2024:BHC-OS:6579

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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 337 OF 2014

Taher Fakhruddin Saheb
alias **Taherbhai K Qutbuddin**
alias **Taher Bhai Qutubuddin**
Aged 47 years, Indian Inhabitant, residing at Fourth Floor, Flat 1, Al-Azhar, Saify Mahal, Malabar Hill, A.G. Bell Road, Mumbai 400 006 and having a residence at Darus Sakina (Madhuban Bungalow), Pokharan Road Number 1, Upvan, Thane (W) 400 606 **... Plaintiff**

~ VERSUS ~

Mufaddal Burhanuddin Saifuddin,
Aged 67 years, Indian Inhabitant, residing at Burhani Manzil, 2nd Floor, Saify Mahal, Malabar Hill, A.G. Bell Road, Mumbai 400 006 **... Defendant**

APPEARANCES

For The Plaintiff

Mr Anand Desai, *Advocate*

With:
Chirag Mody, Nausher Kohli, Samit Shukla, Saloni Shah & Shivani Khanwilkar, *Advocates*

— i/b DSK Legal

For The Defendant

Mr IM Chagla, *Senior Advocate*
Mr JD Dwarkadas, *Senior Advocate*
Mr FE DeVitre, *Senior Advocate*
Mr Pankaj Savant, *Senior Advocate*
Mr Firdosh Pooniwalla, *Senior Advocate*

With:
Azmin Irani, Abeezar Faizullabhoy, Shahen Pradhan, Murtaza Kachwalla, Jehaan Mehta, Ammar Faizullabhoy, Chirag Kamdar, Juzer Shakir, Jaisha Sabavala & Mustafa Maimoon, *Advocates*

— i/b Argus Partners

CORAM:
GS PATEL J

JUDGMENT RESERVED:
5TH APRIL 2023

JUDGMENT PRONOUNCED:
23RD APRIL 2023

JUDGMENT

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A. INTRODUCTION

I General Background

1. By any measure, ten years is a very long time for a lawsuit to come to final judgment. But this case is not just about the time it took. Voluminous pleadings, over ten thousand documents of various description including historical texts going back several centuries, nearly a dozen witnesses with depositions of many thousands of questions and pages, and arguments that, even in a severely curtailed form ran for over a month, all ensured a prolonged trial. In our court, this case is perhaps unique that it began and ended with one judge (and, to put it more piquantly, of the judgeship itself almost beginning and certainly ending with the case) rather than passing from one judge to another. The Plaintiff's evidence was completed in court itself, not before a commissioner for recording evidence, which, too, is fairly unusual. So was some of the Defendant's evidence. The rest went to a commissioner. Then came the business of sorting through that evidence.

2. By then, the documents that had been compiled had run through an utterly extraordinary discovery and inspection process that included multimedia (audio and video both, plus photographs). There were compilations of compilations, and some of the titles of these multi-volume compilations bordered on the bizarre.

3. Covid and the pandemic lockdown interrupted the until then fairly orderly progress in the trial. Technology came to the rescue and the contesting parties and I were able to complete a portion of the trial during the lockdown by deploying some unusually sophisticated internet links: the witnesses were in London, the lawyers were scattered across Mumbai, my staff and I were in the High Court. We had two parallel high-speed internet lines, one for the actual cross-examination and the other linked to the real-time transcript so that everyone could see the questions and answers being recorded. The entirety of the evidence is in question and answer form.

4. By the time final arguments began, the record had ballooned out of all proportion. By agreement, everyone moved to a digital, soft-copy version with appropriate hyperlinks to the digitized record. The level of assistance in the technology, apart from the formidable forensic skills, must be commended. Without it, this was not possible.

5. Yet, the issues are only five. Their impact is, however, much more profound. Leaving aside the more mundane issues such as maintainability, the central issues will affect a community across the globe. For this reason, from the beginning, I ensured open access both in the court hall itself and also online through the hybrid video-conferencing option. The hearings were open to all. During the final arguments, attendance ran to several hundred people online. Except for one minor kerfuffle with a newspaper, there was no untoward incident.

II What the case is about

6. In a word: *control*. Control not of property, despite the wording of some reliefs in the plaint, but the kind of control that is both invasive and pervasive — control over the entirety of a particular faith, and, with it, of a way of life. It is not a case only about jockeying for a particular position (let alone a rank). This is entirely because of the nature of the position in question within the faith — it is, as we shall see, not just of the order of a papacy in terms of numbers and adoration, but something far more profound; and accepted as such. Of the leader of the Dawoodi Bohra faith, the Dai al-Mutlaq or Dai or the Syedna, there is an acceptance of utter infallibility, even of divinity (or as close to it as a mortal may get), and an absolute commitment to the Dai's complete authority at the most personal and intimate levels.

7. The 52nd Dai in line, Syedna Mohammed Burhanuddin Saheb, died on 17th January 2014. The Defendant said he had been appointed — I use this word loosely at this stage; it is at the heart of the suit — the successor, the 53rd Dai. The original Plaintiff, the present Plaintiff's father, Khuzemabhai Qutbuddin, brought suit. He claimed it was he, not the Defendant, who was the rightful successor. He had, he said, been so appointed decades earlier.

8. The faith split. Each rival had his own followers. After Khuzemabhai died — his evidence was taken in Court — his son, Taherbhai Qutbuddin, stepped in (as his father's appointed successor). Nothing turns on this amendment, so I will rid myself of

it immediately: the application for amendment was opposed saying that the suit had abated, but I allowed the amendment. The Defendant did not appeal. The suit went to trial with the amendment and Taherbhai Qutbuddin as the Plaintiff.

9. I will turn to the prayers presently, but it was clear from the start, when an application for interim relief was made and which I declined to decide saying that the suit itself should be heard, that the entire contest was always about control. But the picture that gradually emerged, though some of this is common knowledge in Mumbai and India, began to show that this was, at some subliminal level, about something far weightier: it was about dominion over the entirety of a faith, all its adherents, their lives; and yes, about dominion over a staggering amount of money and wealth, the dimensions of which are difficult to discern.

10. The claim is undoubtedly a civil claim, one that agitates a civil right. That this may have wider consequences to the faith is immaterial. Most emphatically, I was clear that I was not being asked to decide who of the two *should more appropriately* be the Dai. That would be purely a matter of faith. I was asked to decide which of the two had proved, in accordance with civil law, the claim to having been properly appointed following proven doctrine, as the 53rd Dai.

III A caution to the faithful — and their lawyers

11. As the trial progressed, it became evident that, no matter what the outcome, I was presiding over a schism in the Dawood Bohra

faith. This is not the first schism is Shia Islam; but it is undoubtedly one I always wished had not happened.

12. The faith runs deep. The split was not much spoken about, but it was clearly bitter. Families broke apart. The two camps were divided, even if their numbers were unequal.

13. From the beginning, I made it clear to both sides that while the issues formally struck in the suit required an assessment of doctrine but also demanded proof of the rival narratives, I would not accept an assault on the character of the principal contestants. It was one thing to impeach credibility of *the evidence of a witness*. It is quite another to attribute sinister motives and worse to the opposite party. This interdiction on an attack on character just had to be done, for the schism had a physical manifestation in my court: those for the Plaintiff sat on one side, those for the Defendant on the other, and they kept a clear distance. Anything less restrained would have led to chaos and disorder in court. Above all, I stressed that I was conducting a *civil* trial about a claimed *civil* right, not a theological or religious one. The Evidence Act would rule, not emotion or sentiment or perception of doctrine.

14. This was important because of a crucial aspect of the matter. The Defendant claimed to have been appointed more than once. The Plaintiff assailed each claim. But the last claim by the Defendant was at a time two years before the 52nd Dai's demise, when he was taken ill in London. From that time, and until his passing, the Plaintiff said, the 52nd Dai 'lacked the necessary capacity' to make a valid

appointment. This is more or less of a stripe of the kind of opposition one typically encounters in a contested testamentary action, where the allegation is that the testator lacked the necessary 'capacity', meaning she or he was too ill and too infirm physically and of insufficiently sound mind, memory and understanding to know what she or he was doing. This was accompanied by a case that the Defendant exercised what I can only describe as 'undue influence' on the 52nd Dai. Now had this been a case of an ordinary testator, there would have been no difficulty in assessing this challenge on the merits of the evidence led. But no Dai is in any sense 'ordinary', at least not in the faith. He is regarded as the Imam's representative on earth, an aspect I outline in the next section, and is considered to be infallible. In particular, his choice of successor, the Plaintiff himself said, could not be questioned — nor revoked, altered or changed. It was divinely ordained, and known by divine inspiration to the Dai and to the Dai alone.

15. This presented an immediate conflict. On the one hand, there was the acceptance of infallibility. And yet the Plaintiff had to navigate this course of maintaining that the 52nd Dai (at the relevant time, during his hospitalization in London and after) was *not* infallible. To the contrary: he was so enfeebled and so fallible that he knew not what he was doing. It was the Defendant, not an Imam and not Allah, that guided the 52nd Dai's hand. Self-evidently, for a faith with such belief, this is potentially explosive, even leaving aside any logical, moral and theological conundrums it presented. After all, how could the Plaintiff, who claimed succession from the 52nd Dai, and who said he was infallible, and his choice was by divine inspiration of something divinely ordained, also maintain that the

52nd Dai was under compulsion and lacking the necessary mental capacity to know what he was doing? On the question of infallibility of choice, indeed, I myself once put a question to the present Plaintiff. I asked what was to happen if a Dai's chosen successor died or became incapacitated or suffered some disability that prevented him from functioning normally? The answer by the Plaintiff was that this could never happen, *because the Dai was infallible and his choice, being pre-ordained and divinely communicated, could not be wrong.* A chosen successor may pass away before he takes the mantle of a Dai, and a Dai himself might fall ill, but a chosen successor could never be incapacitated.

16. Seeing all this, more than once I asked counsel to find a way to balance the demands of the case against further commentary, and not to carry the matter to a higher pitch. All counsel agreed at once, and the cross-examination and the arguments were appropriately moderated, even muted. Those who were not directly engaged in instructing solicitors or counsel but came to attend the proceedings understood and were, too, throughout sober and restrained. The surface at least remained calm, never once being allowed to be disrupted by the turbulence beneath. I must appreciate this conduct of all at the beginning of this judgment; it made my task easier (and allowed for moments of shared lightness and levity).

17. I follow suit. I have refused to comment on the persona, let alone the character and qualities, of either the Plaintiff or the Defendant. I have limited myself to what I believed, and still believe, to be the sole concern of any civil trial court anywhere — matters of proof.

IV The lawyers and the support team

18. The legal arsenal on display was formidable by any measure. On each side, there was an army of assistants and juniors. After a brief dalliance with a senior counsel, Mr Desai led for the Plaintiff, assisted by Mr Mody, Mr Kohil, Mr Shukla, Ms Shah and Ms Khanwilkar. From the beginning, Mr Desai clearly knew what he was up against, and the mountain he had to climb.

19. On the other side, for the Defendant, Mr Chagla led the charge for the Defendant and was present throughout until 2020 and Covid. His mainstay was clearly Mr DeVitre, who seemed somewhere along the way to acquire a discernible proficiency in Arabic (while also putting on display his romance with the Oxford comma). Until the final hearing, Mr Dwarkadas was an occasional visitor on the Defendant's team. Mr Savant was present throughout to assist. Mr Pooniwala somehow managed to keep all the seniors on track. Relegated to the second row was Ms Irani, a sedulous keeper and tracker of documents in evidence, their complex and bewildering numbering and more, never once wrong in calling the correct number. And there was the rest of the team behind them. We lost far too much time in Covid. When Mr Chagla encountered some health issues, Mr DeVitre took over, especially during the cross-examination before the Commissioner and final arguments. He and Mr Dwarkadas divided the submissions between themselves.

20. The assistance on both sides has been exceptional. My thanks to every single lawyer before me.

V The structure of this judgment

21. This judgment is probably shorter than expected, but longer than I wished. I have not structured it conventionally. There are at least three departures from accepted practice in deciding suits. First, after this introduction, I have attempted a short history (or is it biography?) — unbidden, I might add — of the Dawood Bohra community (not intended to be authoritative, culled from different sources including ones on record, and avoiding discussion of divergences). I came to this late, and on my own, but believed it to be necessary for a clearer understanding of the origins of the faith and why this suit was so bitterly contested.

22. I have then proceeded to summarize the plaint and written statements (there was a second one after the plaint was amended), proceeded to the issues.

23. After this comes my second departure from convention: a separate section on the Evidence Act, some of its provisions, a general assessment of the approach and other governing legal principles. Again, this has a selfish interest. Once the general principles were set out, I had to then assess the evidence against those principles. This made it simpler, easier and shorter than the alternative, which was to take every single nugget and put it under an evidentiary microscope. After all, this is a civil trial, not a criminal one. I have to assess, as I will discuss, likelihoods and probabilities — and the preponderance of probabilities. There are overarching principles that govern civil trials, and I will visit some of these

(including relating to hearsay, inferences, probative burdens, presumptions and expert testimony) in this section.

24. It is the Evidence Act that must be my guide throughout; nothing short of it will do. When we see what it says, it will become clear that in a civil trial it is the *overall assessment* of the evidence that matters.

25. I have then gone on to a very brief overview of the evidence, only to identify those who gave testimony.

26. After this, I have proceeded conventionally, taking the issues in the manner I thought most appropriate. Then there follows the final order, which is this: I have dismissed the suit.

B. THE DAWOOD BOHRAS: A SHORT HISTORY

27. *'Islam': submission to the will of God*. This monotheistic religion, one of the three Abrahamic religious groups with Judaism and Christianity, centres on the Quran and the teachings of Muhammad, the acknowledged founder; held to be not just a prophet, but *the* Prophet.

28. It is probably fair to say that the history of Islam is a story of schisms. These began immediately after Muhammad, when the faith split into the Sunnis, today the largest denominational group, and the Shias. The differentiation is crucial to an understanding of what follows in relation to the Dawoodi Bohras. Sunnis believe that the first four Caliphs were Muhammad's rightful successors. The Shias, the second largest group, split with the Sunnis over the issue of Muhammad's successors — and succession, as we shall see, is central to this case.

29. A turning point in Islamic history is the event at Ghadir Khumm, on Muhammad's return from his last pilgrimage to Mecca. It is here, at Ghadir Khumm, that Muhammad is said to have appointed his cousin (and son-in-law), Ali as his successor, and bade his flock follow Ali. There is a statement about wills, testaments, authority, but the Shias all hold that Ali was Muhammad's successor and — this is important — the next *Imam*, or spiritual and political leader after him.

30. In the Shia branch, the 'Twelvers', also I believe called the Ithna or Isna Ashari, are the largest. While some of the first Imams are commonly revered in Shia Islam, the Twelvers believe in the first twelve, the last of whom is said to have gone into occultation, to return one day as the Mahdi. An 'occultation' occurs when one object is hidden from view by another that passes between the viewer and the object (not to be confused with an *eclipse*, which is the casting of a shadow). An occultation is a blocking from view — a distant object is obscured by one closer. In Shia Islam, this is an eschatological belief: the Mahdi, a descendant of the prophet Muhammad, has been born, and was concealed; but he will re-emerge on the day of judgment (or the end of time) to establish or re-establish justice and peace on earth. The Twelvers believe that the 12th Imam to be in occultation.

31. The Shia belief in Ali's succession directly developed into the concept of the Imamate, the credo that Muhammad's descendants and Ali's bloodline are the rightful leaders or Imams of Islam. Within the Shia group, there are other subsects, including, for our purposes, the Isma'ilis.

32. Another historical event key to Shia Islam is the Battle of Karbala, fought on 10th October 680 AD. The Umayyad Caliphate had nominated a successor. This was contested by the sons of some of Muhammad's followers, including Muhammad's grandson, Husayn (Ali's son). Husayn refused to pledge allegiance to the appointed Caliph successor. He travelled to Mecca. En route to Kufa, an garrison town in Iraq, Husayn's caravan, which had about 70 men, was intercepted by the Caliph's much larger 1000-strong force.

Husayn was forced to turn north. He camped on the plain of Karbala. On 2nd October 680, a larger Caliphate force arrived. The local governor refused Husayn safe passage unless Husayn submitted to his authority. Husayn refused. Battle was joined on 10th October 680. By all accounts, it was a massacre. Husayn and most of his relatives were killed. His surviving family was taken prisoner. This incident gave an impetus to the development of Shia Islam. Husayn's suffering and death are much written about (and taken as a historical tragedy in Sunni Islam as well). They are the subject of sermons to this day. His is said to symbolize a sacrifice in the battle of good over evil, right over wrong, justice and truth over injustice and falsehood. The battle itself is commemorated to this day every year during an annual ten-day period of mourning called Muharram.

33. The Isma'ilis and Twelvers both accept the same first six Imams. The Isma'ilis broke from the Twelvers when they accepted Isma'il ibn Jafar al-Mubarak as the appointed successor to the sixth Imam of the Twelver branch of Shia Islam. The Twelvers believed the successor was Musa al-Kadhim, Isma'il's younger brother who was the successor.

34. Between the 10th and 12th centuries CE, the Fatimid Caliphate, an Isma'ili Shia dynasty, controlled a vast area from the Mediterranean and Red Seas, covering parts of North Africa and West Asia. The dynasty traced its roots back to Muhammad's daughter, Fatima, and her husband Ali.

35. Within Ismail'ism, further sub-sects came into being. At the time of the 19th Imam (around the 11th and 12th centuries CE), the Musta'li accepted al-Musta'li as the 19th Imam (and the ninth Caliph). The Nizaris held that the true successor as the 19th Imam was al-Musta'li's elder brother Nizar. The Musta'li branch began in Egypt — and the Dawoodi Bohras still have strong ties there — under the Fatimid Caliphate. It then moved to Yemen, which was the springboard for the advent of the group into western India. The Nizaris follow the Aga Khan; in parts of India and Pakistan, the Khojas are a predominantly Nizari Ismai'li community.

