SUPREME COURT OF PAKISTAN

SHARIAT APPELLATE BENCH

1988

Mr. Justice Muhammad Afzal Zullah,
Chairman

Mr. Justice Nasim Hasan Shah,

Mr. Justice Shafi-ur-Rahman,

Mr. Justice Pir Muhammad Karam Shah,

Mr. Justice Maulana Muhammad Taqi Usmani,

SUPREME COURT OF PAKISTAN

SHARIAT APPELLATE BENCH

Mr. Justice Muhammad Afzal Zullah, Chairman,

Mr. Justice Nasim Hasan Shah,

Mr. Justice Shafi-ur-Rahman,

Mr. Justice Pir Muhammad Karam Shah,

Mr. Justice Maulana Muhammad Taqi Usmani,

Capt. (Retd.) ABDUL WAJID and 4 others—Appellants

versus

FEDERAL GOVERNMENT OF PAKISTAN—Respondent

Shariat Appeals Nos. 24 and 25 of 1984, decided on 11th January, 1988.

(On appeal from the judgments/orders of the Federal Shariat Court, Lahore, dated 12-8-1984 in Shariat Petitions Nos. 17/1/1984, 2/L/1984, 17/L/1984 and 21/L/1984).

Manzoor Ellahi, Advocate-on-Record for Appellant No. 1 (in S.A. No.24 of 1984).

Appellant No. 2 in person (in S.A. No.24 of 1984).

Appellant No. 1 (In person) and Hameed Aslam Qureshi, Advocate-on-Record and others in person (in S.A. No.25 of 1984).

Dr. Riazul Hasan Gilani, Deputy Attorney-General and Ch. Akhtar Ali, Advocate-on-Record for Respondent (in both Cases).

Dates of hearing: 10th and 11th January, 1988.

JUDGMENT

JUSTICE MUHAMMAD AFZAL ZULLAH (CHAIRMAN).--Appeals Nos.24 and 25 of 1984 jointly filed by two and four appellants respectively, are directed against a decision of the Federal Shariat Court, rendered under Article 203-D of the Constitution. They were preferred under Article 203-F, have now been withdrawn and dismissed accordingly.

The impugned judgment was passed on two petitions of the appellants separately presented, wherein a law: "Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance 1984", was challenged and sought to be rendered ineffective on the touchstone of the "Injuctions of Islam", in pursuance of Article 203-D. The Court declined to grant the prayer, after giving detailed reasons (running into over 200 pages), as required by Clause (2) (a) of the said Article.

Appeal No.24 of 1984 is by the 'Lahori Gruoup' and No.25 of 1984 by the 'Quadiani Group' of the 'Ahmadis', as they are described in Article 106 and Clause (3) of Article 260 of the Constitution. They were added originally by Second Amendment in 1974; which was enacted by a duly elected parliament, in what have been considered as free and impartial elections, on the basis of adult franchise. This Court had also accepted it as competent to frame the constitution after the split of the country into two parts. It passed the amendment not only with the necessary higher

percentage of votes for this purpose but also unanimously in each House. There was no dissent. The sole member walk out by one of the original movers was, as the official record/proceedings show, on the ground that the amendment did not go far enough.

The amendment defined the followers of Mirza Ghulam Ahmad, generally known 'the Ahmadis', as non-Muslims. It was enacted, in a democratic and parliamentary-cum-judicial method. The acknowledged leaders of both the groups of Ahmadis were afforded opportunity of hearing in very lengthy proceedings by a Special Committee of the Full House. The resolution referred to this committee (moved, amongst others, also by the sole member who later staged a walkout), inter alia, contained that the Ahmadis were "indulging in subversive activities internally and externally. ....."; and that, in the then recent Conference of 140 delegations from all over the world, held in Mecca-Al-Mukurram, it was unanimously held that "Quadianism is subversive movement against Islam and Muslim World, which falsely and deceitfully claims to be an Islamic sect" - (National Assembly Parliament Debates Volume 4--1974), hence the amendment was sought. After lengthy hearing and voluminous proceedings (which are matter of record) the Special Committee unanimously resolved, as follows:

"(a) That the Constitution of Pakistan be amended as follows:-

(i)that in Article 106 (3) a reference be inserted to persons of the Quadiani Group and the Lahori Group (who call themselves 'Ahmadis');

(ii)that a non-Muslim may be defined in a new clause in Article 260.

