

Kerala High Court
Justice V R Krishna Iyer
Shihabuddin Imbichi Koya Thangal vs K.P. Ahammed Koya

Citations: AIR 1971 Ker 206

ORDER

1. Who is a Muslim? An odd question of apostasy was argued with Islamic erudition by counsel for the Kazi of Calicut who is the petitioner in this Criminal Revision Petition and the 4th accused in C. C. No. 22 of 1969. Religion is not amenable to reason and theological disputes cannot be decided by secular Courts. So my duty is as embarrassing as my jurisdiction is limited. Even so, the laws of the land lay down norms of conduct and bind divine and commoner alike. The Indian Penal Code which prohibits bigamy cannot be evaded by pleading Islam unless founded on some exemption recognised by the law. The Kazi (4th accused) is accused of abetting the second marriage of a Muslim woman (1st accused) while her first marriage (with P. W. 1) was subsisting. Whatever liberties the Muslim male may claim the female is governed by monogamy which most civilised nations have accepted as good. But the Kazi holding the Quran and the Holy Prophet as final, argues himself innocent by imputing apostasy to the complainant and consequent 'instant' and automatic divorce of the 1st accused-

2. The facts are few and the law is covered by authority and yet the argument has been long and so is the judgment: Admittedly, P. W. 1 had married the 1st accused in 1962 and the latter again admittedly, married the 3rd accused in 1969. There was no formal divorce in between, but it is contended that P. W. 1 had indubitably accepted the Ahamadeeya persuasion and thus ceased to be a Muslim. This act of heresy had made him alien and snapped the marital tie with the 1st accused; the Kazi who solemnised the second marriage, was not therefore guilty of abetting bigamy. The Magistrate has framed charges against all the accused, but the 4th accused alone has chosen to challenge it in criminal revision. I may mention that another feeble plea was suggested by counsel that the Kazi was under the bona fide belief that a divorce had taken place between P. W. 1 and the 1st accused. But when the facts were fully set out, the part of this accused in the polemics about Ahamadiyyas and the precedents rejecting bona fide belief as an exculpatory factor mentioned at the bar, the defence was discreetly dropped at the present stage with the object of pursuing it later, with whatever good fortune may attend on it. Anyway I do not deal with it here. Therefore, I am concerned with the sole question as to whether a muslim by birth becoming a member of the Ahameediya sect (Qusdiani is only an al-allotropic modification of this sect and comes from the birth place of the founder of the movement) automatically ceases to be a muslim as is urged by Shri Khalid for the petitioner.

3. The fatal factor which infidelises an Ahamadi, if I may coin such an expression, counsel for the Kazi cannot be subjected by a Court to rational examination because it is not for the Judges to determine whether a religious claim is false or true. Justice Douglas in the United States v. Ballard, (1944) 322 US 78 observed:

"Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

I therefore desist from putting the argument in the crucible of reason, but proceed to test its reality by its universal acceptance by the community and its affirmation in the past in courts of law.

4. Prophets and Avatars have claimed divine revelation some plenary, some partial and have conveyed the Message of the God in various periods of history. Luckily for mankind the great religions have common basic principles. Even so, the fundamental tenets have varied in their accent and each religion has its own tenets, doctrines and formularies making up its personality as it were. The individuality of Islam and the acceptance of its cardinal tenets must be clearly delineated before one can determine whether a man is a Muslim or has so widely, deviated from Islam as to be designated an apostate. Every departure from orthodoxy is not apostasy, although witch hunt is not the monopoly of any particular religion when polemics appear and libertarian trends assert themselves. What then are the fundamentals, the unquestioning embrace of which makes a man Muslim? Belief in the oneness of God is indubitably the first. even as the message from God which the Prophet preached to the people of Mecca (but meant for the whole world) emphasised:

