10918

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Qazi Faez Isa
Mr. Justice Sajjad Ali Shah

(D.J) AFR

Civil Appeal No. 1241 of 2013.
(Against the order dated 24.4.2013 passed by the Lahore High Court Rawalpindi Bench in CR 368-D/2003)

Mst. Chanani Begum (decd.) thr. LRs

... Appellant(s)

Versus

Mst. Qamar Sultan d/o Mst. Anwar Sultan

... Respondent (s)

For the Appellant (s) : Mr. Muhammad Munir Paracha, ASC
Ch. Akhtar Ali, AOR

For the Respondent(s) : Syed M. Ayub Bokhari, ASC
Mr. Mehmood A. Sheikh, AOR

Date of Hearing : 25.11.2019

Judgment

Sajjad Ali Shah, J. The appellant, through instant appeal, has challenged the concurrent findings of the two Courts below rejecting the appellant's assertion that her sister late Mst. Anwar Sultan by faith was a *'Sunni'* Muslim and her succession was to be opened accordingly. Leave was granted by this Court on 27.9.2013 to examine the appellant's claim that the appellate as well as the revisional Courts were mainly influenced by the statement of Mst. Anwar Sultan recorded in previous proceedings declaring herself to be a *'Shia'* Muslim notwithstanding the fact that in those proceedings the sect of her son was being determined and her statement regarding her son's sect was even not accepted by the Court.

2. Briefly, on the death of Mst. Anwar Sultan, her entire property after necessary inquiry on the revenue side was transferred in the name of her only daughter Mst. Qamar Sultan the respondent herein, on the ground that deceased professed *'Shia'* faith. The present appellant who is real sister of the deceased Mst. Anwar Sultan being aggrieved with such declaration of

her sister's faith and transfer of her entire property in favour of her only daughter filed a suit seeking cancellation of those mutation entries and her ½ share in the property of the deceased on the ground that deceased professed *'Sunni'* faith. The suit, after a full dressed trial, was decreed by declaring that deceased Mst. Anwar Sultan professed *'Sunni'* faith. Consequently, mutation entries of inheritance in the sole name of her daughter by treating her as *'Shia'* were declared illegal. In appeal, the judgment of the trial Court was reversed and the High Court while exercising revisional jurisdiction maintained the findings of the appellate Court.

3. Mr. Muhammad Munir Paracha learned counsel appearing for the appellant contended that the appellate as well as the revisional Courts have erred by relying on the previous statement of the deceased Mst. Anwar Sultan regarding her faith which was inadmissible and was hit by Section 47 of the Qanun-e-Shahadat Order, 1984. Counsel further while placing reliance on the judgment of this Court in the case of *Pathana versus Mst. Wasai and another* (PLD 1965 SC 134) contends that in the Indo-Pak Sub-continent there is the initial presumption that a Muslim is governed by *Hanafi* Law, unless the contrary is established and the respondent miserably failed to establish through independent and reliable evidence that the deceased Mst. Anwar Sultan was *'Shia'* by faith. It was next contended that it has come on record that in the previous litigation her son was treated as *'Sunni'* and further that her son in law was also *'Sunni'* by faith. It was lastly contended that the evidence further reflects that the funeral prayers of the deceased were led by *'Sunni'* Imam, therefore, per counsel there was no legal justification available with the appellant as well as revisional Court to reverse the judgment of the trial Court.

4. On the other hand, learned counsel appearing for respondent contended that no amount of evidence whatsoever could be preferred on the statement of the deceased who herself on oath in the previous proceedings declared herself to be *'Shia'* by faith. Counsel further referred to *Zad-ul-*

miyad by Allama Hafiz Ibn-e-Qayyam and cited an instance the gist whereof is that one of the Ashab *viz. Hazrat* Usama (رضی اللہ تعالیٰ عنہ) killed a pagan after he recited Kalma-e-Tayyaba. Our Holy Prophet (ﷺ) showed displeasure. Consequently, *Hazrat* Usama (رضی اللہ تعالیٰ عنہ) said that he recited Kalma-e-Tayyaba just to save his life and the Holy Prophet (ﷺ) responded that did you open and see his heart. The Holy Prophet (ﷺ) further said that on the day of judgment who would help you against Kalma-e-Tayyaba. The ASC consequently contended that in the matter of faith a person statement has to be believed and given preference over other evidence. Learned counsel further referred to Ayat Number 94 from *Sura-e-Nisa* where it has been ordained that:

> *"O ye who believe! When ye go forth (to fight) in the way of Allah, be careful to discriminate, and say not unto one who offereth you peace : 'Thou art not a believer,' seeking the chance profits of this life (so that ye may despoil him). With Allah are plenteous spoils. Even thus (as he now is) were ye before; but Allah hath since then been gracious unto you. Therefore take care to discriminate. Allah is ever Aware of what ye do" .*

5. In the circumstances it was argued that no better evidence than that of the deceased could be considered to decide her faith. It was next contended that even one of the witnesses of the plaintiff has admitted that *Alam* of Hazrat Abbas (رضی اللہ تعالیٰ عنہ) was hoisted at the house of the deceased. Counsel contended that even this Court in the case of <u>*Mst. Ghulam Ayesha alias Ilyas Begum vs. Sardar Sher Khan*</u> (PLJ 2006 SC 1476) has acceded to the fact that the flying of *Alam* of Hazrat Abbas (رضی اللہ تعالیٰ عنہ) is a strong indication of one being of *"Shia"* faith. Counsel while strongly denying the proposition that in Indo-Pak, the initial presumption regarding a Muslim being of *"Sunni"* faith, contended that in the case of <u>*Muhammad Bashir vs. Latifa Bibi*</u> (2010 SCMR 1915) this Court has laid down that no principle of universal application is available to determine faith of a person which depends on surrounding circumstances, way of life, parental faith and faith of kith and kin.