36. The next split is the one in the Musta'li branch, at the time of the death of the 20th Imam, around 1131 or 1132 CE. His infant son, Abūʾl-Qāsim al-Ṭayyib ibn al-Āmir, was appointed the 21st Imam. The 20th Imam was assassinated (1130 CE).

37. At this point, there enters the narrative one of the most remarkable personalities in the history: Queen Arwa al-Sulayhi. She is said to have been the only Muslim woman to have ever wielded both political and religious authority in her own right. She was the long-reigning rule of Yemen, initially along with her first two husbands, and then on her own from about 1067 CE until her death in 1138. She was conferred the prestigious title of Hujjah, which, in Ismai'li doctrine, meant that she was the living representative of the will of Allah. Popularly, she is known as Hurrat-ul-Malikah or Al-Hurrat ul-Malikah, or some variant, the Noble Queen. There were indeed other female monarchs. But only Queen Arwa (and her mother-in-law Asma) were, as monarchs in the Muslim world, to have had the

khutbah — a formal sermon event — proclaimed in their own names in mosques.

38. Queen Arwa was in Yemen when the 20th Imam died. There is, in these records, reference to a communication or missive from the 20th Imam to Queen Arwa. He entrusted his infant son to her care. It is she who established in Yemen the office of the Da'i al-Mutlaq to act as the vice-regent of the 21st Imam while he was in occultation. Thus began the succession line of the Dai. Zoeb bin Musa was the first Dai. The present case is about the appointment of the 53rd Dai. They follow the son of the murdered 20th Imam — hence, Tayyibis.

39. By now, the Musta'li Tayyibi had established a foothold through missionaries in western India, where there was initially the office of representative or caretaker to tend to the flock.

40. This situation continued from the first to the 24th Dai (around the 16th century CE), with the Dais being in Yemen and appointing representatives in India. It was under the 25th Imam that the faith shifted to India.

41. Now came the next split, this time in the Tayyibi group. It was about the succession as the 27th Dai, and the contest was between Dawood bin Qutubshah and Sulayman bin Hassan. Those who followed Dawood bin Qutubshah became the Dawoodis. The adherents of Sulayman became the Sulaymanis of Yemen. Sulayman claimed to have been appointed in writing by the 26th Dai, Dawood bin Ajabshah, of which writing Qutubshah was himself said to be the

scribe. Qutubshah claimed that Ajabshah had appointed him, not Sulayman. As we shall see, this discord is frequently referenced especially in regard to the mode, manner and tenets governing the appointment. A protesting Sulayman carried his plaint (a case of usurp; not much different from what is before me in this law suit) to court (that of the Emperor Akbar). In Lahore, and before he could reach the court, Sulayman died apparently from consuming a poisoned pickle. Akbar held for Qutubshah.

42. In 1621 CE or so, a small faction separated regarding the succession after the death of the 28th Dai. The breakaway group became the much smaller Alavi Bohra community. There have been other factions: after the death of the 39th Dai in 1754 CE; and after the death of the 46th Dai in 1840 CE (a group that itself splintered in two).

43. Thus, the Dawoodi Bohras are Tayyibi Musta'li Ismai'li Shias. They are governed by Fatemi or Fatemid law. The word *Bohra* appears to have nothing at all to do with Islam or any of these sub-sects, but is rather a reference to the primary or traditional occupation of a trading community.

44. A fundamental tenet is the belief in the existence of the Imam on earth. He is occultation, and his work is done by the Dai. Critical to the survival of the faith is succession to the office of the Dai. This happens through what is called a *nass*, each Dai appointing his successor. 'Nass' is an Arabic word. It has many meanings in translation, and there was some expert testimony on this. It may mean

a known, clear and legally binding injunction or mandate, a divine decree, a designation, a nomination, a testament or will, or some form of a theological imperative. Among the Dawoodi Bohras, the pronouncement of a nass is, above all, a solemn and sacred duty of each Dai. He *must* appoint a successor. The choice is his, but it seems to be commonly accepted that it is divinely inspired. There was an argument by the Plaintiff that it is *pre-ordained*, which is to say that the Dai has little choice but to pronounce that which has been determined for him.

45. At the heart of the contest in this case lie two fundamental questions: *First*, how is a nass properly made? And *second*, once made — that is to say, if shown to have been made — can it ever be retracted, changed or altered, or is it forever immutable? These are questions of doctrine, but they directly speak to the frame of the suit, for it is the Original Plaintiff's case that he was *first* so anointed by a proper nass, and any later pronouncement was ineffective. In answer, the Defendant says two things: First, on facts, that there was no nass conferred on the Original Plaintiff at all at any time; and, second, that even if there was, it could always be changed; and the last nass — the one at the time of the Dai's passing — would be the only one that governs.

46. As we have seen, the history of the Dawoodi Bohra faith is a tale precisely of recurring wars of succession. That succession is crucial is undeniable: he who succeeds controls everything and everyone. Some of the stories are tragic, and the battles bitter. There were assassinations aplenty. There was Sulayman and the poisoned pickle. The Emperor Aurangzeb also imprisoned not one, but two,

and their travails are spoke of to this day. Other stories are altogether more Rabelasian. There is one, for instance, of the two sons of an Imam bickering about who would be the successor. Along came the father and figuratively smacked their heads together. "The true Imam," he said, "is yet to be born…"; and the text tells us that as he said this the 18th Imam pointed to his 'blessed loins'.

47. The Dawoodi Bohras are nothing if not the most assiduous chroniclers. They document and record everything. There are many Dawoodi Bohras in our profession, but even within the most private places, there seems to be an emphasis on documentation, record-keeping and some degree of formality to these documents (whether or not the formality comports with law is another matter). As we shall see almost immediately, this documentation and record-keeping — or, more accurately, the lack of it — is a crucial facet of the affirmative case on either side. Specifically, the Defendant has never failed to point out that the Plaintiff has no record at all of his claim, and that this is in direct contrast to the voluminous documentation of the Defendant's claim.

48. Some of the language is difficult to navigate, even in accepted translation. It is much given to excessive hyperbole. To call it flowery is an understatement. Sometimes, it seems that an entire Mughal garden has been dragged into a single thought. The most delectable Indianism shrivels in comparison to, say, 'the coolness of my eye'. Much of it is self-referential or elliptical, or both; and to parse a strand of theologically sound doctrine or tenet from this is no easy task. The discourses are also not just textual. Vast amounts are in the form of sermons, words spoken, and these — the Dawoodi Bohras being

incorrigible annalists — are dutifully recorded (again with the best of equipment, all self-operated). The 'best' sermons are by the most 'learned', and the quality of the sermons is taken as an indicator of doctrinal learning and wisdom. These sermons have certain set elements. Recounting of historical incidents is one key feature, and is used to lay out a path to proper conduct. Sometimes, it takes the form of a parable. Of necessity, past incidents are, like all history, subject to interpretation — and this, too, has been the focus of much contestation in the trial. Another key element is grief. A good sermon must be able to convey profound sorrow and grief. Typically, the sermon-giver will expound on a tragic past incident, sometimes one of several centuries earlier; and then, expressing sorrow and grief, will turn his face into a fine white handkerchief and sob audibly. At this, the entire congregation will burst into a sympathetic wail. Used as we are to canned laughter on television sitcoms, watching a video of such a sermon can therefore be more than somewhat discombobulating. But the point, I think, is more straightforward: it is a preoccupation, perhaps even an obsession, with the past; and in a concept familiar to those of us in law, of following precedent as a prescription for a life according to the faith.

49. Today the Dawoodi Bohras number over one million across 40 countries. They have a presence from China to the United States. As a community, they are known to be reasonably well-educated and literate, and engaged in trade, business, profession and entrepreneurship. Their garb is traditional and easily identifiable; their lifestyles are often very au courant, especially among the wealthier. Many traditions follow or adapt from Indian custom. There is an identifiable Bohri cuisine, the festive one of which that always

begins with ice cream (on the salutary principle, presumably, that if life is uncertain, one is well-advised to eat dessert first), progresses to a savoury, and then to the main meal. They have always had a pronounced partiality to sugary liquid concoctions, nowadays in the form of cola and flavoured soda drinks (including, I might add, at around 4 pm daily in a discreetly sleeved glass in my court in the middle of the Plaintiff's cross-examination, the pop-and-fizz quite unmistakable). Their dress is distinctive. Traditionally male attire is a predominantly white, three-piece outfit: tunic or kurta-like garment, a long overcoat and loose trousers with a embroidered white cap (that never comes off, even in court). Flowing beards are *de rigeur* (and are often stroked thoughtfully at critical junctures in a cross-examination). Ladies wear a two-piece dress called a rida, quite unlike a hijab, purdah or a chador. It can be of any colour except blank, has decorative designs and lace, and does not cover the face though there is a flap that can be pulled across the visage when desired.

50. The language is Lisan ul-Dawat, said to be a dialect of Gujarati. Many words and expressions and phrases are indeed liberally salted with Gujarati, but the vocabulary is also intensely Arabic, Urdu and Persian, written in a particular right-to-left style. In the community, there is a compulsory zakat or donation to a pooled fund — annually, this is vast. They have also kept abreast with technology; I doubt there was an electronic gadget in the market that did not find its way into the court, and sooner rather than later. There were incessant upgrades. In the city, and through a dedicated trust, the Dawoodi Bohras are undertaking a massive revamp and cluster re-development of one of the most congested wards. The Dawoodi Bohras are also builders — they build mosques and establish libraries everywhere

they have a presence. This traditional activity meets technology for they now have e-Jamaat cards that can track when and how often a member of the flock has (or has not) prayed. In Mumbai, the Syedna and close family live at Saifee (or Saify) Mahal at Alexander Graham Bell Road, Malabar Hill. This is, by all accounts, a complex of several floors and structures, interconnected yet with separate apartments, and some shared common facilities (such a community kitchen optionally available). The Syedna has his own residential and work quarters here. The Syedna is not confined to these premises. There is frequent travel both domestic and overseas (where, too, the Dawoodi Bohras own substantial properties and appear to be able to command first-rate hospital facilities without much heed to the regular rules applied to others).

51. An overall impression is that this is a closely-woven community tied intimately to the faith, yet in matters mercantile fully integrated into society in various fields of endeavour, including banking, trading, manufacturing, architecture, engineering, medicine, accountancy and law. To be sure there is a reformist faction, but that has never attained a formal separation. For the rest, and until now, the community as a whole is literally steeped in Ismai'li Shia Islam, tracing its lineage all the way back to Gadir Khumm, Ali and the Prophet Muhammad. In the time since, Shia Islam and the Dawoodi Bohras themselves have suffered many splits and splinters and schisms.

52. This is possibly the most recent.

C. THE PLAINT AS AMENDED

53. From this point on, I refer to Khuzemabhai Qutbuddin as the "Original Plaintiff", and the successor Plaintiff, Taherbhai Qutbuddin, as "the Plaintiff".

I The suit and its amendments

54. Syedna Mohammed Burhanuddin Saheb ("**Syedna Burhanuddin**"), the 52nd Dai, died on 17th January 2014. He was the Dai from 1965. The Original Plaintiff sued on 28th March 2014. There was a first amendment in October 2014. The Original Plaintiff died in America on 30th March 2016. The Plaintiff sought impleadment in his stead; I allowed this amendment too, and the Plaintiff re-affirmed the Plaint on 18th March 2017.

55. The plaint is not remarkable for its brevity or concision — and, as I later found, much of what it says is directed to the kind of prima facie case one would have to assess in an application for interim relief rather a pleading properly so called. As framed, it runs to 160 pages without the exhibits and not counting the insertions by amendment. It abandons every known canon and precept of a 'pleading', and includes evidence, arguments and submissions. My task has been to condense this to a fraction of that length, under 10 pages, discerning from it a statement only of facts according to the Plaintiff.

56. Much of the plaint reads like a written statement to the written statement, but that is because it was amended following filings in the Notice of Motion for interim relief.

II The reliefs sought

57. The reliefs in the suit (after all amendments) are these.

(a) that this Hon'ble Court be pleased to declare the Original Plaintiff was appointed as the 53rd Dai al-Mutlaq of the Dawoodi Bohra Community and that he was entitled to succeed as the 53rd Dai al-Mutlaq of the Dawoodi Bohra Community;

(a-1) That this Hon'ble Court be pleased to declare the Plaintiff was duly and validly appointed as the 54th Dai-al-Mutlaq of the Dawoodi Bohra Community by the Original Plaintiff and the Plaintiff is entitled to succeed as the 54th Dai-al-Mutlaq of the Dawoodi Bohra Community;

(b) this Hon'ble Court be pleased to further order and declare that Original Plaintiff being the 53rd Dai al-Mutlaq of the Dawoodi Bohra Community was entitled and the Plaintiff being the 54th Dai al-Mutlaq of the Dawoodi Bohra Community is entitled to administer control and manage all the properties and assets of the Dawoodi Bohra Community including and not limited to community's wakfs and trusts, and assets / properties which have been presently usurped by the Defendant;

(c) that the Defendant be ordered and directed to handover to the Plaintiff possession of the various movable properties which are more particularly described in Exhibit "SSS" hereto, which has been usurped by Defendant upon the death of the 52nd Dai al- Mutlaq;

(d) that the Defendant be restrained by a permanent

order and injunction from in any manner holding himself out as or doing any acts, deeds or things as the Dai al-Mutlaq of the Dawoodi Bohra Community;

(e) that the Defendant by himself, his servants and agents be restrained by a permanent order and injunction from in any manner preventing or obstructing the Plaintiff from carrying out his duties as the 54th Dai al-Mutlaq or in any manner threatening or taking any steps against members of the Community who believe in the Plaintiff;

(f) that the Defendant, his servants and agents be restrained by a permanent order and injunction from in any manner preventing the Plaintiff from entering and using Saify Mahal situate at A.G. Bell Road, Malabar Hill, Mumbai 400006, which houses the official office-cum-residence of the Dai al- Mutlaq;

(g) that the Defendant, his servants and agents be restrained by a permanent order and injunction from in any manner preventing the Plaintiff from entering and using Saifee Masjid, Raudat Tahera and all other Dawoodi Bohra community properties (such as mosques, Dar ul-Imarats, Community halls, mausoleums, schools, colleges, hospital, maternity homes, musafirkhanas, cemeteries, offices, etc.) more particularly described at Exhibit "III" hereto to conduct audiences, prayers, sermons, etc.;

(h) that the Defendant, his servants and agents be restrained by a permanent order and injunction from in any manner using, selling, destroying, interfering with or exercising any rights over the Dawoodi Bohra Community's wakfs and trusts, and assets / properties to which the Dai-al-Mutlaq is entitled by virtue of his office;

(i) that the Defendant be directed to furnish to the Plaintiff complete particulars of the assets / properties to which the Dai-al-Mutlaq is entitled by virtue of his office, including the database of all the Dawoodi Bohra community

members (ejamaat ITS database) and hand over such assets / properties to the Plaintiff;

(j) that the Defendant be ordered and directed to furnish to the Plaintiff complete particulars of the funds and assets / properties of the trusts, wakfs and assets / properties associated with the office of Dai al-Mutlaq utilised or disposed off or dealt with by him, or under his direction or acquiescence since 4th June 2011 and bring back and deliver such funds and assets / properties to the Plaintiff;

III The parties

58. The Original Plaintiff and the 52nd Dai, Syedna Burhanuddin, were brothers. The 51st Dai had twelve sons by four wives. The Original Plaintiff was the eleventh; Syedna Burhanuddin was the eldest.

59. The Defendant is the second son of the 52nd Dai, Syedna Burhanuddin. He is also married to the daughter of the 51st Dai's fourth son, Yusuf Bhaisaheb, which would make the Defendant the nephew of the Original Plaintiff. The Defendant was also once married to the Original Plaintiff's daughter and, therefore, was the Original Plaintiff's son-in-law. The present Plaintiff is the Original Plaintiff's son. This means that the Plaintiff and the Defendant are first cousins, the sons of two brothers.

IV The 160-page plaint in nine paragraphs

60. The Original Plaintiff's case is in two parts. The first is about his own nomination or appointment, and has it own time-line. The

second is an effort to dislodge the Defendant's case. Discarding argumentation and evidence, and condensing the factual narrative, the Original Plaintiff's case comes to this:

(i) On 10th December 1965, the 52nd Dai appointed the Original Plaintiff as his Mazoon (one of the highest ranks, said to be the second highest position in the faith; the third rank is the Mukasir), and while doing so at Saifee Masjid, Bhendi Bazaar at the 52nd Dai's pledge of allegiance (misaaq majlis) said some words to the congregation. This, the Original Plaintiff said, made persons of higher spiritual learning that the 52nd Dai had conferred a nass of succession on the Original Plaintiff. At that time, the 52nd Dai was 51 years old and the Original Plaintiff was 25.

(ii) Returning to Saify Mahal (en route making another statement), the 52nd Dai and the Original Plaintiff repaired to the 52nd Dai's private apartments. They were the only two there. The Original Plaintiff understood that he had been appointed a successor. There was no other person present. There was no public announcement of this — at any time. It was 'understood' that this was also the appointment of a Mansoos (successor). The Original Plaintiff said that this was consistent with the wishes of the previous Dai, the 51st Dai. The 52nd Dai gave the Original Plaintiff a finger ring and told him (in private, and orally) that the Original Plaintiff would be the 53rd Dai. The Original

Plaintiff was asked not to reveal this and to hold it in confidence. He did. Later, when asked why he had not publicly announced it, the 52nd Dai apparently said that had he done so, 'swords would have been drawn' — used to bolster that others knew of the Original Plaintiff's appointment, and, too, that had this been disclosed, the Original Plaintiff's life would have been in danger.

(iii) Others, including the Defendant, then paid homage to the Original Plaintiff (offered sajda). This went on for three decades. The Original Plaintiff led all prayers and generally enjoyed high regard and esteem in the community. Many referred to him as 'Maula'. Documents refer to him as holding a high rank and enjoying attendant respect.

