

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

C.R.No.1514 of 2012

Gulzar Ahmad, etc.
Vs.
Ayesha Naz Sarwar, etc.

J U D G M E N T

Date of hearing	11.10.2021
Petitioners By:	Mr. Moiz Tariq, Advocate
Respondents By:	Mr. Aamir Latif Bhutta, Advocate for respondent Nos.1 and 2. Respondent No.3 <i>ex parte</i> .

Faisal Zaman Khan, J:- Through this civil revision judgments and decrees dated 31.05.2010 and 09.02.2012 passed by the learned Civil Judge, Faisalabad and learned Additional District Judge, Faisalabad, respectively, have been assailed. By virtue of the former judgment a suit for declaration etc. instituted by the petitioners has been dismissed and through the latter the same has been upheld.

2. Succinctly, the facts of the case are that Ghulam Sarwar (**deceased**) was related to the parties as petitioner Nos.1 and 2 are his brother and sister, respondent Nos.1 and 2 are his wife and daughter, whereas, respondent No.3 is his mother. In order to assail a mutation of inheritance No.30204 dated 07.05.2006 (**Impugned Mutation**) sanctioned in favour of respondent Nos.1 and 2 as successors of the deceased a suit for declaration etc. was instituted by the petitioners against the respondents alleging therein that since the deceased was of Sunni faith, whereas, in the impugned mutation he has been shown to be of Shia faith, therefore, impugned mutation is fraudulent. Contesting written statement was filed by respondent Nos.1 and 2,

whereas, respondent No.3 filed a conceding written statement. Out of divergent pleadings of the parties as many as 09 issues were framed; evidence *pro* and *contra* was led, whereafter, through judgment and decree dated 31.05.2010 the suit was dismissed. Feeling aggrieved, petitioners preferred an appeal, which also met the same fate and was dismissed vide judgment and decree dated 09.02.2012, therefore, this petition.

3. Learned counsel for the petitioners submits that deceased was of Sunni faith, thus, the impugned mutation which has been sanctioned in favour of respondent Nos. 1 and 2 on the ground that since the deceased was of Shia faith, therefore, under Shia Law of Inheritance only respondent Nos.1 and 2 are entitled to his estate being his legal heirs hence the same is fraudulent. Further adds that it was for respondent Nos.1 and 2 to prove that the deceased was of Shia faith as it is presumed that every Muslim is of Sunni faith until and unless it is proved otherwise. Places reliance on judgments reported as Mst. Sarwar Noor v. Ali Haider and another (2009 CLC 400), Pathana and others v. Allah Ditta (2008 YLR 589), Mst. Latifa Bibi and 8 others v. Muhammad Bashir and 10 others (2006 CLC 1076) and Israr Hussain and 2 others v. Mst. Ghulam Kalsoom and 5 others (2006 MLD 1748).

4. In order to augment his above argument, learned counsel has referred to the following incidents/documents substantiating that the deceased was of Sunni faith:-

- a. that Nikah between the deceased and respondent No.1 was solemnized by a Maulana, who was of Sunni faith, thus, this cannot be said that the deceased was of Shia faith;
- b. that the account opening form (Exh.P3) and bank statement (Exh.P7) would reveal that the deceased has himself opted that Zakat may be deducted from his bank account, which has been done by the Bank, whereas, the

person, who is following the Shia faith does not pay Zakat; and

- c. Respondent No.1 while appearing as DW.1 in her cross-examination has failed to answer a single question with regard to the fact that she has knowledge about the Shia faith.

In support of the above he places reliance on judgments reported as *Rehmatullah and others v. Saleh Khan and others* (2007 SCMR 729), *Fida Hussain through Legal Heirs Muhammad Taqi Khan and others v. Murid Sakina* (2004 SCMR 1043), *Rafiq Dawood and 4 others v. Messrs Haji Suleman Gowa Wala & Sons Ltd. Through Director and others* (2009 CLC 1070), *Shahnaz Bibi v. Muhammad Iqbal Khan* (2006 YLR 886) and *Muzaffar Ali and others v. Muhammad Aslam* (PLD 1964 W.P. (Rev.) 44).

