

36. It is apparent that many words can have several different meanings or shades of meaning, depending on the context. Mirza in his writings seems to have explained the sense in which he uses words which have different meanings. Any fair criticism of a writer can surely only be based upon the meaning which the writer himself attaches to his terms. To attach any other meaning would only result in distortion.

37. One of the matters raised by Defendants in their plea which Plaintiff elected to meet concerned the virgin birth of Jesus. The evidence in this regard was firstly, that over the centuries of the existence of Islam, Muslims have differed on the issue of the birth of Jesus. Some believe that he was born without the agency of a natural or human father, while others hold that he did have such a father. It is clear that this is not an issue of faith nor is it an essential to the religion of Islam. What is part of the faith of Muslims is the acceptance of Jesus as a prophet. Secondly, as regards Mirza, it would be seen from his writings that he personally believed that Jesus was born without the agency of a human father. Thirdly, because the question of the birth of Jesus is not decided conclusively in the Holy Qur'an but ambiguously, he gave his followers freedom in interpreting the Qur'an. As a result of this freedom, some of his followers even differed from Mirza himself on some points.

38. On the evidence placed before the court it is clear that the virgin birth is a matter upon which Muslims differ and that such differences of interpretation are not contrary to the teachings of Islam nor are these essential to the faith of a Muslim.

39. Another difference raised by the Defendants was that the Second Plaintiff was not a Muslim because he does not accept the *Jihad* or religious war against unbelievers in Islam. Second Plaintiff elected to meet this defence and a considerable amount of evidence was led as to the meaning of *Jihad*. In a very comprehensive coverage of the subject the witness first of all dealt with the subject linguistically i.e. from the point of view of its root meaning. This meaning is "to strive." Secondly he approached the subject from the point of view of the teachings of the Holy Qur'an. Thirdly he looked at the subject historically by referring to the Muslims in Mekka and at Medina. He then examined it against the background of the Hadith and then the Bukhari (a commentary on the sayings of the Holy Prophet). Finally he viewed the subject in the light of the writings of Muslim religious scholars.

46. He indicated that *jihad* and "war" are not synonymous. Indeed the Holy Qur'an itself distinguished between *jihad* and *qital* (fighting or war). Undoubtedly *jihad* can mean fighting and physical warfare. The witness stated this and referred to the situation of the Muslims in Madina. The unbelievers of Mekka decided to attack Madina to annihilate Islam and the Muslims by the sword. It was then that God permitted the Muslims to conduct *jihad* with the sword, because not to do so would have meant suicide for the Muslims. At that time the following Quranic verse was revealed :—

".....Permission to fight is given to those upon whom war is made, because they have been wronged and God is well able to help them...."

According to the evidence four conditions must be present for allowing *Jihad* by the sword ;—

- (i) fighting has to be initiated by the unbelievers ;
- (ii) there must be extreme persecution of the Muslims ;
- (iii) the aim of the unbelievers has to be the destruction of Islam and the Muslims ; and
- (iv) the object of the Muslims must only be self-defence and protection.

41. But there is another meaning to *jihad* : the Hadith makes it clear that *jihad* means to exert oneself to the utmost, whether by means of one's wealth or tongue or hands or life, whether it is against one's desires or a visible enemy, whether its aim is to attain nearness to God or to propagate the word of God. The Holy Qur'an and Hadith speak of three kinds of *jihad* :—

- (a) A great *jihad*.
- (b) The greatest *jihad* and
- (c) A lesser *jihad*.

The first two are undertaken constantly, while the third which includes *jihad* by means of the sword, is only undertaken if the special conditions are satisfied. Using the term in its wider significance one classical commentary, commenting on the Hadith, stated that the best *jihad* is to speak the word of truth to a prophet :—

".....It is the best because *jihad* with arguments and proofs is a *jihad* which is greater as compared to *jihad* with the sword which is a lesser *jihad*....."

The view of the Muslim religious scholars strongly support this wider meaning of the term :—

".....The age of the sword is no more. Now instead of the sword it is necessary to wield the pen....."

Thus the term *jihad* has attained a far more significant meaning and a meaning different to that which the Defendants would seek to convey. It is a warfare involving the pen and the tongue instead of the sword and its objective is to capture the minds and hearts of men and not act as a physical opponent :—

".....To change people's views by means of the pen and tongue, and to bring about a revolution in their minds, is also *jihad*. And to spend money for this end, and to oneself physically' is *jihad* too....."