(iv) Then the Defendant and his 'coterie', a word with which the plaint is liberally peppered, hatched a plot against the Original Plaintiff to malign him in furtherance of a 'devious scheme'.

(v) No nass could have been conferred on the Defendant at any time. It could not have been done on 4th June 2011 at the Bupa Cromwell Hospital in London, because the 52nd Dai had just suffered a stroke. There could not have been an earlier nass (including the one of 1969 claimed by the Defendant) or a later one, because a nass

once pronounced is irrevocable — and therefore the nass on the Original Plaintiff would govern. Any nass claimed by the Defendant after 4th June 2011 (specifically, on 18th August 2011) is a fabrication; including the later mention by the Defendant of a diary (of which much more later).

(vi) The Defendant is an unworthy candidate for succession as a Dai.

(vii) The Defendant mounted a hate campaign against the Original Plaintiff and being jealous of the Original Plaintiff, usurped the succession.

(viii) The Original Plaintiff was silent, in fealty to the 52nd Dai's wishes, about the nass conferred on him in 1965 throughout the rest of the 52nd Dai's lifetime after the illness in 2011, a period of nearly two and half years — even after the announcement of the Defendant's appointment in 2011 — right until after the 52nd Dai's demise. The Original Plaintiff hoped that the 52nd Dai's health would improve and that he would 'set right the falsehood perpetrated by the Defendant'. The Original Plaintiff feared for the well-being of the 52nd Dai. He did not participate in all but one event where the Defendant presided.

(ix) It was only on 18th January 2014, the day after the 52nd Dai passed away, the Original Plaintiff publicly announced the nass that had been conferred on him in December 1965.

61. The rest is evidence, argumentation and submissions. It is not necessary to summarize or set out every chunk of supporting evidence.

62. Two things stand out in any reading of the plaint:

(i) There is no witness other than the Original Plaintiff to the 10th December 1965 nass;

(ii) That nass of 1965 was not revealed explicitly until after the 52nd Dai died, by which time the Defendant had already been proclaimed as the one on whom a nass was conferred by the 52nd Dai.

V The plaintiff's case regarding a nass of succession, generally

63. As this is crucial to the Plaintiff's case, it is best to summarize the Plaintiff's case on the requirements of a valid nass of succession. The case is set out in a negative form, in the sense that it delineates what is *not* required, rather than attempt to provide affirmative or positive boundaries. As I understood it, the only positive aspect was that there ought to be *some* communication in *some* form, explicit or implicit, of succession.

64. The entirety of the case is hinged on the solitary nass pronouncement of 10th December 1965, at a time when the Original Plaintiff and the 52nd Dai were alone together.

65. First, the factual:

(i) On 10th December 1965, the 52nd Dai conferred nass on the Original Plaintiff.

(ii) This was in private. No one else was present. There were no witnesses. The conferment was oral.

(iii) No one was *ever* told.

(iv) The 52nd Dai told the Original Plaintiff not to reveal the nass, and the Original Plaintiff abided by this injunction until after the 52nd Dai died.

(v) At Saify Masjid in December 1965, the words of the 52nd Dai were sufficient indication to those of higher learning that such a nass had been conferred.

(vi) Even if no one was told, everyone knew of the nass. Therefore, though formally appointed as the Mazoon — the second highest rank — the Original Plaintiff received respect and honour due to a Mansoos, the chosen or anointed successor.

(vii) There is no reason to disbelieve the Original Plaintiff's word since he held the position of Mazoon, unchallenged and unchanged, for half a century.

(viii) Factually, no nass was ever conferred on the Defendant at any time.

66. Next, the doctrinal, according to the Plaintiff:

(i) No witness is ever needed for a nass. The one who pronounces or the one on whom it is pronounced are sufficient and may be deemed to be witnesses, if witnesses are needed;

(ii) Once conferred, a nass is irrevocable. It is pre-ordained and divinely inspired. The Almighty does not err.

(iii) Therefore, the 52nd Dai *could not have ever* conferred a nass on anyone else, whether the Defendant or some other person.

67. This is the case the Original Plaintiff brought to court.

D. THE TWO WRITTEN STATEMENTS

I The first written statement

68. The first written statement seems to take the length of the plaint as a challenge to be met: it runs to five volumes pages with annexures, 1018 pages. The written statement itself is 187 pages. The traverse of the plaint's paragraphs does not begin until page 75. In this summation, I am, of course, ignoring the annexures. Paragraph 6 at page 5 serves up this delectable morsel, entirely forgetting the goose, the gander and the sauce:

> The Plaint is prolix and argumentative and incorrectly includes alleged evidence sought to be relied upon.

(1) Preliminary Objections

69. The Defendant raises preliminary objections:

(i) That this court does not have jurisdiction because the suit is one for a declaration regarding religious privileges and positions, and is therefore not a civil suit.

(ii) That the suit seeks orders in respect of immovable properties and is therefore a suit for land. Since many of these properties are outside the territorial jurisdiction of this Court on its Original Side, and, in any event, without leave under Clause 12 of the Letters Patent, this Court lacks jurisdiction.

(iii) The suit seeks relief in regard to community trusts, many of which are registered under the Maharashtra Public Trusts Act, 1950 and, for those outside the State, under the laws of the states in which they are registered. Change reports have been filed showing the Defendant as the sole trustee. Therefore, the suit is barred, and in any event, needed the written consent of the Charity Commissioner.

(2) The Defendant's affirmative case

70. The Defendant begins by setting out his affirmative case. This is remarkable for one thing above all: the Defendant's claim that he was *repeatedly* anointed the 52nd Dai's successor. He lays claim to four separate pronouncements of nass on distinct dates/at distinct times and in differing contexts:

(i) 28th January 1969;

(ii) In 2005;

(iii) On 4th June 2011 at the Bupa Cromwell Hospital in London;

(iv) On 20th June 2011, in Mumbai.

71. The first two were private. The third and fourth were public — and to the knowledge of the Original Plaintiff and the Plaintiff. The 4th June 2011 nass was later recorded in writing in a notarized document of 2012 and in a Power of Attorney of 2013. Each of these is detailed later in the written statement.

72. From 2011 and until the 52nd Dai passed in January 2014, i.e., for two and a half years, the Defendant functioned as the successor apparent. He was so acknowledged by the entire community — *including the Original Plaintiff*.

73. After the 52nd Dai's demise, except for the Original Plaintiff, the Plaintiff and few others, the entire community recognized, acknowledged and accepted the Defendant as the 53rd Dai.

(3) On the requirement of a valid nass

74. According to the Defendant, the essential requirements of valid nass of succession are these:

(i) It must be conferred in the presence of *at least* two witnesses;

(ii) A nass is freely alterable and revocable. It can be changed in the next instant.

(iii) It is the last nass, at the time of the last drawn breath of the incumbent, that supersedes all and any previous nass;

(iv) The incumbent Dai has the sole prerogative to choose his successor. His choice is not trammelled by the views of his own predecessor.

(4) The Defendant's first claimed nass of 1969: the Champion notebook and after

75. On 28th January 1969, Syedna Burhanuddin was to take a morning flight out of Mumbai for his Hajj pilgrimage to Mecca and Medina. At about 1 am, he summoned three persons to his private chambers on the 1st floor of Saifee Mahal. He conferred nass of the Defendant. The three were witnesses. The Defendant was not told at that time. One of the three, one Yamani, the 52nd Dai's personal secretary, recorded this in writing (in Lisan al-Dawat) in 'a small red notebook which bears the name CHAMPION note book' on its cover. Champion is evidently the brand, not a description of the contents or the author. The 52nd Dai is said to have signed this and made an inscription in his own hand. The 52nd Dai kept the Champion notebook. Yamani was apparently a chronicler and noted this in his own journals. The Defendant learnt of the Champion notebook in 2009, when the 52nd Dai himself showed it to the Defendant. It remained in the 52nd Dai's cupboard until his demise. Another witness, one Tambawala, apparently also made a contemporaneous record in a calendar diary, kept with confidential papers relating to a business enterprise. That diary notes further that the 52nd Dai's flight was delayed to the evening. Tambawala's son found this calendar diary and gave it to the Defendant's brother, Qaidjoher Ezzuddin (the 52nd Dai's eldest son) around 6th February 2014. The Defendant read the Champion notebook entry in public on 4th February 2014 after the 52nd Dai had passed away. He held it up for all to see. This was dutifully videographed. It is also alleged that in 1994, the 52nd Dai mentioned the 1969 nass to Yamani's son, Abdulhusain, who had by then become the personal secretary, and which he noted in a separate book. Abdulhusain in turn gave the book to Qaidjoher. Everyone was asked to keep it confidential — even though very many people clearly knew.

(5) The Defendant's second claimed nass of 2005

76. This is said to have happened in November 2005. The 52nd Dai called two of his sons, Qaidjoher and Malekulashter Shujauddin, to his residence at Bonham House, Ladbroke Road (just off Kensington and Holland Park) in London. Apparently, the 52nd Dai asked both to 'bear witness' that he had conferred nass on the Defendant. The 52nd Dai mentioned the 1969 nass. The two were witnesses. He swore both to secrecy. Qaidjoher disclosed this to the Defendant and other family members, on 4th June 2011 in London after the 52nd Dai had publicly conferred nass on the Defendant.

(6) The Defendant's third claimed nass of 4th June 2011

77. The 52nd Dai was again in London at Bonham House in June 2011. On 1st June 2011, he took ill and was admitted to the Bupa Cromwell Hospital, a short distance away. A mild stroke was later detected. He was attended to by many medical professionals. He was not comatose. He continued his daily routine, after a fashion, praying (first from the bed and then in a chair), reciting the Qu'ran and so on. The 52nd Dai was said to be alert and intelligible in speech, though enfeebled. His children visited him. On 4th June 2011 at about 6:30 or 7 pm, three of his sons were visiting them. They sought his permission to leave. He bade them stay. His daughter was in the adjoining them. There were others, including the 52nd Dai's grandson. Then, seated upright on the bed, he summoned his daughter. He asked them to sit. At about 8 pm, in a weak voice the 52nd Dai began to speak in an oratorial style. Sensing something important in the offing, one of those present asked his son to start

recording on his cellphone. The 52nd Dai mentioned the Defendant by name four times and twice said "to the rank of Dai al-Mutlaq". He said, "we are appointing Mufaddalbhai to the rank of Dai al-Mutlaq," and then added "inform everyone." Then the 52nd Dai asked for sherbet. The three sons, daughter and grandson repaired to Bonham House. On the way, they asked Qaidjoher to join them there. At Bonham House, they informed Qaidjoher. After some delay, they told the Defendant of what had transpired. This is when Qaidjoher is said to have told everyone of the 2005 nass.

78. The 4th June 2011 nass claimed by the Defendant was announced on 5th June 2011 by Qaidjoher at a majlis in London before a congregation of 2000 or so. An audio-recording was played at all Dawoodi Bohra centres worldwide, including India. There was a video recording as well.

79. In India, the audio recording was played at a majlis at Saifee Masjid on 6th June 2011. The Original Plaintiff presided at this majlis. The Defendant claims that the Original Plaintiff thus accepted the Defendant's succession. He also claims that on 7th June 2011, the Original Plaintiff called Qaidjoher and congratulated him on the Defendant's succession.

80. The 52nd Dai was brought back to Mumbai on 17th/18th June 2011 and taken directly to Saifee Hospital.

(7) The Defendant's fourth claimed nass of 20th June 2011

81. 20th June 2011 was the death anniversary of the 51st Dai. The 52nd Dai visited Raudat Tahera an austere mausoleum to pay homage. There was a majlis. The Original Plaintiff was not present. There is a long narrative, virtually minute-by-minute, in the written statement, but the point being made is that the 52nd Dai called the Defendant close to him and appointed him to the rank of Dai al-Mutlaq in public. He did so repeatedly and explicitly used the word 'nass'. There was live broadcast of the entire event. A video recording was later broadcast too.

(8) Reaffirmations

82. The Defendant claims that the 4th June 2011 nass was re-affirmed in a notarised document of 2nd March 2012 and is reflected in a Power of Attorney dated 18th March 2013 that the 52nd Dai executed and then had registered with the Sub-Registrar of Assurances.

(9) Case on 'conduct'

83. Several paragraphs are devoted to the 'conduct' of the Defendant, viz., his assumption of authority and the acknowledgement of this by people in the faith.

84. This is an ancillary argument inviting an inference. We are not really concerned with this, for what is at issue is whether, on facts, the conferment of a nass was proved on both sides.

(10) The requirements of a nass

85. The written statement then asserts that witnesses are necessary for a nass or there must be a public proclamation. This is a question of doctrine. Paragraph is piled on paragraph to adduce evidence.

86. The question of fact asserted in paragraph 13.5 that over 900 years and 52 Dais, nass has always been in the presence of witnesses or by public proclamation.

87. Then the written statement endeavours a rebuttal of the evidence set forth in the plaint. A parallel is drawn between Sulayman (he of the poisoned pickle) and the Original Plaintiff. There is a long evidentiary disquisition on this.

88. Then, on further material, the pleading is that in doctrine, a nass can always be superseded. It is not irrevocable.

(11) Conduct of the Original Plaintiff before 2011

89. Paragraph 17 contains an important assertion of fact, viz., that though appointed to the second-highest rank of Mazoon, did not live up to expectations or the confidence reposed in him in that position. The Original Plaintiff did not accompany the 52nd Dai on many travels, did not participate in major projects and activities. Yet he continued as Mazoon.

90. Here there is mention of a particular incident in 1988 in Kenya. The Original Plaintiff was there for about five months. A dispute arose, allegedly, between the Original Plaintiff and a local community member. The Original Plaintiff allegedly accused that person of plotting to have the Original Plaintiff deported. The community member protested. The 52nd Dai went to Kenya in May 1989, after the Original Plaintiff had returned. He absolved the local member. But all this is narrated to do little more than point a finger at the Original Plaintiff as being unworthy; and this is carried further, as little more than an accusation, in paragraph 17.5.

(12) Conduct of the Original Plaintiff after 4th June 2011 and until 17th January 2014

91. Paragraph 18 of the written statement makes a positive statement that the Original Plaintiff did nothing to assert his claim between 4th June 2011 and 17th January 2014, when the 52nd Dai passed away. He sought no clarification from the 52nd Dai in his own lifetime. He was aware of various events at which the Defendant's appointment was mentioned, and yet did nothing. He even participated and presided over one such.

92. There is mention, too, that he telephone Qaidjoher and conveyed his congratulations on the Defendant's appointment.

93. He said nothing and did nothing when the Defendant presided over a particular function and relegated the Original Plaintiff, though the Mazoon, and despite his claim to being the only true Mansoos, to secondary position.

94. Now this is not merely prejudicial, though it is certainly that. It is a series of factual assertions set out to invite an inference against the Original Plaintiff. Of course these would have to be proved; but the pleading was essential to support any cross-examination or a case in cross-examination or later arguments.

(13) Other matters

95. There are other assertions too, such as the relative positions of the Mazoon and the Dai intended to dislodge the case and suggestion that *as a Mazoon*, and therefore in the second rank, the Original Plaintiff was destined to be the Mansoos.

96. The Defendant also asserts that the Original Plaintiff did not, in fact, keep to his vow of silence and secrecy. Admittedly, he sought legal opinion from a jurist in the 52nd Dai's lifetime.

97. These assertions all relate to conduct and they are directed to setting a foundation for the Defendant's case that the entirety of the Original Plaintiff's case is more than an afterthought. It is, according to the Defendant, very much a latter-day epiphany, an extremely expensive gamble, a ploy to wrest control and simply taking a chance.

(14) The rest of the written statement

98. The rest is the usual paragraph-by-paragraph traverse, with guarded denials and statements of disavowal.

II The Additional Written Statement

99. After the plaint was amended, following the Original Plaintiff's demise and the Plaintiff was impleaded, the Defendant filed an additional written statement. It too has mostly denials.

III The Affirmations of both written statements

100. Neither written statement is affirmed by the Defendant. Both are affirmed by QaidJoher, said to hold a Power of Attorney from the Defendant.

E. ISSUES

I The Issues Framed

101. Issues were struck on 15th September 2014; one issue was recast on 7th October 2014, and then Issue No 3 was split in two by an order of 3rd May.

102. I reproduce the issues with my findings against each:

ISSUE NO	ISSUE	FINDING
1(a)	Whether the suit is not maintainable for the reasons stated in paragraph 1 of the Written Statement?	**NO**
(b)	Whether this Court has no jurisdiction to entertain and try the suit or grant the reliefs prayed for as stated in the Written Statement?	**NO**
(c)	Whether the reliefs prayed for by the Plaintiff in prayers (b) and (h) are barred by the provisions of the Maharashtra Public Trusts Act, 1950 as stated in paragraph 3 of the Written Statement?	**NO**
2.	What are the requirements of a valid Nass as per the tenets of the faith?	**AS PER FINDINGS**
3-A	Whether the Plaintiff proves that a valid Nass was conferred/pronounced on him as stated in the Plaint?	**NO**

ISSUE NO		ISSUE	FINDING
3-B		If Issue No 3-A is answered in the affirmative, then whether the Plaintiff proves that a valid Nass was conferred/pronounced on him as stated in the Plaint?	**Does not arise**
4.		Whether a Nass once conferred cannot be retracted or revoked or changed or superseded?	**NOT PROVED.**
5.		Whether the Defendant proves that a valid Nass was conferred on him by the 52nd Dai:	
	(a)	On 28th January 1969	**YES**
	(b)	In the year 2005	**YES**
	(c)	On 4th June 2011	**YES**
	(d)	On 20th June 2011	**YES**
		as stated in the written statement	
		and if the answer to Issue 4 is in the negative, then whether any Nass proved on the Defendant as above consequently amounts to a retraction or revocation or change or supersession of any Nass previously conferred on the Plaintiff by the 52nd Dai?	**DOES NOT ARISE**
6.		What Judgment and Decree?	**SUIT DISMISSED**

II Analysis of the Issues

103. Issues Nos 1(a), (b) and (c) are all worded in the negative, laying the burden of proving these issues on the Defendant.