To give effect to the above recommendations a draft Bill unanimously agreed upon by the Special Committee is appended.

(b) That the following explanation be added to section 295-A of the Pakistan Penal Code:-

"Explanation.- A Muslim who professes, practises or propagates against the concept of the finality of the prophethood of Muhammad (peace be upon him) as set out in clause (3) of Article 260 of the Constitution shall be punishable under this section. "

(the Gazette of Pakistan Extraordinary dated 14-11-1974--pp. 1205 and 1206)

The draft Bill recommended by the Committee is the same as was finally passed by the Parliament (for text see National Assembly Parliament debates, Volume-5, 1974).

It would have been noticed that the said Special Committee had recommended an amendment in the Penal Code also. It cannot be denied that these measures were adopted to resolve a longstanding controversy raging in the country for nearly three quarters of a Century over the position of Ahmadis—(appellants' description in ground No.10 in "Addendum dated 15-1-1985" filed in Appeal No.24 of 1984 is: "microscopic minority", as against Muslims who from the "vast majority" not only in Pakistan but as against Muslim World, it is even much less). There has been blood shed, martial law, judicial inquiry and interventions, prosecutions and agitations over this controversy. All solutions had earlier been tried. This time the Constitutional and Parliamentary method was used. The law impugned before the Federal Shariat Court, which prima facie seems to be a sequel and result of what has been stated above, attempts to control and prevent some of the Anti-Islamic activities of the Ahmadis which had resulted in the grave consequences noticed above.

Coming to the appeals before us, as indicated already, the appellants challenged the impugned law before the Federal Shariat Court on the touch stone of 'Islamic Injunctions'. It has the jurisdiction under Article 203-D of the Constitution to declare it as repugnant to them, as distinguished from the jurisdiction possessed by the other superior Courts to annul a law on ground of its repugnancy to a fundamental right, as guaranteed in the Constitution. The Federal Shariat Court having declined to accept the

prayer, that the impugned law was repugnant to the Injunctions of Islam they filed appeals to (the Shariat Appellate Bench of) this Court. The said Shariat Bench of the Supreme Court has been constituted under Chapter 3-A of the Constitution and has the exclusive jurisdiction to hear appeals against decisions of Federal Shariat Court under Article 203-D. The Bench consists of three permanent Judges of the Court and two Ulema Judges. The permanent Judges on this Bench are three senior Judges of the Supreme Court having been members of superior judiciary for nearly twenty years. The Ulema Judges are scholars of international fame, who have organized (and head) eminent Darul Ulums and possess a high degree of attainment in various branches of knowledge. They have also served on the Federal Shariat Court before appointment to the Shariat Appellate Bench.

The appeals in hand were fixed for 22-5-1985 but were adjourned on a request received from the appellants' side. (Appellant No.1 in Appeal No.24 of 1984 prayed for adjournment on the ground of his illness, for few months. Advocate-on-Record of appellants in Appeal No.25 of 1984 had also supported the adjournment request). They again came up for hearing after two and a half years before a Full Bench. Cases like the present one, according to our practice, are not heard in a Bench of less than five Judges. The two Ulema Judges are a necessary part of this Bench.

In this background, to our surprise when it was expected that these appeals would be heard this time, again the same appellant sent application for adjournment for a year, this time on the ground that though he had recovered from illness, he had not yet recovered his full memory. He had not engaged a lawyer. He insisted on arguing his case, when adjourned. The intrinsic evidence in the application and some questioning of his co-appellant, who is an Advocate, showed that it was a lame excuse. We declined long adjournment and ordered that the applicant/appellant might appear and argue on the next day.