".....*Jihad* is derived from *jihad*, meaning literally effort and striving. In the technical sense, it is used for proclaiming the word of God, and the supremacy and success of Islam....."

Not only did the evidence establish that there was a much wider and more significant meaning to the word *jihad* than mere physical warfare, but it established also that it was not one of the Five pillars of Islam :—

".....One more point might be mentioned : *Jihad* or spiritual 'struggle' or 'striving' is not one of the Five pillars of Islam. In proper translation it does not mean 'holy war' except by extension, but it has been debased by this meaning, which is journalistic usage....."

Concerning *jihad* Mirza made his viewpoint abundantly clear. To quote only one passage from his writings :—

".....In our age the pen has been raised against us. It is with the pen that we have been caused pain and suffering. In response to this, the pen is the thing which is our weapon....."

The witness explained why it was necessary for Mirza to write about *jihad*. Many objections against Islam were advanced by Christian missionaries. One of these objections was that Islam had spread by the sword. Naturally Mirza had to reply to this criticism. Secondly, as the ideal about *jihad* which had been spread among people by the Maulvis (spiritual leader) were contradictory to the teachings of the Holy Qur'an it was essential to explain the correct significance of the term.

2. In meeting these criticisms and correcting the false teachings, Mirza had necessarily to deal with *jihad* in terms of physical warfare. He made his standpoint quite clear. I quote from his writing :—

".....It should be known that the Holy Qur'an does not arbitrarily give the command to fight. It gives the command to fight only against those people who prevent others from believing in God, and stop them from obeying His commandments and worshipping Him. It gives the command to fight against those who attack the Muslims without a cause, expel them from their homes and countries, and prevent people from becoming Muslims. These are they with whom God is wrath, and Muslims must fight them if they do not desist....."

Add a further quotation :—

".....But in these times the sword is not used in answer, but the pen and the argument is used to criticize Islam. This is the reason why, in this age, God has pleased that the work of the sword be done by the pen, and the opponents be routed by fighting them with writing. Hence it is not appropriate now for anyone to answer the pen with the sword....."

On the evidence placed before me it is clear that Mirza's convictions and beliefs concerning *jihad* fully accord with the teachings of the Holy Qur'an and the Hadith and the religious tenets of Islam.

43. The witness then set about answering some of the allegations levelled at the Ahmaddiyya movement. The witness set his testimony against the background of the teachings of the Holy Qur'an and in particular that Muslims are taught to listen to everyone but to accept only those aspects which are good. Secondly, they are exhorted to try and understand the teachings of the Holy Qur'an and not just to accept them.

44. He then referred to the writings of Mirza and quoted from them. A few short portions are quoted :—

- ".....Believe God to be one without partners....."
- ".....do good to your fellow beings and be people of good thoughts and character....."
- ".....do not hurt with the tongue or hand and refrain from evil and sin....."

- ".....be good and true advisers to all people and do not keep company with evil doers....."
- ".....deliberate calmly, live peaceably and give no one cause for grievance and complaint".

It is quite apparent that there is much goodness in the writings and teachings of Mirza..

45. The witness explained certain misconceptions about the attitude of the *Mahdis* to intermarriage, the saying of prayers with other Muslims, and the joining of other Muslims in funeral prayers. On whatever subject he testified the touchstone of the witness was the religion of Islam as revealed primarily in the Holy Qur'an and the Hadith. Thus it was when he dealt with the subject of the consensus of opinion against the Ahmadis, that he sought his authority in these sources.

46. He indicated that the sources of Islam were four-fold: Firstly the Holy Qur'an secondly the Hadith, thirdly reasoning and fourthly, *Ijma* or consensus.

47. He went on to say that if there is a teaching in the Holy Qur'an there cannot be an *ijma* against it. Similarly, if there is a teaching or truth to be found in the Holy Qur'an or the Hadith, there is no scope for resorting to the other sources i.e. reasoning or *ijma*. He went on to enumerate three principles that emerge from Islamic writings:—

- (i) the opinion of the majority is not necessarily a conclusive argument;
- (ii) the opinion of the majority is not necessarily binding upon the minority;
- (iii) the opinion of the majority is not necessarily evidence of the truth.

He illustrated this by referring to a majority of 99 to 1, where the 1 was truthful and the 99 were untruthful. In Islam, he said, the word of one truthful man must be accepted against the word of 99 untruthful men, although the 1 be much in the minority.

48. The test, he indicated, was not the majority view of opinion, but what is the truth. For this reason the Ahmadis do not accept *ijma* or the majority view, if this is against the Holy Qur'an or the Hadith.