104. Issues Nos 2 and 4 are connected. The question of revocability must be answered along with the issue of the essential requirements of valid nass.

105. The burden of proving Issue No 3-A is on the Plaintiff. If this fails, the suit fails. Issue No 3-B will not survive unless Issue No 3-A is answered in the affirmative. Further, Issue No 3-B also depends on the answer to Issues Nos 2 and 4 (the requirements of a valid nass).

106. Issue No 5 is in two parts. The first deals with the affirmative case of the Defendant that he was appointed Mansoos four times. The second part ties to Issue No 4, the question of revocability. On reflection, it is awkwardly phrased for it arises if Issue No 4 is answered *in the negative*. But that issue is whether a nass, once conferred, *cannot* be retracted or revoked or changed or superseded. To answer this in the negative would be to hold that a nass *can* be retracted or revoked or changed or superseded. But the issue, as cast, also connects back to Issue No 3, for it asks whether the nass on the Defendant is a 'revocation' of the nass on the Original Plaintiff — positing that Issue No 3 is answered in the affirmative. But if Issue No 3 is answered in the negative, the second part of Issue No 5 cannot possibly arise — there is simply nothing to retract, revoke, change or supersede. Having answered Issue No 3 in the negative, therefore, I have held that the second part of Issue No 5 does not arise.

III What the Plaintiff/Original Plaintiff must prove

107. To succeed, the Plaintiff must—

(a) Prove that there was, factually, a nass pronounced on the Original Plaintiff on 10th December 1965;

(b) Prove that this nass need not have been made known, and that it is sufficient to prove circumstantially that it was understood to have been conferred by some persons or by a class of persons; and

(c) Prove that a nass once pronounced is irrevocable.

108. The burden of proof, never shifting, is on the Plaintiff.

109. If (a) above is not proved (or is disproved), the suit fails.

110. If *all* these three ingredients are proved, the Plaintiff does not have to *disprove* the case of the Defendant.

111. Then the *onus* shifts to the Defendant to disprove the Plaintiff on all three counts. If the Defendant successfully discharges this onus, he does not need to discharge his own evidentiary burden, i.e., proving a nass on himself; the suit would fail anyway.

112. In addition, if the Defendant proves that at least one nass was conferred on him, and also shows that a nass is revocable or alterable, the suit fails, unless the Plaintiff can show (the onus being back on him) that —

(a) Factually, no nass was ever conferred on the Defendant; and

(b) That no nass could have been conferred on the Defendant.

113. The burden on the Plaintiff is very high; and there was always a distinct possibility that the Defendant would lead no evidence at all.

IV What the Defendant must prove

114. On reflection, and on a closer reading, to succeed and have the suit dismissed, the Defendant is required to affirmatively prove — *nothing*. This is startling, given the pleadings, the evidence and the labour, but I maintain it is correct. That the Defendant has assumed an evidentiary burden is another matter; and since issues are framed I will, of course, address them. But this yet remains: what if the Defendant had set up no affirmative case of any nass on himself at all? Could the Defendant — as a litigation strategy — have rested with disproving the Plaintiff's case on facts and on doctrine, setting up no affirmative case of his own nass, and, at most, leading evidence only of experts on doctrine? I believe that was entirely possible. If the suit failed, and the Defendant did not 'prove' a single nass on himself, what might have been the possible result? The answer is that the community and its doctrine would answer that for itself, not needing any judicial determination whatsoever. Further, this would have obviated the need for the Defendant to lead the evidence of medical professionals in London and to offer them for cross-examination by the Plaintiff. Then the Plaintiff would have had to summon them, take their examination-in-chief in court and climb the very steep hill of

attempting to be allowed to cross-examine their own witnesses (plus encountering the jurisprudence that such a practice is deprecated).

115. But the Defendant having assumed a burden, and a comparatively lighter one, he must prove, albeit without consequence any one nass conferred on him after 1965. Even one will do. All four do not have to be proved.

116. The Defendant also does not have to prove that a nass is revocable, alterable or changeable. The burden lies on the Plaintiff that it is not, for that is the Plaintiff's pleading and case from the beginning — and it is central to the Plaintiff's case.

117. Let me put it differently, to end this part. It is wholly impermissible for a plaintiff to come to court with a case that she or he cannot prove (as we shall see in the next section), and then demand that the defendant should disprove the case set up in the pleadings, but which is not proved by the plaintiff. The simplest example should suffice. In a given case, without setting up an affirmative case in the written statement (and possibly without filing a written statement at all), a defendant could yet successfully destroy a plaintiff's case by showing through cross-examination that it was not proved.

F. LEGAL PRINCIPLES

I Generally

118. In the hurly-burly of endless dockets and briefs, pressing ad interim and interim applications, urgent writ petitions and such like, all of us — judges included — seldom have the time to return to the fundamentals of civil law. Some facet of civil procedure at least is often addressed. But a deeper engagement with that astonishing achievement of codification, the Indian Evidence Act, 1872 seldom comes. For all the technology on display, in this matter it was my good fortune to be greatly assisted by lawyers some distance removed from the quick-fix internet-driven answers of narrow and targeted research. As I said at the beginning, I was also fortunate to be able to actually conduct the trial, itself a rarity, though one that got interrupted briefly by roster changes.

119. It is important, I think, before I embark on an assessment of the evidence to set out the cardinal principles that must guide my hand. Apart from anything else, this will lend some brevity to the discussion that follows, for I will not need to constantly refer to these principles in detail at each stage.

II Civil Procedure

120. For our purposes, the discussion here is on two aspects: pleadings and 'cause of action'.

(1) Pleadings

121. Order VI, Rules 1 and 2 of the Code of Civil Procedure, 1908 ("**CPC**") say this:

> **Order VI**
>
> *Pleadings generally*
>
> **1. Pleading.**—"Pleading" shall mean plaint or written statement.
>
> 2. *Pleading to state material facts and not evidence.*—
>
> (1) Every pleading shall contain, **and contain only**, a **statement in a concise form of the material facts on which the party pleading relies for his claim or defence**, as the case may be, **but not the evidence by which they are to be proved**.
>
> (2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.
>
> (3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.
>
> (*Emphasis added*)

122. Clearly Order VI Rule 2(1) contains a proscription. It is expressed twice: "and contain only", and "but not the evidence by which they are to be proved." Yet, as we have seen the pleadings in this case have followed this only in the breach. Had the mandate been followed, the plaint was no more than a dozen pages. For instance, the correct pleading ought to have been:

> "The Original Plaintiff's appointment as a Mansoos, the chosen successor to the 52nd Dai, was acknowledged and recognized by the community in various ways, including the

> terms of address, paying homage of a special kind (performing sajda), and other positive acts."

The rest was a matter of evidence.

123. But among lawyers there is an instinctive terror of including too little (and, conversely, among judges of too much being brought in and needing to be read). This is undoubtedly because of the settled law that all evidence needs a 'foundation' in pleadings. No amount of evidence can be let in without a foundation in the pleadings. It is the plea that must be raised to sustain the introduction of evidence. I can do no better than to begin with the utterly marvellous single-paragraph decision of Viscount Dunedin J for the Privy Council in *Siddik Mahomed Shah v Mt Saran & Ors*.[1] This is the judgment (yes, the whole of it):

> **VISCOUNT DUNEDIN, J.**:— This is a hopeless appeal. A certain Hote Khan is alleged by the appellant, who is in possession of certain lands which belonged to Hote Khan to have given these lands to him. That story is not accepted, and there are concurrent findings as to the fact by both Courts. After Hote Khan's death there was a transference of the lands in question by mutation of names effected upon the application of Hote Khan's widow. The Judicial Commissioners think it very probable that Hote Khan's widow being an ignorant person and with no one to help her, transferred the lands in that way in order that her spiritual adviser might hold them as trustee. The spiritual adviser, who is the appellant wishes to keep them first upon the ground already specified which their Lordships have already disposed of and, secondly upon the ground that it was a gift made by the widow herself **but that claim was never made**

1 1929 SCC OnLine PC 79 : 1930 PC 57 (1).

> **in the defence presented and the learned Judicial Commissioners therefore, very truly find that no amount of evidence can be looked into upon a plea which was never put forward**. The result is that their Lordships will humbly advise His Majesty that the appeal should be dismissed. As the respondents have not appeared, there will be no order as to costs.
>
> Appeal dismissed.
>
> (*Emphasis added*)

124. In *Bondar Singh v Nihal Singh*,[2] the Supreme Court said:

> **7. As regards the plea of sub-tenancy (*shikmi*) argued on behalf of the defendants by their learned counsel, first we may note that this plea was never taken in the written statement the way it has been put forth now.** The written statement is totally vague and lacking in material particulars on this aspect. There is nothing to support this plea except some alleged revenue entries. **It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into.** Therefore, in the absence of a clear plea regarding sub-tenancy (*shikmi*), the defendants cannot be allowed to build up a case of sub-tenancy (*shikmi*). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.
>
> (*Emphasis added*)

125. In *Regional Manager, SBI v Rakesh Kumar Tewari*,[3] referencing both *Siddik Mahomed Shah* and *Bondar Singh*, the Supreme Court

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2 (2003) 4 SCC 161.

3 (2006) 1 SCC 530.

said in paragraph 14 that leading evidence entailed laying a foundation for the case in pleadings. It no such plea is put forward, no amount of evidence can be looked into unless such a plea is raised.

126. There is an unbroken line of authority on this principle: See: *Ravinder Singh v Janmeja Singh*,[4] in the context of an election petition, where, in paragraph 7, the Supreme Court said that it was an established proposition that no evidence could be led on a plea not raised in the pleadings, and that no amount of evidence an cure a defect in the pleadings. *See also*: *Indian Smelting & Refining Co Ltd v Sarva Shramak Sangh*,[5] *Sarva Shramik Sanghatana v Director, Deccan Paper Mills Co Ltd*,[6] *Union Bank of India v Noor Dairy Farm & Ors*,[7] *Milind Anant Palse v Yojana Milind Palse*.[8]

127. In this case, the problem is not one of paucity but rather the reverse, an over-abundance; and that the assertions are not 'pleadings' strictly speaking within the frame of the Code of Civil Procedure, 1908. The challenge was therefore to weed out that which was not a pleading. Given this, my approach was to be liberal in permitting questions in cross-examination and putting a case.

(2) Evidence Affidavits

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4 (2000) 8 SCC 191.

5 2008 SCC OnLine Bom 1431.

6 2018 SCC OnLine Bom 2790.

7 1996 SCC OnLine Bom 571 : (1997) 3 Bom CR 126.

8 2014 SCC OnLine Bom 631.

128. The evidence in chief, in our CPC, is to come in the form of an affidavit.[9] But here again, rather than 'evidence' as understood in the Evidence Act, one typically finds submissions and arguments. I had to weed out those portions that could not find place in the evidence affidavits. Some portions, it was argued, were 'hearsay'. I have dealt with this law a little later in this section.

(3) Cause of action

129. Fundamental to any civil action is its cause of action, an expression not defined in the CPC. In *ABC Laminart (P) Ltd & Anr v AP Agencies, Salem*,[10] possibly a locus classicus, the Supreme Court said:

> **12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.** It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. **It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action.** But it has no relation whatever to the defence

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9 Order XVIII, Rule 4. Nobody has ever reconciled Order XVIII Rule 4 with Section 1 of the Evidence Act, which says it shall not apply to 'affidavits'.

10 (1989) 2 SCC 163.

> which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.
>
> (*Emphasis added*)

130. This has been consistently accepted and reaffirmed: *Church of Christ Charitable Trust etc v Ponniamman Educational Trust*;[11] *Canara Bank v P Selathal & Ors*;[12] *CK Ramaswamy v VK Senthil*.[13]

131. From the sifted pleadings in the plaint, therefore, it emerges that the cause of action is (i) the nass of 4th June 2011 on the Defendant, (ii) the nass of 20th June 2011 on the Defendant and (iii) the assumption by the Defendant of office as the 53rd Dai following the demise of the 52nd Dai. The first two are not the cause of action without the third; for suit would then have had to brought against the 52nd Dai. The third is critical, because without it, there is no suit at all; and (iii) follows on (i) and (ii) (or either (i) or two, because both were not necessary). The 'act done by the defendant' in the words of the Supreme Court in *ABC Laminart*, is the ascension to the office of the 53rd Dai, and that was possible only because — according to the Plaintiff — of the pronouncement of 2011 (or at least one of them). The earlier nass-events claimed by the Defendant are not part of the cause of action.

132. What is this 'bundle of facts' that the Plaintiff must prove on this cause of action to succeed? He must show that—

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11 (2012) 8 SCC 706.

12 (2020) 13 SCC 143.

13 2022 SCC OnLine SC 1330.

(i) Doctrinally, the 52nd Dai *could not* have conferred nass on the Defendant;

(ii) Factually, the 52nd Dai *did not* confer nass on the Defendant.

133. The first is crucial to the Plaintiff's case. If established, the second would not matter (whether the 52nd Dai did or did not confer nass on the Defendant in 2011, because he could not have done it following proven doctrine).

134. The Plaintiff's task to dislodge the nass of 1969 and 2005 comes later, after (and if) the Defendant has discharged that evidentiary burden.

III The Evidence Act

135. With this, I must turn to the Evidence Act. This is an astounding piece of legislative draftsman, because it seems to derive from a welter of cases governing principles. To read the Evidence Act without reading its illustrations is a cardinal mistake. Those illustrations flesh out and lend meaning and heft to the sometimes difficult to grasp concepts in the statute.

136. I begin with key definitions.

(1) Definitions

"**Fact**".— "Fact" means and includes —

(1) any thing, state of things, or relation of things, capable of **being perceived by the senses**;

(2) **any mental condition** of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) **That a man heard or saw something**, is a fact.

(c) That a man said certain words, is a fact.

(d) **That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact**.

(e) That a man has a certain reputation, is a fact.

"**Relevant**". — One fact is said to be relevant to another **when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts**.

"**Facts in issue**".— **The expression "facts in issue" means and includes — any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows**.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations

A is accused of the murder of B.

> At his trial the following facts may be in issue: —
>
> That A caused B's death;
>
> That A intended to cause B's death;
>
> That A had received grave and sudden provocation from B;
>
> That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.
>
> "**Evidence**". —"Evidence" means and includes —
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, **in relation to matters of fact under inquiry**; such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.
>
> "**Proved**". — A fact is said to be **proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought,** under the circumstances of the particular case**, to** act upon the **supposition** that it exists.
>
> "**Disproved**". — A fact is said to be **disproved when**, after considering the matters before it, **the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist**.
>
> "**Not proved**". — A fact is said not to be proved when it is neither proved nor disproved.
>
> (*Emphasis added*)

137. This is actually critical. The definition of 'fact' is wide. But the definitions of proved, disproved and not proved make it clear that one

is concerned with *likelihood* and *probability*. All evidence must be directed to this purpose.

(2) Presumptions generally

138. Then Section 4:

> 4. "**May presume**". — Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
>
> "**Shall presume**". — Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(3) Relevancy

139. Chapter II deals with relevancy. Evidence may be given of facts in issue, relevant facts, facts forming part of the same transaction (they are relevant), and facts that are the occasion, cause or effect of *facts in issue*. Facts that show motive, preparation and conduct (previous or subsequent) are relevant, as are facts necessary to explain or introduce relevant facts and facts showing a mental state or bodily feeling.

140. Importantly, Section 13 tells us:

> **13. Facts relevant when right or custom is in question**. — Where the question is as to the existence of any right or custom, the following facts are relevant:—
>
> (a) any transaction by which the right or custom in question was created, claimed, modified, recognized,

asserted or denied, or which was inconsistent with its existence;

(b) **particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from**.

(*Emphasis added*)

This will have an impact on much of the evidence.

(4) Admissions

141. I turn to Sections 17 and 21.

17. Admission defined.—An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

21. Proof of admissions against persons making them, and by or on their behalf.—Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body

existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

> He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.
>
> (e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.
>
> He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.
>
> A may prove these facts for the reasons stated in the last preceding *illustration*.

142. It is settled that an admission, unless explained, furnishes the best evidence: *Ramji Dayawala & Sons (P) Ltd v Invest Import*.[14] It is substantive evidence of the fact admitted: *Bharat Singh v Bhagirathi*.[15] The weight to be attached to an admission as a piece of evidence is distinct from its admissibility. An opportunity must be afforded to the person against whom it is proposed to be used to explain it: *Bishwanath Prasad & Ors v Dwarka Prasad & Ors*.[16]

143. This will be of some consequence to a line of questioning in cross-examination by the Defendant on the Plaintiff's conduct after 4th June 2011.

(5) Experts

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14 (1981) 1 SCC 80.

15 1965 SCC OnLine SC 57 : AIR 1966 SC 405.

16 (1974) 1 SCC 78.

144. Sections 45 to 51 of the Evidence Act deal with experts and expert testimony. Sections 48 and 49 in particular are material.

> **48. Opinion as to existence of right or custom, when relevant.**—When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.
>
> *Explanation.*—The expression "general custom or right" includes customs or rights common to any considerable class of persons.
>
> *Illustration*
>
> The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.
>
> **49. Opinion as to usages, tenets, etc., when relevant.**—When the Court has to form an opinion as to—
>
> **the usages and tenets of any body of men or family**,
>
> **the constitution and government of any religious** or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people,
>
> **the opinion of persons having special means of knowledge thereon are, relevant facts.**
>
> (*Emphasis added*)

145. Expert evidence is not conclusive proof of the fact: *Ram Chandra v State of UP*;[17] *Shashi Kumar Banerjee v Subodh Kumar Banerjee*;[18] *Magan Bihari Lal v State of Punjab*;[19] *S Gopal Reddy v State*

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17 AIR 1957 SC 381.