"The Creator of the world is One. None else is worthy of worship. The Prophets have ever believed Him to be One and taught their followers so." This is not just a teaching of the Holy Prophet but the bedrock of Islamic faith. A single episode brings this out boldly. The elders of Mecca were angered by this teaching and went in a deputation to the Prophet's uncle Abu Talib and addressed him thus:

"You are one of our chiefs and for your sake we have so far spared your nephew. Muhammad. The time has come, however, when we should put an end to this national crisis, this conflict in our midst. We ask and demand that he should desist from saving anything against our idols. Let him proclaim that God is One, but let him not say anything against our idols. If he agrees to this, our conflict and controversy with him will be over. We urge you to persuade him. But if you are unable to do so, then one of two things must happen. Either you will have to give up your nephew, or we, your people, will give you up (Hisham)."

But the Prophet told his uncle the great words which turned his mind and opened his eyes.

"I ask you not to give up your people. I ask you not to stand by me- Instead, you may give me up and stand by your people. But the One and Only God is my witness when I say that even if they were to place the sun on my right and the moon on my left. I would not desist from preaching the truth of One God. I must go on doing so until I die. You can choose your own pleasure (Hisham and Zurqani)." It is obvious from this narrative that nothing is more obnoxious to Islam than the non-acceptance of the unity of God. But the Ahamadees swear by the Alia as one God and so they cannot be heathenised on this score.

5. The second doctrinal principle to 'forsake which is to ostracise oneself is according to Shri Khalid the acceptance of the Prophet Mohammad as the last of the Prophets. By necessary implication, the great teachers who came after him could not be exalted to the position of Prophet. Here, says counsel. Is the touchstone by which the Ahamadees can be put out of the fold, for they treat Haza-rath Mirza Gulam Ahamad as a Prophet thus repudiating the second article of faith of ever/ Muslim. We have to examine this argument a little more closely.

6. In science, discoveries are never treated as final and so, Newton was disproved by Einstein and Einstein modified by Sudarsan. Truth being infinite is apprehended in part by the human mind and a fuller grasp displaces

the more imperfect earlier revelation. In the major religions (with the capital 'R') monopoly of spiritual finality is not infrequently claimed by each for the Truth as revealed or illumined through its Prophet or founder, and acceptance of this Truth constitutes the Faith. Indeed, the Holy Prophet of each religion is the last and final exponent of Divine knowledge and those who come after, can claim only to carry the light forward within the limits of the Prophet's teaching. Of course, sub-prophets do appear to revive, never to repudiate. According to counsel for the petitioner Prophet Mohammad was the last of the Prophets and acceptance of this finality of pro-phethood is an axiom of that religion. He goes further to say that the Ahamadiyya Movement refutes the claim and sets up Hazrath Mirza Gulam Ahamad as a Prophet and therefore those who subscribe to this doctrine are aliens to Islam.

7. Hazrath Mirza Gulam Ahamad was born in 1835 in Quadian, India in a family of Mughul Chiefs. It is said that from his childhood Hazrath Ahmad was devoted to the study of the Holy Quran and spent the greater part of his time in prayer and contemplation. Later in life, finding doubts and scepticism spreading over the Islamic world and religious sentiment being but skin deep the Hazrath was deeply distressed and under-: took a vindication and exposition of Islamic doctrines and teachings. He published *Brahin-i-Ahamadiyya*. *"In this publication his thesis was that Islam was a living faith, by following which man could establish contact and enter into communion with his maker, and that the teaching contained in the Holy Quran and laws promulgated by Islam were designed to help mankind to attain moral, intellectual and spiritual perfection. Hazrath Ahamad claimed to be the recipient of Divine revelations and announced that God had appointed him as the Messiah mentioned in the prophecies contained in the Bible and the Holy Quran. In 1889 he organised his followers under the name of Ahamadiyya Movement."* It is said that its members are now sprinkled all over the world and missions have been established in many countries of the East and the West under the direction of the present Khalifa. It may be straightway stated that Hazrath Ahamad based every claim in his argument on the Holy Quran as the word of God. With this background, let us approach the question of the Ahama-diyya sect being alien to Islam on the second count of not accepting Prophet Mohammad as the last of the Prophets. Of course, the Quran forecasts in Chapter 61 Verse 7 thus:

"And remember when Jesus, son of Mary, said, 'O children of Israel, surely I am Allah's messenger unto you, fulfilling that which is before me of the Torah and giving glad tidings of a Messenger who will come after me. His name will be Ahamad-"

And the Ahamaddiyyas claim that Hazrath Ahamad fulfils this forecast. Even the Christians believe in the resurrection of Christ. The Muslims also believe that Jesus will come again, not as a Prophet though, but as the follower of Prophet Mohammad because it is the unshakable creed of a Muslim that the holy Prophet was the last Messenger of God. I have only summarised the submission of counsel for the petitioner in stating what I have said above. The question, however, is whether this insistence on Prophet Mohammad being the last is so basic that if anyone believes that Hazrath Ahammad was also Prophet ipso facto he became an apostate.

8. Sir Zafrullah Khan, an eminent jurist and a distinguished judge of the Federal Court of India, was admittedly an Ahamadi. He has represented his country (Pakistan) in the highest councils of the World and it must be remembered that Islam is the religion of Pakistan. It should, indeed, be startling if one of the most distinguished representatives of a country which has adopted Islam as the State religion should himself be deemed an apostate but that is the consequence of accepting counsel's submission. Sir Zafrulla himself argued two cases when the precise question arose whether a member of the Ahamadiyya Movement ceased for that

reason to be a Muslim, and in those cases his contrary contention was upheld- The case reported in 71 Ind Cas 65 = (AIR 1923 Mad 171) is directly in point and I will deal with it first.

9. In that case the accused had been acquitted on the finding that an Ahmaddi was an apostate and, therefore, a Muslim who, had adopted the Ahmadi persuasion automatically became divorced from his wife. Mr. Zafrulla Khan argued successfully that "*Ahmadiyas are merely a sect of Mohammadans, their divergences from ordinary Mohammedanism not involving abandonment of that creed or making them schismatics*". Oldfield J., proceeded to determine the question. "*Inasmuch as It relates substantially and ultimately to the personal status, which petitioner's religious views determine; and to say that only degrees of orthodoxy are in dispute is to beg the question whether the Ahmadiya's deviation, from Islam is such as entails abandonment of any essential thereof.*" The learned Judge took note of the usual hostility to new beliefs from the orthodox section of the community but every deviation cannot in law be treated as a desertion. Of course, even regarding the consensus among Muslims the court took the view that "*it has not been established that the Muslim community either generally or in India has reached any decision which we can regard as conclusive.*" The court quoted from Ahmad himself (the alleged latter day prophet). "*We are Muslims by the grace of God: Musthafa the Holy Prophet of Arabia is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called the Quran- Every prophet hood has found its culmination in that Messenger of God, whose name is Mohammad. The revelation and inspiration that we receive has not been granted us independently . but it is through him that we have received this gift.*" The various texts quoted in the ruling dispel doubts about Ahmadi on the crucial twin tests "*that there is no God but Allahand Mohammad is the servant and Messenger of God.*" Oldfield J. emphasised: "*All this would seem to involve a plenary acceptance of Mohammedanism; and in fact the respondent's objection is to the Ahmadian additions to it and their alleged inconsistency with it but we have, in my opinion, been shown no distinct authority as to which doctrines of Islam are regarded as fundamental or the extent to which additions to them, deviations from them or inconsistencies with them are permitted.*" The reasoning of the learned Judge is illuminating "That private judgment and analogical deduction are, in appropriate circumstances and to a greater or less extent, legitimate methods of ascertaining the law is recognised in the text books; (Ameer Ali's Muhammadan Law. 11-14, Abdur Rahim's Muhammadan Jurisprudence, 25); and we have not been shown how they are not also legitimate in theology, so long as fundamental principles are maintained and the question is only of the development to which every creed must be subject so long as it retains life and growth and adapts itself to altered conditions. This is in fact enough to justify the Ahmadiyas in their faith and six alleged deviations from orthodoxy as enumerated by the lower court For their abandonment of the sword for peaceful argument as the method of propagation of Islam has been inevitable since the cessation of militant conditions and the permeation by Muhammadans of countries to whose law they owe allegiance: and their refusal to acknowledge the spiritual supremacy of the Sultan of Turkey cannot, if only for chronological reasons, be fundamental." The other points of divergence between the Ahmadiyas and the non-Ahmadiyas was examined by the court; and the conclusion was expressed thus: "*Reference has been made to the extent to which Ahmad stately accepted and proceeded from the fundamental tenets of Islam. It was then for respondents to show that the additions to and divergences from them involve their abandonment; and it is not possible on the materials before us to hold that they do so*". I may mention a word about Mohammad being the last prophet and the Ahmadi theory that Ahmad himself was a prophet identified as the one "*who will come after me and whose name will be Ahmad*" referred to in the Quranic verse earlier mentioned by me. The scope of their belief is "*that Mohammad and other earlier recognised prophets, for instance, Jesus Christ have not been the sole channels of communications between God and man; that others, for instance. Buddha, Rama and Krishna have been bearers of the divine*