5. Replying to the above, learned counsel for respondent Nos.1 and 2 supports the impugned judgments and decrees.

6. Despite service, none has entered appearance on behalf of respondent No.3 therefore, she was proceeded against *ex parte* on 25.07.2012.

7. Arguments heard. Record perused.

8. The moot point, which requires determination, by this Court, is that as to whether the impugned mutation is fraudulent for the reason that the stipulation made therein that deceased was of Shia faith, as it is the contention of the petitioners that the deceased in his life time has been practicing Sunni faith.

9. In the above back drop and keeping in view the judgments cited by the learned counsel for the petitioners in paragraph no.3 supra, it has to be determined by this Court at the outset that the onus to prove this fact is on whom?

10. There is no cavil to the proposition that the judgments referred to in paragraph no.3 supra mentions that every Muslim is presumed to be of Sunni faith unless proved otherwise however none of these judgments would mention any provision of law or the reason upon which this presumption is drawn.

11. Intrigued by the above presumption and in order to see wherefrom this presumption is drawn, this Court has gone through judgments reported as *Pathana v. Mst. Wasai and another* (PLD 1965 S.C. 134), *Mst. Sardar Bibi v. Muhammad Bakhsh and others* (PLD 1954 Lahore 480), *Shirin Bai v. Muhammad Ali and others* (PLD 1970 Karachi 450), *Hussain v. Mansoor Ali and others.* (PLD 1977 Karachi 320), *Muhammad Sulaiman Malik and another v. Royal Trust Corporation of Canada and others*, (1979 CLC 48), *Zainul Hassan Mian and others v. Mst. Khuwand Naka and others* (1998 MLD 1857), *Mst. Fatima (deceased) through L.Rs. and another v. Lal Khan and 19 others* (PLJ 2001 Lahore 91), *Akbarally A. Adamji Peerbhoy and others v. Mahomedally Adamji Peerbhoy and others* (A.I.R. 1932 Bombay 356) *Moosa Seethi v. Mariyakutty* (A.I.R. 1954 T.C. 432) (Vol. 41, C.N. 148) and *Mt. Iqbal Begum v. Mt. Syed Begum* (1933) 140 I.C. 829

12. In all the above judgments reference has been made that in the subcontinent it is presumed that a Muslim is of Sunni faith unless proved otherwise however none of them refer to any provision of law or a research upon which this presumption has been drawn. It was only in the judgment titled *Pathana v. Mst. Wasai and another* mentioned supra a passing reference is made to section 28 of the Muhammadan Law.

13. In order to appreciate that whether the said provision draws such a presumption, for benefit it is reproduced as under:-

28. Sunni sub-sect.—*The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.*

The Sunni Muhammedans belong principally to the Hanafi School.

14. A bare perusal of the above provision would show that it does not refer to any presumption upon which this could be ascertained or held that in subcontinent it is presumed that every Muslim is of Sunni faith unless proved otherwise.

15. For a while if this is presumed that section 28 *ibid* can be interpreted in such a manner, it has to be determined that what is the status and binding effect of the provisions of Muhammadan Law. It has been held in *Messrs Najaat Welfare Foundation through General Secretary v. Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs, Islamabad and 4 others (PLD 2021 Federal Shariat Court 1)* that Muhammadan Law by D.F.Mullah is a reference book and is not a statute having binding force. In these circumstances, Muhammadan Law can only be consulted as a reference book and cannot be termed to be statutory law having binding effect, upon which any presumption can be drawn against a person.

16. While discussing that what is a presumption and how it can be proved, it has been held in judgment reported as *Hussain v Mansoor Ali and 5 others (PLD 1977 Karachi 320)* that a presumption can be bifurcated into two parts i.e. *presumption of fact* and *presumption of law*. In the first case, the presumption is rebuttable in view of the fact that it is not based on law and is based on the inference which the mind naturally and logically draws from the given facts, thus, to prove the said presumption it is the person, who alleges to believe/rely/seek benefit of such presumption and once he manages to prove the same through unequivocal and clear evidence, the onus shifts on the other side. whereas, in the latter case where the presumption is based on law, it would be mandatory for the person, who negates the said presumption to prove the same.