18 AIR 1964 SC 529.

19 (1977) 2 SCC 210.

of AP;[20] *Chennadi Jalapathi Reddy v Baddam Pratapa Reddy & Anr.*[21] It may or may not need corroboration. Caution is advised (*Murari Lal v State of MP*;[22] *Alamgir v State (NCT of Delhi)*[23]), and the expert evidence is usually as not substantive. Usually, it is the other way around: the expert's evidence is used to corroborate the testimony of the plaintiff or the defendant.

(6) Burden of Proof

146. Part III and Chapter VII of the Evidence Act is critical. Sections 101, 102, 103, and 106 must be noted.

PART III

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII. — OF THE BURDEN OF PROOF

101. Burden of proof. — Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

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20 (1996) 4 SCC 596.

21 (2019) 4 SCC 220.

22 (1980) 1 SCC 704.

23 (2003) 1 SCC 21.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

102. On whom burden of proof lies. — The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

103. Burden of proof as to particular fact. —The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

> **106. Burden of proving fact especially within knowledge.** — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> Illustrations
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.
>
> (*Emphasis added*)

147. The Plaintiff's burden of proof is clear from Sections 101 and 103. If no evidence at all were given, the Plaintiff would fail. It is for the Plaintiff to prove the nass of 10th December 1965, and that it was irrevocable.

148. The 'preponderance of probabilities' test tells us that the burden of proof is discharged only if the court is satisfied on the evidence (and having regard to all circumstances, etc), the occurrence of the event was *more* likely to have happened: *more* probable than not; and if equally balanced, then the burden is *not* discharged. *M Siddiq v Mahant Suresh Das & Ors*, the Ram Janmabhoomi case before the Supreme Court.[24] The test is never certainty; but the degree of probability for proof remains high. The test of a man of ordinary prudence is the test to be applied to a court: the legendary Dastane v Dastane Supreme Court judgment — *NG Dastane v S Dastane*.[25]

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24 (2020) 1 SCC 1, para 720.

25 (1975) 2 SCC 326.

149. The definitions of *proved*, *disproved* and *not proved* inform the discussion on burden of proof. This is best understood by an illustration:

> P pleads that a certain person X was at a hotel in Mumbai on a given day.
>
> The burden of proof is on P to prove that X was in Mumbai *and* was at the hotel in question on that day.
>
> The defendant has denied that X was in Mumbai or at the hotel on the day in question.
>
> If P proves both, the fact in issue is *proved*.
>
> If the defendant proves that X was not in Mumbai on that day, P fails.
>
> P also fails if the defendant proves that X was in Mumbai but elsewhere and not at the hotel on that day. If the defendant succeeds in so showing, the fact in issue is *disproved*.
>
> If the defendant does nothing to prove the contrary, and P cannot show that X was in that hotel in Mumbai on that day, the fact in issue is *neither proved nor disproved*.

Disproved thus casts a burden on the other side to show that what the first party professes is demonstrably untrue.

150. Likelihood and probability are therefore key to the question of proof. That proof may take a variety of forms, and no absolute prescription is possible. The burden of proof never shifts. The onus, however, is constantly shifting from one side to the other. In our illustration, if P discharges his burden of proof, the onus would shift

to the defendant to show the reverse or, in cross-examination, destroy the evidence led by P in proof.[26]

151. But what is impermissible is to substitute conjecture and surmise and supposition for proof.

152. On the Defendant lies the burden of proving each of his four claimed nussoos. What if he does not? It makes no difference, given how the plaint is laid. For, if no evidence were given on either side, the plaint would fail. That is enough for the Defendant. Even under Section 103, the burden of proof is on the Defendant only if the Plaintiff first discharges his evidentiary burden.

(7) Oral and documentary evidence

153. Chapter IV (Sections 59 and 60) and Sections 61 to 65 of Chapter V will need to addressed next, along with the issue of 'hearsay' evidence and presumptions under Section 114 of the Evidence Act.

CHAPTER IV. — OF ORAL EVIDENCE

59. Proof of facts by oral evidence. — All facts, except the contents of documents or electronic records, may be proved by oral evidence.

60. Oral evidence must be direct. — Oral evidence must, in all cases, whatever, be direct; that is to say —

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26 *Addagada Raghavamma & Ors v Addagada Chenchamma & Ors*, (1963) SCC OnLine SC 37 : AIR 1964 SC 136.

> **if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it**;
>
> **if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it**;
>
> **if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner**;
>
> **if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds**:
>
> Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found; or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
>
> Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.
>
> (*Emphasis added*)

154. These two phrases "*if it refers to a fact which could be seen, **it must be the evidence of a witness who says he saw it***" and "*if it refers to a fact which could be heard, **it must be the evidence of a witness who says he heard it***" are of particular importance to the very beginning of the Plaintiff's case. This is because of the narrative regarding the misaq majlis at Saifee Masjid on 10th December 1965. It is the Original Plaintiff's case that the words spoken on that day — and

which the Original Plaintiff heard, because he was there — not only referenced his appointment to the second-highest rank of Mazoon, but also conveyed to 'men of higher learning' that he, the Original Plaintiff, had been appointed Mansoos, the successor. These men of higher learning would be the ones who 'saw', 'heard' and 'understood'. Theirs would be direct evidence.

(8) Hearsay, relevancy and presumptions

155. The rule against hearsay evidence has always been difficult to navigate. On the one hand, there are the shoals of excluding otherwise admissible and relevant evidence; on the other, the dangerous reefs of allowing in that which ought to be excluded. Lay understanding is, quite simply, wrong.

156. A steady diet of muddle-headed television serials has only added to the confusion. The popular approach, untethered to law, is that any evidence of a witness about what someone said to that witness is automatically excluded as 'hearsay'.

157. That is plainly wrong. As we have seen, the Evidence Act itself says in the definition of a 'fact' that a fact includes inter alia anything seen, heard or perceived by the senses. This is borne out by Section 60, extracted above: only he who has seen or heard something can depose to it. Therefore, deposing to something seen or heard is not automatically hearsay.

158. But evidence of what is seen or heard is different from proof of what was seen or heard. A person may depose to what she or he

heard; but that is all that she or he can depose to. She or he cannot depose to the *correctness* or *truth* of what was seen or heard. For instance, a witness may legitimately depose:

> "On such and such a day, I heard X say that there was an accident on the road."

The witness can depose to what X said. His deposition is not proof that what X said was correct. If the evidence of the witness is sought to be led to prove that there was an accident, it would be excluded as violating the rule against hearsay.

159. The entire area has occupied courts here and elsewhere for a long time: *Wright v Doe, dem Tatham*;[27] *R v Kearley*, approving *Wright v Doe*.[28]

160. The facts in Kearley are illustrative. Suspecting that one Alan Robert Michael Kearley was a drug dealer, the police searched his home. They found some drugs, but the quantity was too small to support a charge of possession for dealing (as opposed to possession for personal use). Kearley was arrested and taken into custody. Then the police answered 15 calls to Kearley's telephone. Ten callers asked for drugs. Nine came to the house. Seven offered to buy drugs. The police charged Kearley with possession of drugs with intent to supply. At the trial in the Bournemouth Crown Court before Judge Best and a jury, police officers deposed to the calls, the callers, *and what was said*. Save one exception, held to be irrelevant, the callers did not testify. The Crown Court convicted Kearley. The Criminal Division

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27 [1838] 4 Bing (NC) 489 (HL)

28 [1992] 2 WLR 656.

of the Court of Appeal dismissed Kearley's appeal, but granted leave to appeal. Kearley's case was that the police officers' evidence about the calls (and the callers) was wholly inadmissible as hearsay. By a majority of 3:2 (all five judges delivered separate speeches), the House of Lords held that the officers' evidence about the callers/customers was hearsay and was inadmissible. It held that the evidence about the callers only spoke to their state of mind, viz., their belief or opinion that Kearley would supply them with drugs. The callers' state of mind was not relevant, and evidence of it was inadmissible. But on the submission that the callers' requests could be treated as an 'implied assertion' that Kearley was a drug-dealer, that evidence had to excluded by the rule against hearsay (the rule applying equally to implied and express assertions). In other words, the police could depose to what the caller said — not to the truth or correctness of it, nor to any implied assertion from it. The relevant passage from the speech of Lord Bridge of Harwich reads:

> **LORD BRIDGE OF HARWICH**. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Ackner and Lord Oliver of Aylmerton, and I agree with them. But since my noble and learned friends, Lord Griffiths and Lord Browne-Wilkinson (whose speeches I have also had the advantage of reading), are of the contrary view, it is right that I should indicate the principal considerations which have led me to my conclusion.
>
> The question certified by the Court of Appeal (Criminal Division) as raising a point of law of general public importance in this case is expressed in the following terms:
>
> > "Whether evidence may be adduced at a trial of words spoken (namely a request for drugs to be supplied by the defendant), not spoken in

> the presence or hearing of the defendant, by a person not called as a witness, for the purpose not of establishing the truth of any fact narrated by the words, but of inviting the jury to draw an inference from the fact that the words were spoken (namely that the defendant was a supplier of drugs)."

In my opinion this question not only defines accurately the essential issue which falls to be determined in the appeal; it also provides the only correct starting-point for the inquiry on which the House must embark. If the answer to the certified question is affirmative, that will be the end of the matter. If the answer to the certified question is negative, it may be necessary to ask the further question whether a different answer should be given in the case where the evidence proposed to be tendered is to the effect that a multiplicity of persons, not called as witnesses, all made similar requests for drugs to be supplied by the defendant and, if so, in what circumstances. But to start from the proposition that evidence of a multiplicity of such requests made at the same place and within a limited space of time must be admissible because of their manifest probative force and to proceed from this premise to the conclusion that the certified question must therefore be answered affirmatively seems to me, with respect, to be a wholly illegitimate approach to the problem and to be rendered doubly suspect by the circumstance that the conclusion has to be qualified by saying that evidence of a single request of the kind referred to in the certified question, though technically admissible, ought properly to be excluded in the exercise of the judge's discretion on the ground that its prejudicial effect must outweigh its probative value.

The first question, then, is whether the fact of the request for drugs having been made is in itself relevant to the issue whether the defendant was a supplier. The fact

that words were spoken may be relevant for various purposes, but most commonly they will be so when they reveal the state of mind of either the speaker or the person to whom the words were spoken when that state of mind is itself in issue or is relevant to a matter in issue. The state of mind of the person making the request for drugs is of no relevance at all to the question whether the defendant is a supplier. The sole possible relevance of the words spoken is that by manifesting the speaker's belief that the defendant is a supplier they impliedly assert that fact. This is most clearly exemplified by two of the requests made to police officers in the instant case by callers requesting drugs from the defendant where the speaker asked for a supply of his "usual amount." The speaker was impliedly asserting that he had been supplied by the defendant with drugs in the past. **If the speaker had expressly said to the police officer that the defendant had supplied him with drugs in the past, this would clearly have been inadmissible as hearsay.** When the only relevance of the words spoken lies in their implied assertion that the defendant is a supplier of drugs, must this equally be excluded as hearsay? This, I believe, is the central question on which this appeal turns. Is a distinction to be drawn for the purposes of the hearsay rule between express and implied assertions? If the words coupled with any associated action of a person not called as a witness are relevant solely as impliedly asserting a relevant fact, may evidence of those words and associated actions be given notwithstanding that an express assertion by that person of the same fact would only have been admissible if he had been called as a witness? Unless we can answer that question in the affirmative, I think we are bound to answer the certified question in the negative.

The answer to the question given by the English authorities is clear and unequivocal. In *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, **letters written to a deceased**

testator by persons who could not be called to give evidence which clearly implied the writers' belief in the addressee's sanity were held unanimously by the Court of King's Bench, in a single judgment delivered by Lord Denman C.J., and by the six judges in the Exchequer Chamber to be, per se, inadmissible as hearsay on the issue of the testator's testamentary capacity. It is instructive for present purposes to note part of the argument of Sir Frederick Pollock, counsel for the plaintiff in error in the Exchequer Chamber, where he said, at pp. 338–339:

> "Suppose a testator were proved to have received a great number of letters from learned and intelligent persons, consulting him on points of science or policy; that those persons were shown to have been well acquainted with him, and, in some instances, to have written to him repeatedly on the same subjects; can it be said that the sending of such letters, even though not proved to have been acknowledged or acted upon, would, in the ordinary course of life, produce no effect on a reasonable mind? the question being, not whether the testator was of sound understanding at a particular moment, but what the general state of his mind was throughout his life. If letters had been written to him in a foreign language, with an apparent view to correspondence, by a person who knew him, would no inference arise as to his knowledge of the language? The present evidence is precisely the same in character, though perhaps not calculated to produce so strong an effect."

This argument closely mirrors that advanced here that the quantity and quality of the evidence of what speakers or writers have said or written which implies

their belief in a certain state of facts is so cogent as to be self-authenticating and should be received on that ground. But the argument was emphatically rejected. In addition to the passages from the judgment of Parke B. cited by my noble and learned friends, Lord Ackner and Lord Oliver of Aylmerton, which I need not repeat, he said, at pp. 386–387:

> "**It is admitted, and most properly, that you have no right to use in evidence the fact of writing and sending a letter to a third person containing a statement of competence, on the ground that it affords an inference that such an act would not have been done unless the statement was true, or believed to be true, although such an inference no doubt would be raised in the conduct of the ordinary affairs of life, if the statement were made by a man of veracity. <u>But it cannot be raised in a judicial inquiry; and, if such an argument were admissible, it would lead to the indiscriminate admission of hearsay evidence of all manner of facts.</u>** Further, it is clear that an acting to a much greater extent and degree upon such statements to a third person would not make the statements admissible. For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the ground that otherwise the bet would not have been paid. It is, after all, nothing but the mere statement of

> that fact, with strong evidence of the belief of it by the party making it. Could it make any difference that the wager was between the third person and one of the parties to the suit? Certainly not. The payment by other underwriters on the same policy to the plaintiff could not be given in evidence to prove that the subject insured had been lost. Yet there is an act done, a payment strongly attesting the truth of the statement, which it implies, that there had been a loss. **To illustrate this point still further, let us suppose a third person had betted a wager with Mr. Marsden that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to Mr. Marsden's banker be admissible evidence that he possessed that capacity? The answer is certain; it would not. It would be evidence of the fact of competence given by a third party not upon oath.**" (My emphasis.)

Again, as my noble and learned friends, Lord Ackner and Lord Oliver of Aylmerton, point out, the recent decision of your Lordships' House in *Reg. v. Blastland* [1986] A.C. 41 clearly affirms the proposition that **evidence of words spoken by a person not called as a witness which are said to assert a relevant fact by necessary implication are inadmissible as hearsay just as evidence of an express statement made by the speaker asserting the same fact would be**."

(*Emphasis added*)

161. So this now tells us that the evidence of what was heard is not per se or automatically excluded; but it is excluded if it not found to be 'relevant', i.e., a third party's statement is sought to be used to establish the correctness or truth of what was said by the third party (who does not testify) to the one who heard it (who is the only one who does testify).

162. At this stage, I must quote Section 114 of the Evidence Act. Its many illustrations and the explanation to those illustrations are most instructive.

> **114. Court may presume existence of certain facts.—** The Court **may presume the existence of any fact** which it thinks likely to have happened, **regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts** of the particular case.
>
> *Illustrations*
>
> The Court may presume—
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
>
> (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;
>
> (c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
>
> (d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

as to illustration (a)—a shop-keeper has in his bill a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

as to illustration (b) —A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

as to illustration (b)—a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

> as to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence;
>
> as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;
>
> as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;
>
> as to illustration (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;
>
> as to illustration (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;
>
> as to illustration (h)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;
>
> as to illustration (i)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.
>
> (*Emphasis added*)

163. A presumption may thus legitimately be drawn as to the *existence* of certain *facts*, and the drawing of such an inference would make it a relevant fact. Thus, testifying to what was said/heard is not automatically excluded, unless it is sought to adduced as proof of the correctness or truth of what was said/heard; and the fact of what was said/heard is not a relevant fact, *unless* a presumption can be drawn

under Section 114, which would make it a relevant fact. The drawing of such a presumption demands that "regard be had to the common course of natural events, human conduct and public and private business, in their *relation* to the facts." This neatly dovetails with the definitions of proved, disproved and not proved set out earlier.

164. This immediately takes us to the legendary *Bhowal Sanyasi* decision of the Privy Council: *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*,[29] on appeal from the Calcutta High Court. The principal argument was on the question of maintainability of an appeal against concurrent findings of fact. It is the second aspect that is of consequence to my discussion. This extract is from the decision of Lord Thankerton:

> The following is a short account of the family history in the judgment of the trial judge:—Rajah Rajendra Narayan Roy, the Zemindar of Bhowal, one of the largest landed proprietors of East Bengal, died on April 26, 1901. The title was personal, but the family was old, and though not entitled to fame, regarded as the premier Hindu Zamindar family of Dacca. The family-seat was at Jaidebpur, a village about twenty miles from Dacca, and situate in the Pargana of Bhowal, a large and fairly compact estate, spreading over the districts of Dacca and Mymensingh. The Rajah had a residence at Dacca, but he ordinarily lived in his family home, and was undoubtedly a local magnate of the highest position and influence. The rent-roll of the estate was Rs.6,48,353 in 1931. It could not have been much less in the Rajah's time.
>
> The Rajah died leaving him surviving, his widow, Rani Bilasmani, and three sons and three daughters. The

29 1946 SCC OnLine PC 30 : (1945-46) 73 Ind App 246.

sons were: Ranendra Narayan Roy, Ramendra Narayan Roy and Rabindra Narayan Roy. Those, mentioned in order of seniority, were known as Bara Kumar, Mejo Kumar and Chhoto Kumar. The daughters were Indumayee, Jyotirmoyee, and Tarinmoyee. Indumayee was the eldest child, Jyotirmoyee the second, then had come the sons, and then the youngest child, Tarinmoyee Debi.