6. We have heard the learned counsel for the respective parties and have thoroughly examined the record as well as the case law cited at bar. No doubt the Courts below while determining the faith of the deceased heavily relied upon her statement recorded in some previous proceedings in which she declared herself to be *"Shia"* however, such statement according to Mr. Paracha ASC was inadmissible in terms of Article 46 and 47 of the Qanun-e-Shahadat Order, 1984. It is to be noted that Article 46 specifies the cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant, whereas Article 47 narrates the relevancy of certain evidence, for proving in subsequent proceeding, the truth of facts therein stated. The minute examination of these provisions would reflect that these provisions are based on principles exempting direct evidence in certain cases and on meeting certain conditions allow the use of indirect or hearsay evidence without the opportunity of cross-examination. However, in our opinion none of the Article applies to the facts and circumstances of the case for the simple reason that the Courts below did not relied/adopted the statement/testimony of the deceased in respect of the controversy in respect whereof the statement was recorded which otherwise would have been hit by the principles of hearsay unless its justification could be found in terms of the subject Articles. In fact the controversy with regard to previous testimony was the faith of her son whereas the controversy in hand is the faith of the deceased herself. In case her statement was to be used in any other proceeding in respect of a portion of a controversy which required cross examination keeping in mind the controversy subject matter of the proceedings in hand then of course such statement could not be accepted by the Court unless it had met the threshold laid down by Section 46 & 47 of the Qanun-e-Shahadat Order, 1984. However, the question before us is the voluntary declaration by the deceased regarding her own faith which she declared while deposing with regard to a different issue and we see no reason to disbelieve the declaration of deceased in

respect of her own faith which neither was challenged nor it could successfully be challenged even if one is allowed to cross examine the person who declares his/her faith. It is also of utmost importance that on factual plane the veracity of the statement of the deceased wherein she declared her faith through out has not been challenged. It is not the case of the appellant that the deceased did not appear in a witness box or she did not on oath declared herself to be *"Shia"* by faith. There could be no better evidence made available to the Court then the declaration of such person to resolve the controversy regarding his/her faith. It is also to be kept in mind that the question of faith being very personal to oneself and a declaration of faith by one has to be accepted on its face value which, of course, is not open to challenge from anyone, therefore, such voluntary declaration even if made in some previous proceeding is of great persuasive value after the death of such person and, therefore, could be validly used in the subsequently instituted proceedings to determine the faith of such person. In the circumstances we are of the view that neither the bar as pleaded applies to such declaration nor it could be discarded.

7. As to submission of Mr. Paracha ASC regarding initial presumption of once faith as being *"Sunni"*, no doubt that this Court has ruled by keeping in mind the rule of majority that in Indo-Pak Sub-continent majority of Muslims are *"Sunni"* by faith, therefore, there is initial presumption that the parties to the proceedings are *"Sunni"*, however, such initial presumption is rebuttable and for this reason this Court in the case of *Muhammad Bashir (supra)* held that no principle of universal application is available to determine the faith of a person which should be determined keeping in view the surrounding circumstances, the way of life, the parental faith and faith of other kith and kin. Consequently once the faith of person is challenged the question of the initial presumption looses its sanctity and is to inferred from the facts creating presumption or the surrounding circumstances one way or the other.

8. The other important piece of evidence which persuaded the Court in deciding the faith of deceased was the hoisting of Alam of Hazrat Abbas (رضی اللہ تعالیٰ عنہ) at the house of the deceased. This fact was admitted by none other than plaintiff's own witness Khizar Hayat (PW-2) during cross examination and we have no hesitation in concurring with the observations made by this Court in the case of *Mst. Ghulam Ayesha alias Ilyas Begum (supra)* that such act, of course, was a strong indication of the fact that the resident of the house was *"Shia"* by faith. It is also interesting to note that the plaintiff who claims to be a *"Sunni"* by faith choose not to appear in the witness box and one of her sons who appeared as her Attorney declared himself to be *"Shia"* by faith. Even if we without drawing an adverse inference accept this statement as its face value then this fact alone is a strong indication of the fact that the family of the deceased comprised of people having both *"Shia"* and *"Sunni"* faith.

9. It is also very strange and intriguing that the plaintiff's Attorney despite his close relation with the deceased (nephew) showed ignorance but did not deny two very important facts; firstly, that Alam of Hazrat Abbas (رضی اللہ تعالیٰ عنہ) was hoisted on the house of deceased and; secondly, that deceased used to hold *"Majlis"* at her house. He also admitted that he used to visit Dharnaal where the deceased resided and that there was no *"Shia"* Mosque and the *"Shia"* used to pray at the *"Sunni"* Mosque. The non denial of this suggestion in the peculiar circumstances of the case where the witness himself claimed to be of *"Shia"* faith amounts to admission of fact.

10. In these peculiar facts and circumstances of this case, we are of the view that the two Courts below have rightly evaluated the evidence on record in coming to the conclusion that the deceased was *"Shia"* by faith and we see no reason to interfere with such concurrent findings of fact and, therefore, would dismiss this appeal.

11. These are the reasons of our short order of even date which was in the following terms:-

> *"For the reasons to be recorded later, this appeal is dismissed but with no order as to costs".*

Islamabad, the
25th November, 2019
A. Rehman

Not Approved for Reporting.