49. Although the witness dealt with the subject of *fatwas* at some length, it is not proposed to deal with it here in any detail. *Fatwas* of kafir or "rulings of heresy" are so frequent among the various Sunni groups and given for such apparently superficial reasons, that they do not warrant special consideration.

50. The conformists have issued *fatwas* against the non-conformists, condemning them as kafir; and the non-conformists have issued *fatwas* against the conformists condemning them in similar fashion. The followers of all the four Imams and the followers of the four Sufi orders have been condemned as kafirs; and so have the Deobandis. The Deobandis, in turn, have declared the Barrelavis to be kafir and the Barrelavis have retaliated in like manner.

51. Not only have various sects of which there are a large number had *fatwas* directed against them, but prominent men within their ranks have been condemned individually.

52. There are *fatwas* against prominent leaders of modern times such as Sir Sayyed Ahmad Khan, Jinnah and Iqbal; and there are *fatwas* of heresy against the early servants of Islam; such as Imam Hanifa, Imam Shafi, Imam Hambal and so on.

53. The witness then dealt with a Muslim's right to enter a mosque. As was his way he based his evidence upon the teachings of the Holy Qur'an:—

".....And who is more unjust than he who prevents (men) from the mosques of Allah, from His name being remembered therein and strives to ruin them? (As for) these, it was not proper for them to enter them except in fear. For them is disgrace in this world, and theirs is a grievous chastisement in the Hereafter....."

He said that all who claimed to be Muslims had an inherent right to entry into a mosque; those who recite the *Kalima* were Muslims and it was they who were entitled to attend a mosque unhindered. It was only idolaters, i.e. those who called themselves unbelievers and therefore became kafir, who lost their right of entry into a mosque.

54. People had been denied entry into mosques for the slightest and most superficial of reasons. This was contrary to the teachings of the Holy Qur'an and contrary to the religion of Islam. Every Muslim is entitled to enter a mosque and perform devotions whatever may be the sect or school to which he belongs. Reference to certain Indian cases supports this viewpoint. See: *Queen Empress v. Ramazan & others* (1885) ILR 7 All 462, *Ata Ullah v. Azim Ullah* (1889) 12 ILR 494, *Khalik Ahmad v. Israfil* 1917 Indian Cases AIR (1955) Allahabad 68.

In *Ata Ullah's* case (at p 504) *Mahmood J* is reported to have said:—

"So long as a mosque is a mosque (that) so long as the plaintiffs are persons who call themselves Mohammedans and entitled to worship, there is absolutely no authority to say that any sect or any creed or any portion of the community can restrain others who claim to have the right which, to use the language of Mohammedan law, GOD and his prophet gave them, from putting such right into exercise".

In the same case *Edge CJ* is reported as follows:—

"No authority has been brought to our notice to show that a mosque which has been dedicated to God can be appropriated exclusively to or by any particular sect or denomination of the Sunni Mohammedans, and without very strong authority for such a proposition, I for one could not find as a matter of law that there could be any such exclusive appropriation. As I understand it, a mosque to be a mosque at all must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual. As I understand it, a mosque is a place where all Mohammedans are entitled to go and perform their devotions as of right, according to their consciences."

(This judgment was concurred in by Straight, Brodhurst and Tyrrell JJ). See also: *Mulla on the Principles of the Mohammedan Law* (Pakistan Edition 1980), at p 222, and *Fyee, Outlines of Mohammedan Law* pp 319 et seq.

55. Condition 2 of the Deed of Transfer of 11 February 1881 which is the document in terms whereof the mosque was founded provides that the mosque shall be:—

“Free for the use of all persons professing the Moslem.”

56. It is clear from the deed of grant (signed in December 1908) that the grant was made in terms of section 6 of the Disposal of crown Lands Act, No. 159 (1887) (Cape) which provides for the grant of land “for special public purposes.”

57. The effect of the grant was to vest the land in question in the trustees as a public cemetery for the benefit of certain groups of persons, *inter alia*, Muslims. See: *In re Consistory of the Dutch Reformed Church, Cape Town* (1897) 14 S.C. 5, 9-10, and also *Honors The South African Law of Trust* (2nd ed) P. P. 36-37.

58. As with the mosque, so with the cemetery, once plaintiff establishes that he is a Muslim he is entitled to the same rights as pertain to all Muslims with regard to burial.

59. It is not open to the Trustees to refuse burial to a Muslim. Cf. *Noordien v. Moslem Cemetery Board* 1965 (4) SA 174 (C).