A brief outline of the contentions of the parties was as follows:—there was no dispute that the second Kumar and the appellant, with a large party went from Jaidebpur to Darjeeling in April, 1909, arriving at the latter place on April 20, and took up their residence at a house called "Step Aside," which had been rented for their stay; and, further, that at that time the second Kumar had gummatous ulcers on or about both elbows and on his legs, being the tertiary stage of syphilis, which he had contracted at some date subsequent to 1905. **It was also agreed that he was taken for dead on May 8, 1909. The appellant maintained that the second Kumar died shortly before midnight and that the following morning his body was taken in a funeral procession and was cremated with the usual rites at the new sasan at Darjeeling. The plaintiff admitted that there was a funeral procession and cremation on the morning of May 9, but maintained that the body so cremated was not that of the second Kumar; his case was that the second Kumar was taken for dead about dusk, between seven and eight o'clock, in the evening of May 8, that arrangements were at once made for cremation, that the body was taken in funeral procession to the old sasan, and placed in position for cremation, when a violent storm of rain caused the party to take shelter, and that, on their return after the rain had abated, the body was no longer there; that, thereafter another body was procured and taken to "Step Aside," and was the subject of the procession and cremation the following morning.**

On May 10, the appellant, with the rest of the party, left Darjeeling for Jaidebpur, where she had her ordinary residence until April, 1911, when she left for Calcutta, to live there permanently with her mother and brother Satyendra in a rented house. She began to enjoy her widow's estate in the undivided one-third share of the Bhowal estate, which the second Kumar had owned, and she recovered the proceeds, amounting to Rs. 30,000, of a life policy taken out by the second Kumar, the necessary certificates of his death having been provided. Soon after her departure for Calcutta, the Court of Wards took charge of the appellant's share of the Bhowal estate, and an attempt by her to obtain its release having been unsuccessful, her share remained in charge of the Court of Wards up to the time of the decree in the present suit.

On the other hand, the plaintiff's case was that while the funeral party were sheltering from the storm, he was found to be still alive by four sanyasis (ascetics), who were nearby and had heard certain sounds from the sasan, and who released him and took him away, looked after him, and took him with them in their wanderings; that when he had recovered from an unconscious state, he had lost all memory of who he was, where he came from and of past events. He lived and garbed himself as a sanyasi would, smeared himself with ashes and grew long matted hair and a beard. Some eleven years later he recalled that he came from Dacca, but not who or what he was; that in December, 1920, or January, 1921, he reached Dacca, and took up a position on the Buckland Bund, a public walk on the margin of the river Buriganga, at Dacca, where people promenade, morning and evening, for pleasure or health. He could be found seated at the same spot, day and night, with a burning dhuni (ascetic's fire) before him. Then followed a period of gradual recognition or suspicion of him as the second

Kumar by certain people, which culminated in the removal of the ashes, and after greatly increased recognition of him as the second Kumar by relatives and others, a declaration by him of his identity as the second Kumar in the presence of many people on May 4, 1921, and that mainly on the insistence of his sister Jyotirmoyee, who accepted him as such and was one of his principal witnesses.

… … …

The first of these contentions relates to the admissibility of the evidence of four witnesses, conveniently referred to as the Maitra group, whom the learned trial judge accepted as unimpeachable witnesses, and whose evidence he accepted as virtually conclusive proof of the time of "death" as having taken place at dusk, between seven and eight o'clock. The time of death or apparent death at Darjeeling is crucial. If the death took place shortly before midnight, and not at dusk, that fact would be fatal to the plaintiff's case. The learned judges of the majority in the High Court placed the same reliance on this evidence. The evidence of these four witnesses is described with sufficient accuracy by the trial judge as follows:— "The evidence of these gentlemen is that one day they were seated in the common room of the (Lewis Jubilee) Sanitarium before dinner—that would be about 8 p.m.— chatting, each does not recollect all the rest, but each recollects the day, and the fact they used to be in the common room before dinner. They recollect the day, not the date or anything, but the day when a certain thing happened. **When they were so seated, and there were others too, a man came with the news that the Kumar of Bhowal was just dead, and he made a request for men to help to carry the body for cremation.** Principal Maitra has a distinct recollection of this request—the news broke in upon the talk they were having, and the thing has stuck in his memory." **It**

> **should be added that the man who so came into the common room has not been identified, and is not a witness.** It was, further, agreed that, according to the Hindu custom cremation would, when possible, follow immediately after the death.
>
> **Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of ss. 3 and 59 of the Indian Evidence Act of 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of s. 60; *but it was not a relevant fact unless the learned judge was entitled to make it a relevant fact by a presumption under the terms of s. 114*.** As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, **but, in the opinion of their Lordships, *the learned judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation*, that it was *likely* that the request was authorized by those in charge at "Step Aside," having regard to "*the common course of natural events, human conduct and public and private business,*" *and therefore to presume the existence of such authority*.** Having made such presumption, the fact of such an authorized request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.
>
> (*Emphasis added*)

165. This discussion is important at different places in the assessment of the evidence. A presumption may be invited about, say, the Original Plaintiff's conduct after 4th June 2011 until after the demise of the 52nd Dai in 2014. Some portion of the present Plaintiff's evidence may be assailed as excluded by the rule against

hearsay (he could depose to what his father, the Original Plaintiff told him, but not necessarily, absent a valid presumption, to the correctness of that statement), and so forth.

(9) Inferences

166. A civil court must be very cautious in drawing an inference. It must be irresistible. That can only happen — on the Evidence Act tests that we have seen — if they augment the preponderance of probabilities; and an inference must be rooted in evidence, direct or circumstantial. There must be objective facts from which an inference of another fact may be drawn.

167. Absent proved facts (oral, documentary or circumstantial), no inference is permissible, for then it is nought by conjecture or surmise. See *Maharashtra State Board of Secondary & Higher Secondary Education v KS Gandhi & Ors.*[30]

(10) Direct evidence, circumstantial evidence

168. Some passages of the Supreme Court decision in *Neeraj Dutta v State (NCT of Delhi)*[31] are important for their exposition of the applicable principles (though in the context of criminal law).

> 50. In criminal cases, the facts in issue are constituted in the charge, or acquisition, in cases of warrant or summon cases. The proof of facts in issue could be oral and documentary evidence. Evidence is the medium through

30 (1991) 2 SCC 716.

31 (2023) 4 SCC 731.

which the court is convinced of the truth or otherwise of the matter under enquiry i.e. the actual words of witnesses, or documents produced and not the facts which have to be proved by oral and documentary evidence. Of course, the term evidence is not restricted to only oral and documentary evidence but also to other things like material objects, the demeanour of the witnesses, facts of which judicial notice could be taken, admissions of parties, local inspection made and answers given by the accused to questions put forth by the Magistrate or Judge under Section 313 of the Criminal Procedure Code, 1973 (CrPC).

51. **Further, according to Sarkar on Law of Evidence, 20th Edn., Vol. 1, "direct" or "original" evidence means that evidence which establishes the existence of a thing or fact either by actual production or by testimony or demonstrable declaration of someone who has himself perceived it, and believed that it established a fact in issue. Direct evidence proves the existence of a fact in issue without any inference of presumption. On the other hand, "indirect evidence" or "substantial evidence" gives rise to the logical inference that such a fact exists, either conclusively or presumptively. The effect of substantial evidence under consideration must be such as not to admit more than one solution and must be inconsistent with any explanation that the fact is not proved. By direct or presumptive evidence (circumstantial evidence), one may say that other facts are proved from which, existence of a given fact may be logically inferred**.

52. **Again, oral evidence can be classified as original and hearsay evidence. Original evidence is that which a witness reports himself to have seen or heard through the medium of his own senses. Hearsay evidence is also called derivative, transmitted, or second-hand evidence in which a witness is merely reporting not what he**

himself saw or heard, and not what has come under the immediate observation of his own bodily senses, but what he has learnt in respect of the fact through the medium of a third person. Normally, a hearsay witness would be inadmissible, but when it is corroborated by substantive evidence of other witnesses, it would be admissible vide *Mukhtiar Singh* [*Mukhtiar Singh v. State of Punjab*, (2017) 8 SCC 136 : (2017) 3 SCC (Cri) 607].

53. Evidence that does not establish the fact in issue directly but throws light on the circumstances in which the fact in issue did not occur is circumstantial evidence (also called inferential or presumptive evidence). **Circumstantial evidence means facts from which another fact is inferred.** Although circumstantial evidence does not go to prove directly the fact in issue, it is equally direct. **Circumstantial evidence has also to be proved by direct evidence of the circumstances.** Further, letting in evidence should be in accordance with the provision of the Evidence Act by the examination of witnesses i.e. examination-in-chief, cross-examination, and re-examination.

57. **Section 60 of the Evidence Act requires that oral evidence must be direct or positive.** Direct evidence is when it goes straight to establish the main fact in issue. **The word "direct" is used in juxtaposition to derivative or hearsay evidence where a witness gives evidence that he received information from some other person. If that person does not, himself, state such information, such evidence would be inadmissible being hearsay evidence.** On the other hand, forensic procedure as circumstantial or inferential evidence or presumptive evidence (Section 3) is indirect evidence. It means proof of other facts from which the existence of the fact in issue may be logically inferred. In this context, the expression "circumstantial evidence" is used in a loose sense as, sometimes, circumstantial evidence may also be direct.

> 58. **Although the expression "hearsay evidence" is not defined under the Evidence Act, it is, nevertheless, in constant use in the courts. However, hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed such as evidence of an informant of the crime**.
>
> (*Emphasis added*)

169. Let me take two examples from this record. If the Original Plaintiff says "The 52nd Dai said some words in public and those at the gathering understood these to mean that I had been appointed the Mansoos and conferred a nass of succession," he can only depose to what was said and heard. He cannot depose to the state of mind or understanding of *others* who heard it. They must come forward and say that this was indeed their understanding.

170. Let us assume the Original Plaintiff then says, "I was the Mansoos and others who ought to have known knew it, for they performed certain acts or used some words reserved for a Dai or his Mansoos. I saw them perform such acts and heard or read them use such words. This showed that those persons regarded me as the Mansoos. Therefore I say it can be inferred that I had been appointed Mansoos." The Original Plaintiff can depose to the actions he witnessed being performed or the words addressed to him that he heard or read. He cannot depose to the state of mind or intention of the performer or the speaker.

171. The only way for the Original Plaintiff to get around the second situation is to show that *but* for his appointment as the Mansoos, those acts would and could never have been performed, and those words could never have been said. That would have to be shown unequivocally and without ambiguity.

(11) Documentary Evidence

172. I include this only for completeness. The following sections are relevant.

> **CHAPTER V.—OF DOCUMENTARY EVIDENCE**
>
> **61. Proof of contents of documents.**—The contents of documents may be proved either by primary or by secondary evidence.
>
> **62. Primary evidence.**—Primary evidence means the document itself produced for the inspection of the Court.
>
> *Explanation 1.*—Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
>
> *Explanation 2.*—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.
>
> *Illustration*
>
> A person is shown to have been in possession of a number of placards, all printed at one time from one original.

Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

63. Secondary evidence.—Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

64. Proof of documents by primary evidence.— Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition or contents of a document in the following cases: —

(a) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved,

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

> (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.
>
> In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.
>
> In case (b), the written admission is admissible.
>
> In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.
>
> In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.
>
> (*Emphasis added*)

(12) The Original Plaintiff's half-completed testimony

173. The Original Plaintiff passed away before his cross-examination could be completed. His examination-in-chief was on affidavit. Since he passed away before his cross-examination could be completed, this would bring us within the frame of Section 32 of the Evidence Act.

174. Here, the decision of HR Khanna J (as he then was), sitting singly in the Delhi High Court, clearly and succinctly sets out the correct position in law: *Krishan Dayal v Chandu Ram*.[32] Khanna J said:

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32 1969 SCC OnLine Del 134 : ILR (1969) Del 1090.

That the statement of a witness in examination-in-chief, which was admissible at the time it was recorded, cannot become inadmissible by reason of the subsequent death of the witness before cross-examination. The absence of cross-examination would undoubtedly affect the value and weight to be attached to the statement of the witness, but it would not render the statement inadmissible or result in its effacement. So far as the question is concerned as to what weight should be attached to such statement made in examination-in-chief the Court has to keep in view the facts and circumstances of each individual case. **Some of the factors which may be borne in mind are the nature of the testimony, its probative value, the status of the witness, his relationship or connection with the parties to the case, a likely animus which may colour his statement and any other factor touching the credibility of the witness which may emerge on the record. Regard must also be had to the fact that the witness has not been subjected to cross-examination. The Court should see whether there are indications on the record that as a result of cross-examination his testimony was likely to be seriously shaken or his good faith or credit to be successfully impeached. The Court may also adopt a rule not to act upon such testimony unless it is materially corroborated or is supported by the surrounding circumstances.** If after applying that rule of caution, the Court decides to rely upon the statement of a witness who was examined-in-chief, but who died before cross-examination, the decision of the Court in this respect would not suffer from any infirmity.

(*Emphasis added*)

175. I followed this decision in *Banganga CHSL v Vasanti Gajanan Nerurkar*.[33]

176. The evidence of such a witness is not inadmissible. But the weight to be given to it depends on the facts of the case. Its probative value might be very slight in a given case, and it might even legitimately be discarded: *Maharaja of Kolhapur v S Sundaram Ayyar & Ors*.[34] There is no fixed rule. Sometimes the evidence has been disregarded if the witness died after a prolonged cross-examination but before it could be completed: *Narsing Das v Gokul Prasad & Ors*.[35]

(13) Adverse inference against the Defendant

177. Mr Desai for the Plaintiff canvassed a submission that since the Defendant did not examine himself, an 'adverse inference' must be drawn against him.

178. I do not believe there is the slightest merit to this submission. There is no rule that a defendant *must* examine himself. A plaint may be so hopeless that it can be defeated without the defendant ever giving evidence; and in an extreme case, without even entering a written statement. If other evidence can substantiate the affirmative case placed by a party, the failure to enter the box personally cannot inevitably result in some adverse inference.[36]

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33 2015 SCC OnLine Bom 3411.

34 1924 SCC OnLine Mad 603 : (1925) ILR 48 Mad 1.

35 1927 SCC OnLine All 333 : ILR (1928) 50 All 113.

36 *Rattan Dev v Pasam Devi*, (2002) 7 SCC 441.

179. As I have noted, the principal case to be tried is whether the Plaintiff proves that the 52nd Dai conferred a nass on the Original Plaintiff at all; whether this was a valid nass; and whether that nass was irrevocable. I have also held that while the Defendant has taken on an affirmative burden, nothing of consequence happens if he fails to discharge that burden. The Plaintiff's case is not dependent on the success or failure of the Defendant's case.

180. The Defendant has led evidence of those who could depose to the nussoos of 1969, 2005 and 4th June 2011. He has then led the evidence of others in support of his opposition to the Plaintiff's case on tenets regarding the requirements of a valid nass and its revocability.

181. So when Mr Desai says 'an adverse inference' must be drawn against the Defendant, the only question that arises — and which is never convincingly answered — is *what adverse inference*? There is no rule or law that says that an adverse inference — even assuming one can be discerned — *must* be drawn.[37]

182. An adverse inference might legitimately be drawn only if the Defendant puts up an affirmative case in his written statement and then leads no evidence on it at all: *Pandurang Jivaji Apte v. Ramachandra Gangadhar Ashtekar*.[38]

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37 *Municipal Corporation Faridabad v Siri Niwas*, (2004) 8 SCC 195; *Jitendra Singh Rajendra Singh Khushwaha & Ors v Suresh Rajendra Singh Khushwaha*, 2016 SCC Online Bom 1260.

38 (1981) 4 SCC 569.

183. Mr Desai lays much emphasis on the Privy Council decision in *Sardar Gurbaksh Singh v Gurdial Singh & Anr*.[39] The question there was whether a son had been born posthumously. A medical examination was stymied until it was too late. Yet, the lady in question did not step into the witness box, although she attended court. Now this is a very different thing for only a mother can tell of her pregnancy — and who the father is. If she makes a claim about childbirth — something specially within her knowledge within the meaning of Section 106 — and then chooses not to give evidence, a strong adverse inference can certainly be drawn. But I return to my question: *what* adverse inference? On tenets, the Defendant has led expert testimony. On the first three nussoos, there is the evidence of those present (and the Defendant could not possibly give evidence). Of the fourth, there were others present and it was in public view.

184. Similarly, the reliance by Mr Desai on *Vidhyadhar v Manikrao & Anr*[40] is entirely misplaced. The plaintiff sued the 1st defendant for redemption of a mortgage. The plaintiff said the 2nd defendant had sold the land to him and was also an assignee of a previous mortgage created by the 2nd defendant in favour of the 1st defendant. The 2nd defendant accepted the plaintiff's claim. The 1st defendant contested. He said the sale was bogus. But the 1st defendant never gave evidence. It is that situation that the Supreme Court held that an adverse inference had to be drawn.

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39 1927 SCC OnLine PC 70 : AIR 1927 PC 230.

40 (1999) 3 SCC 573.

185. But let me take it at its highest: the *only* adverse inference that could be invited was the Defendant's claim to at least one nass. But the last of these was in public. What did matter if the previous three were unproved? And the Defendant had no personal knowledge of any of the three earlier ones to begin with. As to tenets, the precepts and tenets of the faith as testified to by the Defendant's experts could hardly be jettisoned because the Defendant did not give that evidence.

186. There is simply no adverse inference to be drawn. The submission is a shot in the dark. And it misses.

G. OVERVIEW OF THE EVIDENCE

I Documentary evidence

187. The documentary evidence is too vast to admit of any meaningful summary. It includes treatises, opinions, ancient texts, translations, transliterations, videos, audio recordings, transcripts, medical records and more.