When the second appeal (No.25/1984) was taken up, the appellants therein sprung a still bigger surprise. They also were not willing to argue the case. Similar attempts were made on the basis of two applications placed on record, more than two years ago. It was well-known to the appellants that the requests in the applications were of such nature that orders could be sought in Chambers at least for the fixation of these applications. They related to the summoning of the tape-records regarding proceedings before the Federal Shariat Court and the expungement of a part of the impugned judgment, before the hearing of the appeal.

Be that as it may, the first request for tape-records, as explained at the Bar, was for resolving the controversy regarding the nature of arguments before the Federal Shariat Court, reference to which is made from page 9 to page 152 of the impugned judgment, and the same was sought to be expunged in the second application.

At the end of this application, the Court was told to 'determine' this issue "before the appeal is taken"; otherwise, the appellants "will have no interest left in appeal". Thus, a serious attempt was made to get the appeal adjourned for another long period.

After some discussion, we declined to summon the tape-records, at this stage, as it would entail unnecessary adjournment, and at the same time we assured the appellants that if they argue the appeals and during their hearing we felt the need for summoning the tape-records we would do so on our own initiative.

Finding no further scope to Press any further the first request at this stage, the second application was then pressed. It was also an extraordinary request, in the circumstances. We were being virtually told to "expunge" nearly two-third of the impugned judgment as unnecessary, irrelevant and 'outrageous' for the appellants' religious reasons forgetting that even jurisdictional facts and aspects of the new dispensation under Article 203-D of the Constitution, essentially relate to the religion (دین) of

Islam. They were required to establish that the law in question was repugnant to the 'Injunctions 4 of Islam'-- as a Deen. Not only this, the facts recorded at page 8, paras 13 and 14 of the judgment (not sought to be expunged) showed that despite some formal statement, made presumably to change position : if the verdict went against the appellants, they did argue with "persistence" and "emphasis" that they are not non-Muslims. Twice learned Deputy Attorney-General, who was present in Federal Shariat Court, refuted the appellants on this fact; when, they tried to show that the record was not correct. We also noticed that in their grounds of appeal, the appellants in Appeal No.24 of 1984 in para 1 of "the Addendum", have not denied the correctness of what is recorded in the opening part of page 9 of the impugned judgment. Its jurisdictional aspect, however, has been questioned.

After hearing on the question of expungement, we felt that the request of the appellants in Appeal No.25 of 1984 could not be granted, as a preliminary relief without hearing the appeal; whereafter if need be, during the main hearing of the appeals the points and portions for expungement, might be noted for orders on this question in the final judgment. Now law was cited to show that it would not be the proper procedure for us to follow in the appellate jurisdiction. In that eventuality it might also have been examined whether the scope of special jurisdiction conferred by Article 203-F vis-à-vis the validity and "reasons" for the impugned judgment, the expungement, setting aside, upholding of the objected part or any other order, was the lawful course to be adopted. As already noticed, the appellants having themselves taken a decision (not to be interested in appeals if their request was not allowed) did not evince any interest in this approach to the subject, yielding finality to the impugned judgment.

Before going on the next application, the fourth in the two appeals, it is necessary to mention that we have during writing of this judgment, discovered from the appellants' own pleadings and memoranda submitted in this Court and in the Federal Shariat Court that, they did argue the point:

that, they are not non-Muslims. If the appellants would have argued the appeal, we might have considered all this in juxtaposition to the constitutional position and what they stated before us as also in their statements before the Federal Shariat Court. After that the legal question might also have been examined: that if the appellants did argue a point and invited the Court to give decision on it, which went against them, could they in an appeal under Article 203-F, succeed in getting the decision on these arguments expunged on the grounds stated in the application or that the Federal Shariat Court had no jurisdiction in the matter.