17. In the above circumstances, this Court is of the view that since it was alleged by the petitioners that the deceased was of Sunni faith and the impugned mutation has fraudulently been sanctioned in favour of respondent Nos.1 and 2 on the ground that deceased was of Shia faith, therefore under Article 119 of the Qanun-e-Shahadat Order 1984 being a particular fact, the initial onus to prove was on the petitioners, which in the case in hand, they have failed to discharge as no cogent and unequivocal evidence has been produced by them.

18. During the course of arguments, learned counsel for the petitioners time and again has been asked to highlight the evidence wherefrom this could be ascertained that the impugned mutation was fraudulent and the deceased was not following the Shia faith, however, learned counsel has not been able to point out any evidence, wherefrom the above aspect can be proved, however, he kept on pointing out the *lacunae* left in evidence of respondent Nos.1 and 2.

19. It is settled proposition of law that a party, who alleges a fact has to prove his case himself and cannot thrive on the *lacunas* left by the opposite party. For reference reliance can be placed on *Abdul Majeed and others v. Amir Muhammad and others* (2005 SCMR 577) *Mst. Zainab v. Majeed Ali and another* (1993 SCMR 356) and *Muhammad Sajjad Hussain v. Muhammad Anwar Hussain* (1991 SCMR 703).

20. As regards the argument advanced by the learned counsel for the petitioners that since the Maulana who got the Nikah solemnized between the deceased and respondent No.1 was of Sunni faith hence this stands proved that deceased was follower of Sunni faith, the said argument is not tenable for the reason that petitioners have not been able to produce any evidence wherefrom this could be proved/presumed that a Maulana who is following Sunni faith is debarred from solemnizing the Nikah of the spouses following Shia faith.

21. Similarly, the fact that the deceased has been paying Zakat from his Bank account does not prove that he was of Sunni faith. Moreover, there is no evidence on the record wherefrom this could be established that a person following Shia faith is not obligated to pay Zakat or there is an embargo on them to pay Zakat.

22. As regards the lack of knowledge of respondent No.1 about the Shia faith, this by no means would prove that deceased was not following the Shia faith. Furthermore, there is no evidence on the record, wherefrom this could be established that the questions, which have been put by the learned counsel for the petitioners in cross examination, are correct depiction of the rituals of Shia faith.

23. It shall not be out of place to mention here that when a person dies and his succession opens, his estate will be divided according to his faith and personal law and not according to the faith of the successors. In these circumstances, if this is presumed that respondent Nos. 1 and 2 are of some other faith even then their share in the estate of the deceased will be according to the Shia law of inheritance as their right to inherit will be in accordance with the faith of their predecessor, who allegedly was following Shia faith and not otherwise.

24. Great emphasis has been laid by the learned counsel for the petitioners on Exh.P.1, which is a certificate issued by Jafria Trust (Registered) highlighting that the deceased was their member and was practicing Shia faith, upon which the impugned mutation was sanctioned, to be fraudulent, however, perusal of the available record would show that the said certificate was not challenged by the petitioners in the main suit. Moreover, while appearing as PW.1 petitioner no.1 has himself acknowledged the above membership of the deceased and the entries made in the record of the said organization that the deceased was practicing Shia faith.

25. The above resume clearly reveals that the deceased was following Shia faith during his life time, thus, the impugned mutation has rightly been sanctioned in favour of respondent Nos.1 and 2.

26. As regards the judgments referred by the learned counsel for the petitioners, the same having different facts and circumstances, are not applicable to the case in hand.

27. Since the learned counsel for the petitioners has not been able to point out any jurisdictional defect or procedural impropriety in the concurrent impugned judgments and decrees passed by both the learned courts below, therefore, in view of judgments reported as Nizam-ud- Din and others v. Sheikh Zia ul Qamar and others (2016 SCMR 24), Iqbal Ahmed v. Managing Director Provincial Urban Development Board, N.W.F.P. Peshawar and others (2015 SCMR 799), Mandi Hassan alias Mehdi Hussain and another v. Muhammad Arif (PLD 2015 SC 137), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Haji Muhammad Din v. Malik Muhammad Abdullah (PLD 1994 SC 291) no interference can be made by this Court in the concurrent findings rendered by the courts below.

28. As a sequel to the above, this revision petition being devoid of any merits is **dismissed**.

(FAISAL ZAMAN KHAN)
JUDGE

Approved for reporting

JUDGE