v. Union of India (1978) 1 SCC 248**, such procedure must be 'right, just and fair' and not 'arbitrary, fanciful and oppressive'.

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. Mudasir 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.

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.

(SANJEEV KUMAR)
JUDGE

SRINAGAR:

27.05.2022

Anil Raina, Addl. Registrar/Secy

Whether order is speaking: Yes

Whether order is reportable: Yes