60. Indeed, this is not Third Defendant's case: Third Defendant asserts that it can decide whether or not Second Plaintiff is a Muslim; this is clearly unsound; not only would it be contrary to Mohammedan usage and customs but also it would be contrary to the terms of the original grant.

61. As far as the right of any Muslim to approach a non Muslim Court for a ruling concerning religious matters was concerned, the witness referred to the sayings and to the experience of the Holy Prophet. He also referred to a *fatwa* concerning the duty of Muslims to protect their mosques.

62. The *fatwa* indicated that to resort to violence in protection of a mosque is not acceptable. Muslims should turn to the secular authorities for a decision. He also referred to other *fatwas* where it was declared that non-Muslim judges could adjudicate on Muslim matters.

63. The witness referred to certain instances in the life of the Holy Prophet where he said that the Angel Gabriel had revealed to him that he ought to appoint a non-Muslim as a judge to determine a particular dispute. Not only was a non-Muslim judge appointed, but the Holy Prophet accepted the judge's ruling.

64. It was quite clear from this evidence that Muslims are expected to accept the authority of the government of the country in which they live.

65. The witness indicated that hindrances were constantly being

placed in the way of Ahmadis despite the fact that they were Muslims. If they separate themselves then they are criticised; if they go to mosques they are ejected. Their right to burial is denied to them. He then asked: what must they do? All that is open to them is to approach the secular authorities for implementation of their rights as citizens and Muslims. He said that *fatwa* arouse the passions of the public and this gives rise to a deprivation of rights. He appealed to the Court for a restoration of such rights, whatever might be the attitude of other Muslims.

66. The witness concluded his evidence by referring to two further matters. The first related to the obituaries of Hazrat Mirza Ghulam Ahmad and other tributes paid to him by prominent Muslims. This aspect of evidence is not dealt with in any detail other than to say that it is quite clear that during his life, at the time of his death and thereafter, Mirza was held in very high esteem. Reference is made to one small part of a quote which seems to sum things up concerning the Founder of the movement:

".....undoubtedly the deceased was a great fighter for Islam....."

The second matter related to the tributes which have been paid to the Lahore Ahmaddiyya movement by prominent Muslims. Here too, the evidence is not dealt with in any detail and comment is confined to one short part of a letter written by Abul Ala Maudoodi (an opponent of the Ahmadis):—

".....However, the Ahmadi group is included in Islam....."

67. The witness concluded his evidence by saying that those who oppose Mirza do not know him, nor have they read his works.

68. In my estimation the witness is a man of great learning and integrity. He gave evidence before me for some six days and created an extremely favourable impression. I accept his evidence without hesitation.

69. The Second plaintiff, Israail peck, then gave evidence. It is obvious that he is a bumbie and sincere person. He was born in the Cape in 1923 into a Muslim family. He was brought up in a staunch Sunni home. His parents were practising Muslim, and he, himself, observed all the practices, rituals and requirements of the religion of Islam. He believed the Kalima, accepted the other four pillars of Islam and expressed no doubt concerning the finality of Prophethood, namely that the prophethood concluded with the Holy Prophet.

70. In about 1957 he became a member of the Ahmadi movement and continued to regard himself as Muslim. Indeed, he was always accepted as such until about 1963 when he was denied entry to a mosque. He expressed the desire, shared by all other Muslims, to be allowed unhindered entry into any mosque, including the mosque on the corner of Long and Dorpe Streets in Cape Town. This desire, he said, arises simply out of the fact that he is a Muslim.

71. Similarly, he would like to be buried in a Muslim cemetery on the same basis i.e. that he is a Muslim. In particular, he would like to be buried in the Vygekraal Cemetery because his father and brother are buried there

72. He testified to the fact that in May 1982 the Movement applied for a welfare organisation number to enable them to raise money for an Islamic centre. This caused the shakhs to incite the Sunni Muslims against the Ahmadiyya movement. The pamphlets (copies of which are annexed to the pleadings) were printed and distributed amongst the Muslim community.

73. He said that he felt very disturbed and offended by this action. To quote his words ;—

"...my world came to an end"

He went on to refer to certain personal incidents relating to the death of his mother and to his relationships with other Muslims and it is quite clear that the attitude taken by the Defendants has caused him deep hurt.

74. He went yet further and indicated that his very life had been threatened. For these reasons he was left with no alternative but to approach the Court. He was a manifestly truthful person and I accept his evidence.