message", Of course, Ahmad himself is treated by his followers as the one whose advent is foretold in the verses of the Quran, but this Messiah accepted the position that "no prophet, who is also a *lawgiver, can appear after the Holy Prophet, even from among his followers. For this door is completely closed.*" In this view. Old-field J. unhesitatingly held, taking an overall view of the teachings and tenets of the Ahmadiyahs, that there was substantial identity with the Islamic religion. Krishnan J. also dealt with this question of Mohammadan theology and agreed with Sir Abdur Rahim's observations in his *Muhummadan Jurisprudence* page 250, "some people are too prone to charge others with unbelief and treat them as heretics, but the correct law is that, when heretical doctrines are opposed to clear and indisputable texts, they would amount to unbelief and not otherwise." After a detailed study, the learned Judge agreed with his learned brother to find that the Ahmadiyahs are only a reformed sect of Moharnmadans.

10. Islam is an international religion, as it were, and is not continued to Malabar or India. Therefore, the Question of consensus in the community, if it is to be the touchstone as urged by counsel, must transcend national frontiers. It would be extraordinary if on a narrow view of what people in one region think a sect wore to be excommunicated, thus leading to the grotesque sequel of a person being un-Islam in Malabar but devout Musalman in Pakistan and in other countries. Consensus in this context must, therefore, mean a broad unanimity in the Islamic world as it were. That obviously has not been attempted or achieved by way of proof in this case.

11. Certain other rulings were brought to my notice, not germane to the issue except distantly. ILR 7 All 461 was a case dealing with another sect called Wahabis and the court held that they were Muslims. In (1890! ILR 12 All 494 also, members of the Wahabi group, notwithstanding their loudly obtrusive form of worship, were held to be Mohammadans entitled to perform their devotions in a mosque though they may differ from the majority Sunnis on particular points. In ILR 14 Lah 518 (AIR 1933 Lah 759) it was laid down that every person who believed in the unit of God and the mission of Mohammad as a prophet is a Musalman. to whatever sect he may belong, as a Muslim and that Shias satisfy this dual test. I place accent on the belief in "the mission of Mohammad as a prophet" and not as the last prophet.

12. The challenge of Ahmadiyahs as Muslims arose in yet another case (37 Ind Cas 302) = (AIR 1916 Pat 87) where the right of this sect to worship in a mosque was the main question. The plaintiffs professed to be the followers of Mirza Gulam Ahmad of Quadiyan known generally as Ahmadiyahs or Quadiyanees i.e. the same sect with whom we are concerned in the present case. A Division Bench of the Patna High Court after hearing the arguments of Mr. Zafrulla Khan observed that the members of that Movement were Moharnmadans although the orthodox Sunnis regarded them as infidels.