The last application of the appellants in Appeal No. 25 of 1984 (there is no such applications in Appeal No. 24 of 1984), presented in Court, sought the exclusion of the two Ulema Judges from this Bench on the ground of bias. They are stated to have expressed opinion in favour of the enactment of a law as is involved in the appeals before us. Written material, in this behalf, was also placed on record. After having perused the same, we felt that it was like the expression of an opinion in a tentative manner and that too without hearing the full arguments as often Judges do when hearing applications for stay or preliminary arguments for admission of regular cases, or for that matter, when granting leave to appeal even in this Court. It has never been treated per se as either creating any kind of bias, prejudice or bar. Moreover, the Ulema Judges we have noticed, felt more concerned and bound than any other, by the Qur'anic Verse No. 135, in Chapter IV (Surah Al-Nisa). The text and the translation follow:-

"يا ايها الذين امنوا كونو قوامين بالقسط شهداء الله ولو على انفسكم اولوالدين والاقربين ان يكن غنياً اوفقيراً فالله اولى بهما فلا تتبعوا الهوى ان تعدلوا وان تلوا وتعرضوافان الله كان بما تعملون خبيراً"

"O, ye who believe, be maintainers of justice, bearers of witness for Allah's sake though it may be against

your own selves or your parents or near relations, be he rich or poor. Allah is most competent to deal with them both, therefore, do not follow your low desires lest you deviate, and if you swerve or turn aside then surely Allah is aware of what you do."

The Qur'an and Sunnah are full of Injunctions emphasising undiluted justice, with its much more pronounced importance in our polity, as compared to Western jurisprudence. It is one of main pillars of Islam- after Touhid and Risalat like Taqva in one sense. It is in this light that in a conceptual sense, totally different from Western ideas, Islam in a given situation, does not prohibit hearing of a case and decision even against oneself. Qur'an does not treat it as an impossibility, though such an extreme case might arise only rarely.

The treatment of similar objection by Federal Shariat Court in Federation of Pakistan v. Hazoor Bukhsh and 2 others PLD 1983 FSC 255 at pages 281 and 302, is also unexceptionable. Reliance therein was placed on Miss Asma Jilani v. The Government of Punjab and another PLD 1972 SC 139 at 178; Mr. Zulfiqar Ali Bhutto v. The State PLD 1978 SC 125 at 132 and on Interpretation of Statutes by Maxwell 12th Edn. at pages 50, 51 and a case from English jurisdiction, cited as Re Mew (1862) 31 L.J.Bk. 87.

Even if opinions relied upon by the appellants, be treated as firm in judicial sense which is not the case," the principle of Rujoo (رجوع) in Islam would come in. In view of what happened in Court, it is not necessary to dwell on this aspect. Both the learned Ulema Judges stated that they firmly believed that if after hearing the arguments, they felt the need for Rujoo 'they will do so'. It has now been discovered that both the learned Ulema Judges have done so on several important subjects: One, for example, the question of impositi0n of death sentence in a Tazir offence and the other relating to charge of interest by a Muslim in Dar-ul-Harb. They both follow Imam Abu Hanifa's view on this point. See: Hayat-i-Imam Abu Hanifa by Muhammad

Abu Zuhra--Urdu Version by Malik Sons. It reads as follows:-

''جو شخص میری دلیل سے نا آشنا ہے، اسے میرے کلام سے فتویٰ دینا حرام ہے۔ فتویٰ صادر کرتے وقت ارشاد فرماتے ہیں کہ یہ میری ذاتی رائے ہے جو اپنی حد تک سب سے بہتر ہے۔ اگر اس سے عمدہ قول مل سکے تو وہ زیادہ قرین صحت ہے۔ فرمایا کرتے تھے، لوگوں کی رائے سے احتراز کیجیے۔'' (المیزان الکبریٰ ص ۵۸، طبع مصر)

Not only this, we in addition to this procedure to ensure confidence, also adopted the one laid down by this Court in an absolutely similar situation in Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57 at p.188, 1975 Pakistan Supreme Court Reports. When an objection was raised regarding the sitting of the two Judges on the Bench hearing that case, it was observed as follows at page 214 of the Report: PLD 1976 S C 57 at p. 188;