75. The defamatory allegations complained of are that all Ahmadis are non-Muslims, apostates and disbelievers ; that they reject the finality of the Holy Prophet Muhammad ; that they are non-believers and as such are to be denied the right to bury their dead in any Muslim cemetery ; that all business and social intercourse (including marriage) with Ahmadis is prohibited ; and an exhortation to all Muslims to stand up and defend Islam against the Ahmadis (record pages 5, 6, 122, 123, 125—128 ; ) publication is not in issue (record page 488) ; First Defendant, denying that the statements are defamatory, pleads a *bona fide* belief in the correctness of their statements and a right and duty to communicate same—*i. e.* a qualified privilege.

76. The *onus* of establishing the qualified privilege is on First Defendant—it has tendered no evidence in regard thereto.

77. To say of a Muslim that he is a non-Muslim and an apostate is the gravest possible defamation ; this has been testified to by the expert witness and Second Plaintiff has himself told the Court of the hurt which has been occasioned to him as a result thereof *Lavy v. Molke* 1934 EDL 296, 324 et seq.

78. Second Plaintiff is an Ahmadi, a member of a small group of only some 200 men, women and children in all in this country, and is clearly comprehended within defamation and entitled to seek the Court's protection in respect thereof. See *SA Associated Newspapers Ltd. and another v. Estate Pelsler* 1975 (4) SA 787 (AD) ; *Krupfer v. London Express Newspaper Ltd* (1944) 1 All ER 495 (HC) 497—8 ; *Lavy v. Von Molke* 1934 EDL 296, 315, and also *Gayley on Libel and Slander* (6th ed) p 141. No. 30.

79. Second Plaintiff does not seek damages ; merely an injunction against continued publication of such defamatory matter. Clearly he is entitled to such relief. In the result Second Plaintiff has proved that he is entitled to the various orders which he has claimed.

80. I turn next to consider the question of costs. Before Mr. Desai

and his clients withdrew from the Court, at the commencement of these proceedings Mr. King, who together with Mr. Prest appeared for the Second Plaintiff, gave formal notice to the Defendants that an order for attorney and client costs would be sought. It is contended that Defendants behaved un-reasonably and vexatiously in failing to communicate to the Court and to Second Plaintiff their intention to withdraw from the proceedings. Mr. Khan, Second Plaintiff's attorney, gave evidence as to his communication with Defendants. I accept his evidence. I am satisfied that in the light of the discussions between the attorneys, and the exchange of correspondence, in all probability the decision to withdraw had been taken some time ago, and for reasons best known to Defendants, this was kept secret until the actual moment of its announcement in Court. The letter of 21st October 1985 (Exhibit 24) from Defendant's attorneys is in my view a deliberately misleading document. In the light of the long history of the Defendants' strenuously conducted defence no one could have guessed what Defendants had in mind. Nor was the Court or the Second Plaintiff informed as to when the decision to withdraw had been taken, though the inference is clear that it probably was taken before the letter of 21st October was written.

81. The result of all this is that without doubt the Second Plaintiff has unnecessarily been put to considerable further expense in preparing for what would clearly have been a protracted and complicated trial. I view this conduct on the part of the Defendants with disfavour and it is in my opinion only just that in these circumstances I should order them to pay costs on the attorney and client scale in respect of the whole litigation.

82. I have considered whether I should award attorney and client costs only from a certain date but have decided against that course. The Defendants have not seen fit to explain why this decision, if it is indeed one of conscience, was not taken and communicated long ago. Summons was after all served more than three years ago, in October 1982, Mr. Khan also gave evidence on certain other aspects relating to costs which satisfied me as to the reasonableness of getting experts and an interpreter from overseas.

83. In the result I make the following order:—

- (1) As against all three Defendants, Second Plaintiff is declared to be a Muslim and as such to be entitled to all such rights and privileges as pertain to Muslims.
- (2) As against First Defendant, First Defendant is interdicted from disseminating, publishing or otherwise propagating false, harmful, malicious and defamatory matter of and concerning members of the Ahmediyya Anjuman Ashati Islam Lahore South Africa, including Second Plaintiff, to wit, that such members are non-Muslims, disbelievers, kafir, apostates, Murtads that they reject the finality of the Prophet-hood of Muhammad, that they are non-believers and as such are to be denied admittance to mosques and to Muslim burial grounds, and that marriage with an Ahmadi is prohibited by Muslim law.
- (3) As against the Second Defendant, Second Plaintiff is declared to be entitled to admittance to the Malay mosque situate at the