188. Not all documents on each side found their way into evidence. There was a complex exercise of discovery, inspection and admission and denial. The result was a mind-numbing series of compilations with daunting titles and mystifying abbreviations: DCONAD is, for instance, the *Defendant's Compilation of Not Admitted Documents*. Some documents came through admission, others were proved through witnesses at the trial.

189. I will look at the ones I consider relevant as I address the issues.

II Oral evidence and testimony : the Plaintiff

190. The Plaintiff led the evidence of four witnesses, tabulated below:

Sr No	PW No	Description
1	PW1	The Original Plaintiff
2	PW2	The present Plaintiff

Sr No	PW No	Description
3	PW3	Professor Devin Stewart,
4	PW4	Dr Husain Khuzaima Bhaisaheb Qutbuddin, (another son of the Original Plaintiff and the brother of the present Plaintiff).

191. The Original Plaintiff filed two Affidavits of Evidence ("**AOE**") in lieu of examination in chief.

III Oral evidence and testimony: the Defendant

192. The Defendant responded with as many as 13 witnesses:

Sr No	DW No	Description
1	DW1	Dr Oman Malik
2	DW2	Dr John Costello
3	DW3	Abdul Qadir Moiz Nooruddin
4	DW4	Taher Shaikh Abdulhisain Tambawala
5	DW5	Kausarali Sahik Abdulhusain Yamani
6	DW6	Mohd Shaikh Yusuf Rampurwala
7	DW7	Saifuddin Shaikh Fidaali Heptullah
8	DW8	Abdeabiturab Shaikh Abdulhusain Rangwala
9	DW9	Malekulashter Shujauddin
10	DW10	Prof. Ramzi Mounir Baalbaki
11	DW11	Dr Sameer Traboulsi
12	DW12	Dr Christopher Davis
13	DW13	Kinana Mudar Dawoodi

193. Some of these AOEs were assessed to sift that which was admissible from that which was not. There is no great controversy about this.

IV Approach to the evidence

194. With this huge welter of material, losing one's way was always a distinct possibility. Steering clear of that hazard was the challenge. The lawyers did what lawyers do: they dove into every niggling details of every nugget of evidence, no matter how trivial. The effort was, after all, to put *all* the bits in and then stitch them together. There were, for instance, references to a particular sentence, phrase, line or word in some ancient text. Sometimes the text was accepted. Sometimes it was not. Sometimes its translation was accepted. Sometimes it was not. Sometimes, a translation was commandeered in court. Or a video was played again and again to discern a particular word, and there was some combustion about the transcript. I was asked to segue into some absurdly minute details in a medical record and even invited to return a finding on whether a particular speech therapist's view would prevail over that of the attending physician or surgeon.

195. I also found that the narrative on each side had distinctly identifiable time-frames or time-zones. The evidence on facts tended to cluster around these time zones. That analysis demanded that there be an overview; otherwise, the analysis was simply disjointed and incoherent.

196. I have also done this at the quite considerable risk of annoying some and possibly all the lawyers before me. This is because not every one of their labours will necessarily find reflection in this judgment. Some may not be mentioned at all, or may be disposed of in a manner more perfunctory than they would like.

H. ISSUE NO 1

I The three parts of Issue No 1

197. Issue No 1 has three components.

1(a) Whether the suit is not maintainable for the reasons stated in paragraph 1 of the Written Statement?

(b) Whether this Court has no jurisdiction to entertain and try the suit or grant the reliefs prayed for as stated in the Written Statement?

(c) Whether the reliefs prayed for by the Plaintiff in prayers (b) and (h) are barred by the provisions of the Maharashtra Public Trusts Act, 1950 as stated in paragraph 3 of the Written Statement?

198. I have answered all three in the negative.

II Issue No 1(a)

199. The submission is that the suit is one for declaration of 'religious honours' and not a civil suit. Reliance is placed on the minority view of Sahai J in Supreme Court decision in *Most Reverend PMA Metropolitan v Moran Mar Marthom*[41] (on the footing that the majority expressed no view) that courts should not adjudicate 'purely religious matters'. Yet that very said a civil court could decide who could perform what rite according to which tenet, and, generally, a suit is not precluded under Section 9 of the CPC except in the rare

41 1995 Supplementary 4 SCC 286.

where the declaration sought is about what constitutes a religious rite. The submission is that this is just such a 'rare' case.

200. It is not.

201. The submission has only to be stated to be rejected. This is clearly a civil suit. The Original Plaintiff sought an adjudication that what the nass conferred on him was valid and irrevocable, and therefore it is only he who was entitled to succeed as the 53rd Dai. The case is not about deciding what rites or ceremonies should be performed.

202. At this stage, a reference to what is called the "the Gulla case" or "Mullaji Case" is necessary: The Advocate-General of Bombay v Yusufalli Ebrahim, before Marten, J.[42] A summary is on the Bombay High Court website.[43]

203. The Advocate-General, Sir Thomas Strangman, brought suit in 1917 at the instance or behest of Adamjee Peerbhoy's family against the 51st Dai. The question was of trusteeship of the money donated via a galla or gulla (a donation box) near the tomb of Chandabhoy, revered as a saint. The trusteeship was challenged on the ground of an improper chain of succession from the 47th Dai's appointment. The question of trusteeship receded during the case and yielded to questions about the office of the Dai. Strangman wrote a book about

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42 (1922) 24 Bom LR 1060. Original Side Suit No 941 of 1917.

43 In the online library section, and under 'historical cases'. https://bombayhighcourt.nic.in/libweb/historicalcases/cases/MULLAJI_CASE.html

Indian courts and 'characters', noting that the Galla case was remarkable for its length — and for the 'amazing claims put forward on behalf of the Mullaji [the 51st Dai], the likes of which have never been put forward in any Court of Law'.

204. Had the 47th Dai's succession been disturbed, the entire chain downwards would have been disrupted — and with it would have gone all claims of trusteeship. Marten J held on the evidence, including religious texts, that the Dai was the sole trustee of the properties in question but, importantly for our purposes, that the Dai remained accountable a court of law despite all claims of infallibility. This was a case where the defendant himself claimed to be infallible. The 51st Dai deposed about Dawoodi Bohra belief, including the occultation of the Imam, the Dai-ship and infallibility.

205. The 51st Dai succeeded in the trial court. The parties settled in appeal.

206. The Bombay High Court report notes Strangman's observation:

> Looking back on the proceedings, I think what impressed me the most, even more than the extravagance of the claims, was the personality of the Mullaji, a frail looking figure possessed nevertheless of an iron will, great determination, and organising capacity. At the time he assumed office the administration must have been extremely slack. Yet he managed in a very few years not only to pull the administration together but to obtain a hold upon his followers greater perhaps than that of any of his predecessors.

207. My purpose in noting this here is two-fold. First, and obviously, there is binding precedent to hold that claims of this sort are civil claims.

208. The second is also important, though not from the case but from Strangman's observations of the 51st Dai. For, clearly, physical frailty has very little to do with will, determination and *capacity*.

III Issue No II(b)

209. The submission that this is a suit for land is entirely misconceived. It is nothing of the kind. Control of the land passes with the ascension of the next Dai; that is all there is to it. What is claimed is not personal title to any land. That land vests in the *Dai*, and goes with the Dai-ship.

210. It would have made no difference at all even if there had been no prayer regarding land: the land would have passed along with the office of the Dai.

211. Far too many authorities are multiplied on this. There is quite enough to do as it is.

IV Issue No 1(c)

212. This is answered similar to Issue No 1(b) above. The suit is not about trusts at all.

213. The control of the trusts passes to each Dai in succession. The Plaintiff is not a 'person interested' under the MPT Act any more than any other member of the community; but he is seeking only a relief incidental to being a Dai. Again, excluding that prayer would have made no difference at all to the plaint.

214. Every plaint must be read as a whole for what it really seeks, not carved up and balkanized into bits and bobs so that an assault on one irrelevant aspect is used to torpedo the whole enterprise.

215. All three components of Issue No 1 are answered in the negative.

I. ISSUES NOS 3-A AND 3-B

I Issues Nos 3-A and 3-B

216. The issues are framed thus:

> 3-A. Whether the Plaintiff proves that a valid Nass was conferred/pronounced on him as stated in the Plaint?
>
> 3-B. If Issue No 3-A is answered in the affirmative, then whether the Plaintiff proves that a valid Nass was conferred/pronounced on him as stated in the Plaint?

217. I take these issue first because they are clearly fundamental: if these issue fail, the suit fails and must be dismissed. I begin with Issue No 3-A. Issue No 3-B depends on the answer to Issue No 3-A. It is only if Issue No 3-A is in the affirmative that Issue No 3-B arises.

II The approach to Issue No 3-A

218. The issue combines two questions: one of fact and one of doctrine. The question of fact is whether the Original Plaintiff proves that a nass was conferred on him at all, as he says in the plaint. The question of doctrine is that if there was an indeed a nass proved, whether it was a 'valid' nass. That demands an enquiry into whether the Plaintiff has proved his case as to what constitutes a valid nass — an aspect covered by Issues Nos 2 and 4.

219. But if the question of fact is not proved, the entire edifice collapses. Consequently, the first part of Issue No 3-A is to be assessed on (i) what was pleaded and (ii) what is proved.

220. Incidentally, one of Mr Desai's opening notes ('the Plaintiffs case vs the Defendant's case') is more than somewhat misdirected. The Plaintiff cannot succeed or fail depending on what the Defendant pleads or proves. Even if the Defendant proves nothing (or placed no affirmative case), the Plaintiff might still fail.

221. This is evident from Issue No 3-A itself, for this is cast on the Plaintiff's story (and its denial by the Defendant) that the Plaintiff was in fact conferred a nass by the 52nd Dai; and that this was a valid nass.

222. Mr Chagla and Mr DeVitre are fundamentally in error on one aspect, i.e., when they say that the Original Plaintiff's case of a conferral of a nass on him by the 52nd Dai is '*almost* entirely inferential'. There is nothing 'almost' about it. It is entirely inferential. The challenge is whether, in conformity and consonance with the Evidence Act, this inferential and circumstantial material is such that the Original Plaintiff's case of a conferral of a nass can legitimately be said to have been 'proved' — that is to say, whether the preponderance of probabilities and likelihood support it.

III The Plaintiff's pleaded case

223. The Original Plaintiff came to court with this narrative: that, on 10th December 1965, the 52nd Dai told the Original Plaintiff in private — only the two of them were there together — that he was going to appoint the Original Plaintiff as the Mazoon.

224. What comes next is crucial. According to the Original Plaintiff, the 52nd Dai then said that the Original Plaintiff would be Dai after him, i.e., that the Original Plaintiff would succeed as the 53rd Dai. This, according to the Original Plaintiff, was the 'nass' conferred on the Original Plaintiff by Syedna Burhanuddin, the 52nd Dai.

225. At this time, the Original Plaintiff says, the 52nd Dai placed his own ring on the Original Plaintiff's finger. The 52nd Dai spoke certain words that indicated to the Original Plaintiff that he was the Mansoos, the successor in line to be the 53rd Dai.

226. The 52nd Dai also told the Original Plaintiff to keep this secret and confidential until the appropriate time — it would be revealed when it was revealed.

227. This narrative is repeated in the Affidavit in lieu of Examination-in-Chief.

IV Proof of the Plaintiff's case

228. Was there such an utterance by the 52nd Dai at all? Immediately, Section 106 of the Evidence Act comes into play. These are matters that, on their own, are specially within the knowledge of the Original Plaintiff — *and no one else*. The evidence of the Plaintiff's other witnesses, including the present Plaintiff are clearly irrelevant.

229. The only other person, the 52nd Dai, has passed away.

230. There is also no written record at all of this conversation or of this claimed conferral of a nass.

231. So what we are left with is an examination of the Plaintiff's circumstantial and inferential evidence. To summarize it in one sentence, it runs like this:

> "Beyond my word, I have no direct evidence, oral or written, to prove that a nass was conferred on me by the 52nd Dai, or that he spoke the words I have attributed to him. However, I say that surrounding circumstances show and must lead to the inference that I had been so appointed as a Mansoos, and that others who could be expected to discern this appointment so discerned it; and this is established by their conduct towards me immediately thereafter, which conduct is special to a Mansoos."

232. The Original Plaintiff's narrative in his first AOE deviates somewhat from the case pleaded in the plaint, which refers to one private meeting in the morning of 10th December 1965, before the 52nd Dai went to deliver the sermon at Saifee Masjid. In the first

AOE, this becomes two private meetings. Also, there is a spot of bother about the appointment as a Mazoon: was it by a private communication followed by a public announcement? Or did the 52nd Dai only say he *would* appoint the Original Plaintiff as the Mazoon? In cross-examination, the Original Plaintiff said the 52nd Dai appointed him as the Mazoon in and at the sermon on 10th December 1965 — i.e., not in a preceding private conversation. But he also said that the 52nd Dai had privately told him of his intent.

V The elements of the Original Plaintiff's case about the conferral of a nass on 10th December 1965

233. The Original Plaintiff's narrative bundles together multiple elements to prove the nass claimed of 10th December 1965. Each assertion and element must be tested for proof. Some may not be proved; others might. The test then is to see if *overall*, the preponderance of what has been proved supports the Plaintiff's case.

234. The elements may be parsed thus:

(a) Whether the 52nd Dai say the words the Original Plaintiff claims were said in private on 10th December 1965;

(b) If so, what was the intention of the 52nd Dai in speaking those words to the Original Plaintiff?

(c) Does the placing of a ring by the 52nd Dai on the Original Plaintiff's finger prove the conferral of a nass?

(d) Was the intention of the 52nd Dai in using the words he did at the public sermon on 10th December 1965 to convey the conferral of a nass on the Original Plaintiff?

(e) Did 'men of higher learning' so understand this intention?

(f) Do subsequent actions of the Defendant and others in the community towards the Original Plaintiff indicate an acceptance and acknowledgement of the Original Plaintiff as the Mansoos? Specifically, is this established by —

(i) Certain actions such as prostration and obeisance?

(ii) The use of certain honorifics and epithets in speech and in writing?

VI The words in private on 10th December 1965

235. We will never know if the 52nd Dai ever said in private the words to the Original Plaintiff that the Original Plaintiff claims. We do not even know if they met in private. There is no record of either; in itself odd from a community of inveterate record-keepers. The 52nd Dai can give no evidence of either the meeting or anything that passed in private. What we are therefore asked to accept is the word of the Original Plaintiff simpliciter, without corroboration.

236. This asks the impossible. Once a person comes to a secular civil court, his rank in a religious sect or faith is immaterial. There is no

exemption from proof because a person held the highest rank in a faith. If a plaintiff comes to court, then no matter who she or he is, the plaintiff must prove her or his case in accordance with law. The only exceptions will be the ones that the law itself allows; and no such claim is made here.

237. But the versions of the Original Plaintiff about what passed in private seem to be something of a work in progress. That the Original Plaintiff was the Mazoon and was so publicly appointed is not contentious.

238. At the head of the plaint, the assertion — and it is a strong one — is that the 52nd Dai also told the Original Plaintiff that the Original Plaintiff would be Dai after him, i.e., the 53rd Dai. Thus, says the Original Plaintiff, nass was pronounced upon the Original Plaintiff by the 52nd Dai.

239. Much later, after the 52nd Dai's demise, in a public statement on 17th January 2014,[44] the Original Plaintiff claimed that what the 52nd Dai had said was that the 'after me' (the 52nd Dai), the Original Plaintiff would do 'the khidmat' (service) of the dawat. This, the Original Plaintiff then said was the anointment of the crown of nass. This is not what the plaint says.

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44 Ex P159.

240. Another variant is in the Original Plaintiff's AOE: that 'after me' (after the 52nd Dai), the Original Plaintiff would do khidmat in the rutba of the Dawat.

241. On 18th January 2014, the Original Plaintiff wrote to the Defendant.[45] Here he claimed a nass conferred in private, the 52nd Dai apparently having said that the Original Plaintiff would come to his exalted position. In that letter, the Original Plaintiff claimed that the 52nd Dai had said that the Original Plaintiff would be Dai after him. PW4 agreed that the words 'Dai after him' or 'future Dai' are not in this letter. He claimed they were implied.[46]

242. PW2 said that a draft of this letter was emailed to him for review by his younger brother.[47] The phrase about the rutba of the dawat do not appear in the draft.

243. Much is made of the word 'khidmat' or service of the Dawat. At the very least, it is ambiguous. Everybody in a high rank in a faith is, it is safe to say, expected to serve the faith. On its own, this will not unambiguously show a nass nor an intention of a nass. Similarly, the words 'after me' could mean different things. After all, the 52nd Dai was once the Mazoon (and the Mansoos) of the 51st Dai. On becoming the Dai, the 52nd Dai was no longer the Mazoon. Does 'after me', even if spoken in private, refer to being a successor Mazoon? Why not? We must not forget that in 1965, the 52nd Dai,

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45 Ex P158.

46 PW4, X/E, Q&A. 267–271.

47 Ex D313.

just ascending to the office, was only 51 years old. The Original Plaintiff was but in his 20s. It is extremely unlikely that the 52nd Dai, even before he took his pledge of allegiance, would be in contemplation of a period after his lifetime — and he lived for nearly another half-century.

244. I will come to the aspect of the giving of a ring a little later, but so far nothing about the private meeting is proved — not even the meeting itself.

VII The public sermon of 10th December 1965

245. It is true that the 52nd Dai used the words 'service of the Dawat' in his sermon. But he did so explicitly when *appointing the Original Plaintiff as the Mazoon* — clearly indicating that the 'service of the dawat is not necessarily a reference to being a Mansoos or of the conferral of a nass. But it is this phrase to which the Original Plaintiff lays claim *as being the conferral of nass* in his statement of 17th January 2014.