"As regards the objection taken to the Constitution of the Bench, learned counsel were informed on the very first day that no party to a litigation can claim the right to be tried by a particular Judge or Judges of his choice. In the case of superior Courts, it is entirely a matter for the Judge or Judges concerned to decide as to whether they will or will not sit in that particular case. Mr. Wali Khan has been informed that both the learned Judges, against whom the objection has been raised, have now recorded minutes in writing which have been placed on the record of these proceedings to say that they do not feel embarrassed in sitting to hear this proceeding, The objection based purely on conjectures is, therefore, in our view, unwarranted. Judges concerned are fully conscious of their own responsibilities. There is nothing to show that they are in any way disqualified from sitting to hear this reference. The objection is, accordingly, overruled."

The relevant principles have been discussed in that case. No further discussion is necessary. The appellants

refrained from referring to this case and insisted on citing Chairman, Federal Land Commission and another v. Sardar Ashiq Muhammad Khan Mazari and 37 others 1985 S C M R 317; which it seems, was not approved for reporting, However, when the opinion of two Judges on the Bench at the end of the report, was brought to the notice of the objectors, this case was not pressed any further. Attempt, nevertheless was made to distinguish Abdul Wali Khan's case. We did not agree on this point. The two Ulema Judges then were asked as to whether they would in any way feel embarrassed in sitting on the Bench; to which, both answered in the negative. These proceedings were of such solemn character that we genuinely felt that now the hearing of Appeal No.25 of 1984 would commence. But abruptly, without consulting his other co-appellants or informing the Advocate-on-Re cord, appellant No.1 who was then standing at the Bar, announced that they withdraw the appeal. We pointed out to him that he did not consult the others, to which he responded with indication that their's was also the same position. Then the other appellants present in Court and the A.O.K. stood up and withdrew the appeal. We ordered its dismissal accordingly.

To our further surprise, the second appellant in Appeal No.24 of 1984 which stood adjourned to next day as stated earlier, also stood up and withdrew his appeal without any argument or giving any reason. It is emphasised that no such applications had been filed by the appellants in Appeal No.24 of 1984, as were filed in Appeal No.25 of 1984. He was then asked about his co-appellant's attitude to which the reply was that he would be contacted for this purpose. The next day none appeared in that appeal. We waited for quite some time and perforce passed order for its adjournment to another date. Though, according to facts if required a finding of abandonment, as in the case of B.Z. Kaikaus v. Federal Government of Pakistan and others PLD 1982 S C 409 could be rendered, we refrained from doing so, in the interest of the absent party. After some time, Mr. Manzoor Illahi Advocate-on-Record, filed his power of attorney and other documents

with the application to withdraw Appeal No.2 of 1984 on behalf of appellant No.1 also, which we dismissed accordingly as withdrawn.

Before parting, it needs be observed that, in the circumstances of the case, for the sake of propriety, we have not examined nor have tried otherwise to discover the underlying intention and motive for the conduct of the appellants. Amongst others, the questions which arise, in this context, are that if they were genuine, in this behalf, why did they seek decision of the first two applications particularly the one relating to the expungement of major part of impugned judgment, before the hearing of the appeal. This exercise would have involved examination of merits by the same Bench, the constitution whereof was objected to in the third application. It means that till then they had no apprehension that justice would not be done on that vital issue. And most important of all, they, as noted earlier, had already decided not to press the appeal if second application was disallowed. If they had to withdraw the appeal due to this reason then why it was not done at that stage when we declined to accept the most extraordinary plea and the facade that some members of the Court were biased was raised, although the decision not to press the appeal had already been taken by them.

Thus, in view of the facts and circumstances noted above, both the Shariat Appeals Nos.24 and 25 of 1984 stand dismissed as withdrawn and the impugned judgment of the Federal Shariat Court shall rule the field. There shall be no orders as to costs.

Petition dismissed as withdrawn.

(PLD 1988 Supreme Court 187)