13. Mulla, in his *Principles of Mahomedan Law* observes: "*A person born a Mahomedan remains a Mahometan until he renounces the Mahomedan religion. The mere adoption of some Hindu forms of worship does not amount to such a renunciation.*" The learned author points out that it is not necessary to be a Muslim that a man should be an orthodox believer in that religion; "*it is sufficient if he professes the Mahometan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.*" Of course, while dealing with divorce the learned author states that apostasy operates to dissolve a marriage instant. I am afraid even the basic teachings of Ahmad do not give room for the tall contention that Ahmadiyahs are infidels. The learned Public Prosecutor, who helped the court, brought to my notice a publication entitled "*The Holy Quran*" by the son of Ahmad "the promised Messiah", wherein it is explicitly stated thus: "Nearly seventy years ago he was

informed through divine revelation that he had been appointed to serve Islam and the Holy Prophet and to work for the exaltation of God's name in the universe. He was told that God had conferred upon him the dignity of prophet-hood with this proviso that he would continue to be a perfect follower of the Holy Prophet and of the Quran and that the revelation which was vouchsafed to him would be subordinate to the Quran and would contain no new law. One of his revelations is: 'Every blessing is from Muhammad and blessed is he who has taught', i.e. the Holy Prophet, 'and blessed is he who has learnt', i.e. Ahmad, who was the recipient of this revelation (Haqiqat al-Wahy). Again, he received a revelation: 'A Warner has appeared in the world but the world did not accept him. God will, however, accept him and will establish his truth through mighty convulsions' (Barahin Ahmadiyya). In the terminology of the Quran a Warner means a Prophet and in one version of his revelation received by the Founder of the Ahmadiyya Movement the word used in place of 'Warner' was Prophet (EK Ghalati Ka Izala). His function was to bring man face to face with his Maker in this age of darkness and sow the seed of spiritual advancement in this material world through fresh signs and revelations. Thus, it is clear that Ahmad claimed to be a prophet, not a plenary one but secondary to the Holy Prophet and did accept Mohammad as the Messenger of God. Counsel for the petitioner drew my attention to various new Movements in the world of Islam like the Bahais (indeed, I remembered my visit to the Bahai temple near Chicago a few years ago). The relevant point is that as time changes and men progress, materially and spiritually, new social conditions are created and illumination takes different forms. Total conformity, rigid adherence to a static doctrine and suppression of all ferment of spiritual thought pave the way for stagnation and decline. Every religion has produced from time to time men of light and learning who have within the limits of the fundamental framework of each religion contributed spiritually to the upgrading of the human personality. Every such endeavour cannot be dogmatized as heresy and every such movement castigated as an infidel outburst. Catholicity and liberal views are often the anathema of the 'orthodox but the court is concerned only with civil rights and status and the impact of religion as affecting such status. In so doing, it cannot get entangled in theological meshes but has to go by the essential test of the basic identity of a religious community organized as a Church or a Faith. The bond of union, if I may say so, consists in the identity of its doctrines, creeds, formularies and tests which are its very core and constitute its distinctive existence. Looking at the issue devoid of sentiment and passion and in the cold light of the law I have no hesitation to hold that the Ahmadiya sect is of Islam and not alien. Therefore, it is not possible to accept the dissolution of marriage as a bye-product of apostasy of P. W. 1 In this case. Minor cults in every religion cannot be equated with major desertion of faith even if it may produce quakes in a section of the community.

14. Of course, there may be other valid contentions open to the Kazi I am not concerned with them here and they may have to be considered by the trial court at the further stages of the case. The Criminal Revision Petition is dismissed, but I place on record my indebtedness to counsel for the petitioner and the Public Prosecutor for bringing the relevant learning to my notice.