246. There is simply no later or contemporaneous record of the 52nd Dai's intention when he delivered the public sermon. The Original Plaintiff's understanding of that intention is problematic in law, for the reasons we have seen, including the decision in *Kearley*.

247. The Original Plaintiff could depose to what the 52nd Dai said, and what the Original Plaintiff heard. He could not use that to prove an express or implied *intention* on the part of the speaker — save and

except by the drawing of a legitimate presumption under Section 114 to make that a relevant fact. Now the ordinary course of human conduct, etc., in regard to the public sermon raises no such presumption. The Privy Council decision in the *Bhowal Sanyasi* case clearly does not permit the introduction of such evidence as proof of the fact *unless* a presumption can legitimately be drawn. The Original Plaintiff's impression of the 52nd Dai's *intention* cannot be taken into account.

VIII The alleged gift of a ring

248. Now in his AOE, the Original Plaintiff claimed that at the second private meeting (not mentioned in the plaint), the 52nd Dai gave (and placed on the Original Plaintiff's finger) a ring 'in the same way as was done by the 51st Dai while appointing the 52nd Dai as his Mazoon and Mansoos'. The Original Plaintiff claims that the 52nd Dai said that he was given the ring when appointed to 'this rank', and that the 52nd Dai was appointing the Original Plaintiff to 'this rank'.

249. Which rank? The 52nd Dai was the Mazoon *and* the Mansoos. Both ranks were now empty. Can it be said that the gift of the ring only referred to the appointment as a Mansoos? Or of both Mazoon and Mansoos? And not of the immediately-needed vacancy of a Mazoon?

250. The 51st Dai's action was, incidentally, in public, not in private.

251. At the very least, this narrative is ambiguous. The words 'this rank' or rutbah will not lend certainty, for there are three ranks: the Dai, the Mazoon and the Mukasir.

252. But what the Original Plaintiff says in the amended plaint is that the 52nd Dai's words ('this rank') "clearly signified … an indication to appoint the Original Plaintiff as Mazoon and Mansoos." But that is only the Original Plaintiff's understanding: signified to whom? There were only two persons allegedly present (and we do not even know that for certain); and there is nothing at all to indicate that what the Original Plaintiff understood as 'clearly signified' was ever the intention of the 52nd Dai, i.e., appoint the Original Plaintiff as both Mazoon *and* Mansoos. It could equally have been one and not the other.

253. But a ring is just a ring. The Original Plaintiff would have to show that this was *the* ring; and that its giving unequivocally according to faith or tradition was an indication of the conferral of a nass. This is speculative. I cannot make out any particular ring in the photographs led in evidence.[48]

254. But as Tolkien tells us, one must follow the ring; it will not do for the Original Plaintiff to only say "my precious". When we do, something surprising turns up. The 52nd Dai somehow seems to have repossessed this ring. He continued to wear it. There is a 1966 commemorative card[49] distributed by a brother of the Original

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48 Exs P123–130.

49 Ex D1103, trans Ex D1106.

Plaintiff and the 52nd Dai that refers to the ruby ring gifted by the 51st Dai to the 52nd Dai as one of the three gifts at the time when the former appointed the latter as Mazoon and Mansoos. It then says that 'even today' — three months later — the ring was with the 52nd Dai.[50]

255. The Defendant has led some evidence of ring-giving outside the conferment of a nass.[51]

256. The Plaintiff relies on the 51st Dai's book '*Risala Mafatih al-Yaqutat al-Hamra*' to suggest, from the Plaintiff's translation, that when the 35th Dai gave an auspicious ring to the 36th Dai with good tidings, and then performed a nass (in the presence of two witnesses). But one ring does not make a tenet, and this does not show that the giving of a ring by a Dai *always* indicates the conferral of a nass, even if given to one holding a high rank. Religious heads are now to gift many things, from sacred ashes to Rolex watches and high-end motor cars. This gift-giving is at best a benediction. It is not an act of appointment of a successor.

257. Let me take it at his highest, that there is at least one incident of a Dai or an Imam conferring nass *and* giving a ring. This does not mean that the giving of a ring *is* the conferral of a nass. That is the

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50 Actually, it says that 'the ruby ring is just as pure as the finger on which it sparkles on Eid days'.

51 That of the 2nd Imam, before his martyrdom at Karbala, giving the Prophet's ring to his son Ali Akbar, not his successor, but holding a high rank. DW13, AOE, paragraphs 357–359.

classic *post hoc ergo propter hoc* fallacy: 'after this, therefore necessarily because of this'.

258. The ring itself is not produced from the custody of the Plaintiff. Not that it would matter.

IX The men of higher learning

259. The individuals in this amorphous tribe of 'men of higher spiritual learning' (**MOHSL**) are never identified. Who might they be? What distinguishes them from men of ordinary learning? We encounter these phrase repeatedly, but only ever in this generic sense.

260. The Plaintiff invites an *inference* from what he claims was the *understanding* (and later the conduct) of these MOHSL. Not one such MOHSL is brought forward to give evidence to say that his understanding was indeed correctly perceived or understood by the Original Plaintiff. Nobody tells us what this understanding of the MOHSL actually was; and this would be a fact specially in the knowledge of every one of the MOHSL. Only the individuals could depose to it. It is only if the evidence was in place that any inference could be invited.

261. Now what the Plaintiff does is to wholly elide all direct evidence of a single one of the MOHSL. No case is made out that there are no MOHSL available to give evidence. Instead, the Plaintiff seeks to adduce circumstantial evidence of the alleged conduct of some of these MOHSL to invite an inference that they knew that a

nass had been conferred on the Original Plaintiff. This is an attempt to infer from inference. In simpler terms, we call this speculation or conjecture.

262. Such an application for an inference is defeated by the rule against hearsay. Any evidence of an action or word by another to prove the intention behind that action or word without calling the other and also without being able to invite a presumption under Section 114 (which is not done), would violate the rule against hearsay.

263. In my view, without explaining why no one from among the MOHSL could be summoned to give direct evidence, it was impermissible for the Plaintiff to rely only on his own circumstantial evidence about the conduct of the MOHSL and to then invite an inference.

264. The Original Plaintiff's perception or understanding of what others perceived or understood is not objective direct or circumstantial evidence.

265. I will turn to this circumstantial material immediately next to assess whether it meets the tests in law.

X The actions /conduct of others vis-à-vis the Original Plaintiff

266. The Plaintiff's case in this regard is in two parts: physical actions and the use of words, honorifics and epithets, written and

spoken, all in regard to the Original Plaintiff. The claim is, substantially, that but for his appointment as a Mansoos and the successor, these persons, some or all of them among the MOHSL, would not have acted, spoken and written as they did.

(1) Sajda

267. Let us see how this part of the case is constructed, and its logical consequences. According to the Original Plaintiff, the Defendant and others offered sajda (a prostration; physical or communicated in writing as an act being done) to the Original Plaintiff after he was appointed Mazoon. Thereby, the Original Plaintiff says, the Defendant and many in the faith 'knew' that the Original Plaintiff was to be the successor.

268. This statement in paragraph 28(c) of the plaint conflates several distinct elements. To use it to establish his appointment as the Mansoos, the Original Plaintiff would have to show:

- **(i)** Sajda is offered only to a Dai or a Mansoos — a Dai-in-waiting (that it is offered to a Dai is not contentious);
- **(ii)** That the Original Plaintiff was not offered sajda *before* he was appointed a Mazoon;
- **(iii)** That sajda is not offered to a Mazoon.
- **(iv)** That by offering Sajda to the Original Plaintiff, the Defendants and others (presumably MOHSL) accepted that the Original Plaintiff was the Mansoos.

269. The last of this is inherently problematic. It runs into a head-on collision with the parallel claim that the nass said to have been conferred on the Original Plaintiff was to be kept a secret because otherwise blades would be drawn. But if the Defendant et al were doing Sajda and thereby accepting the Original Plaintiff as the Mansoos, it was clearly no great secret. Nobody says that this sajda was done in a clandestine manner. If the principle or tenet advocated is that a sajda is done only to a Dai or his Mansoos, then the moment the Defendant and his 'coterie' (which seems to include just about everybody) started performing sajda, the entire community could safely be presumed to have known of the nass — because sajda was reserved, says the Original Plaintiff, only for the Dai or the Dai-to-be. This conflict between secrecy (and the studied silence until 2014) and what was alleged *public* knowledge is never explained. If the Original Plaintiff maintains that he was bound by the vow of secrecy and his oath and pledge to keep it secret, *and* sajda was reserved only for the Dai or the Mansoos, then surely the 'normal course of human conduct' would be to expect the Original Plaintiff to have *protested* at the sajda — so as to maintain that secrecy he claims he was sworn to.

270. Thus, there is a contradiction fatal in and of itself. Both situations cannot co-exist. One must yield. Therefore, either—

(a) sajda is *not* reserved only for the Dai or the Mansoos — which would be consistent with the case of secrecy, but would add nothing of value to the case that the performance of sajda indicated that the Original Plaintiff was the Mansoos; *or*

(b) sajda being reserved for the Dai and the Mansoos, many and perhaps all knew, and there was no secrecy about the alleged conferral of nass on the Original Plaintiff at all.

271. The express case is that sajda (and some epithets) *are reserved for the Dai and the Dai to be*. This had to be proved. This would put us in the frame of paragraph (b) above.

272. In cross-examination, the Original Plaintiff twice volunteered that he was offered sajda even before he became a Mazoon, though he had not said so in the Plaint.[52] Then came three bewildering answers: asked if, according to him, sajda is offered only to the Dai or the Mansoos, he said yes; and then added that this was 'officially so'.[53] I then asked if he was suggesting that in practice sajda is offered to a person other than the Dai or the Mansoos at any time. The Original Plaintiff said no.[54] My next question was if there was a single case or instance where sajda is offered to a person who was *neither* the Dai nor the Mansoos, to the knowledge of the Original Plaintiff. To this he said, *yes*, and that this is recorded in the faith's history.[55] This was in the context of a student and teacher, as documented.[56] The Original Plaintiff was cross-examined on this. He did not agree that a pupil would offer sajda to his master; but yet had to accept that the document established the offering of sajda by a pupil to his master,

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52 PW1, X/E, Q&A. 474, 488.

53 PW1, X/E, Q&A. 474, 492.

54 PW1, X/E, Q&A. 493.

55 PW1, X/E, Q&A. 494.

56 Ex D185, trans Ex D186.

and that the master was neither the Imam nor his successor.[57] There was some kerfuffle about this, for the Plaintiff maintained that the pupil suffered rebuke for doing sajda.[58] At best, this is inconclusive for the Plaintiff — because it does not show that the sajda was protested *because* the honoree was not the Imam or the successor.

273. The sajda, the Original Plaintiff says, was offered to him by physical prostration and in writing.

274. On the physical prostration part, the evidence is *not* unequivocal that sajda is reserved for a Dai or his Mansoos. There are prostrations and there are prostrations. A great deal of time was spent exploring the dimensions of another form of prostration, taqbil al-ardh, or kissing the ground. The evidence tends to the conclusion that the word sajda is generally used for prostrations of respect and as a sacred act of worship in daily ritual prayers. The Plaintiff's evidence on this is slight: a video recording about a sajda to a Dai (which nobody disputes),[59] and *also* to a Mansoos.[60]

275. The Defendant led evidence of physical prostration to someone who was neither the Dai or the Mansoos from the book *Muntaza Al-Akhbaar*. It seems that the 19th Dai's representative in India and other high dignitaries in India obeyed the directive of the Dai in Yemen to bow before a water bearer (*saqqaa*), who was

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57 PW1, X/E, Q&A. 498–502.

58 PW2 Further examination in chief, Q&A. 31, X/E Q&A. 1204–1207, 1301 and 1383.

59 Ex P284, trans Ex P284B.

60 Ex P286, trans Ec P286B.

appointed the Wali al Hind (the representative of the Dai in India). They are said to have performed a taqbil and kissed the earth beneath the water bearer's sandals.[61] PW2 denied everything. He said they kissed the dust of the slipper of the water bearer. The Wali became neither the Dai nor the Mansoos; his footwear is surely irrelevant, or whether the kissing was of the earth behind his sandals or the dust of the slippers. The point only is that there was prostration of respect to a person neither the Dai nor the Mansoos.

276. In writing, the sajda is the sajadaat. DW5 said a sajadaat uboodiyah was reserved for a Dai.[62] He was then shown a document by his father.[63] It was addressed to the Original Plaintiff. It had a sajadaat uboodiyah. DW5 was asked if the sajadaat uboodiyah was offered to the Original Plaintiff. He replied saying it was reserved for the Dai, but his father offered it to the Original Plaintiff only out of respect. His grandfather, father and he offered written sajadaat to the Original Plaintiff only out of respect, DW5 said, but never considered him the Mansoos.[64] Now DW5 was a third-generation Yamani, brought in to prove some journals, writings and also to depose generally. The trouble is that this cross-examination ends here. The rest of the answer is not tested all, and this is the totality of the sajda evidence produced by the Plaintiff.

277. The Defendant has led evidence of many prostrations, especially in writing, those who were neither Dai nor Mansoos, and

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61 Ex D105, trans Ex D702; DW13 AOE, para 549.

62 DW5, X/E, Q&A. 45, 47.

63 Ex P228.

64 DW5, X/E, Q&A. 75, 76.

there is a tabulation of these on record. There is no convincing dislodging of the case.

278. Instead, the evidence indicates that sajda/sajadaat is offered as respect at the graves of dignitaries other than the Imam, Dai or Mansoos. It is not rank-dependent. The Plaintiff accepted in cross-examination that the 51st and 5nd Dais, PW1, PW2 and others in the community do sajda at the grave of Syedi Luqmanji bin Habibullah in Surat. He was neither the Dai nor ever the Mansoos.[65]

279. As to the sajda to the Original Plaintiff, no evidence was ever led of the intention of the person performing sajda. It is not shown that those who offered sajda did so because they understood the Original Plaintiff to be the Mansoos (apart from the secrecy conflict that I have noted).

280. But there is another predicament for the Plaintiff. If the sajda is reserved for the Dai and the Mansoos, and given the emphasis in the faith of such elaborate performances at the slightest opportunity, it would follow that such sajda was compulsory or inevitable or, at least, once begun could not stop. Otherwise, the performance of sajda is an indicator of nothing but respect, done sporadically. But if it is compulsory, then it cannot stop so long as the Dai is the Dai and the Mansoos is the Mansoos. But the Plaintiff says that written sajda to the Original Plaintiff stopped in 1986 and that physical sajda stopped

65 PW2, X/E, Q&A. 664–667, 1208.

by 1988 or so. He claims that the Defendant too did sajda until about that time.

281. This creates an impossible contradiction in terms that the Plaintiff never explains, for he maintains both positions simultaneously — that he was offered sajda because he was the Mansoos and yet sajda stopped while he was still the Mansoos.

282. Further, there is no cogent material to show the Defendant performing sajda to the Original Plaintiff. The Plaintiff relies on video clips from Cairo in mid-1988 (the Defendant was to marry the Original Plaintiff's daughter). The clips do not show sajda.[66] There was much kissing of various body parts, but there was no prostration.

283. The Original Plaintiff's own elder brothers are not shown to have offered sajda to him ever. This is decidedly odd — all would be MOHSL.

284. The case that sajda is reserved for a Dai or a Mansoos is not made out. Instead, the preponderance of probability is that the mark of respect was to the Original Plaintiff as the Mazoon.

(2) Spoken words

285. The Plaintiff references several words which he says indicate that MOHSL knew he was the Mansoos. These include maula or mola, bewe mola, my beloved son (by his brother, the 52nd Dai); and

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66 Exs P166, P167.

there was a bit of ramble and an improvement as the case progressed. The Defendant straightaway denied that Maula/Mola was under any kind of 'reservation' for the Dai or the Mansoos. It was used even for those who were not the Mazoon or the Mukasir, and simply connoted an acceptance of learning and wisdom.

286. There is a laboured explanation by the Plaintiff that the phrase 'bewe Mola' is *exclusively* used for the Dai and his Mansoos. There are documents showing such usage.[67] But this self-destructs with another document: a telegram of 21st May 1964 (*before* the nass claimed). It was sent by the Defendant and others to the 51st Dai. It referred to three Molas: the AkaMola (the 51st Dai), the BawajisabMola (the 52nd Dai) and QutbuddinMola (the Original Plaintiff).[68] The Plaintiff complains there is no cross on this. Rightly so. For at the time, the 52nd Dai was the Mazoon *and* the Mansoos; and the word Mola was *also* used for the Original Plaintiff who was neither. How this squares with the assertion that Mola was used only for a Dai or a Mansoos is not explained. The word 'bewe' cannot be explained to be a reference to only the Dai and the Mansoos. It could well be the Dai and the Mazoon (who may or may not be the Mansoos).

287. The Original Plaintiff was cross-examined on some of this but passed away before his evidence was completed. PW2 stepped in. His amendment introduced a new vocabulary: inter alia he added the word 'moulana'. In his AOE, he stepped further and added

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67 Exs P5, P247, P8 (from the Defendant), P9 (a telegram from the Defendant)

68 Ex P4.

"Hamshan" and *"Sultan-ul-Wa'ezeen"*. Then, in further examination in chief, he narrowed it to down to six expressions:[69] : (i) Moulana; (ii) Tawwalallahu Umruhu Shareef Ila Yaumuddin (to wish the Dai or his chosen successor a long life until the day of judgment, not normally used for anyone else); (iii) Umdatul Ulema al-muwahhideen; (iv) Abbreviation T.U.S.; (v) Pivot of Dawat of Guidance; (vi) Qurrato Ain-e-Imam-al-Muttaqeen (the coolness of the eyes of the Imam of the pious). But "Hamshan" and *"Sultan-ul-Wa'ezeen"* did not figure in this list. In evidence, items all but item (iii) were shown to be used by others. I am not going to detail every chunk of evidence. My task is to see whether on a general assessment the Plaintiff has made out a case that these terms were and could only be used for a Dai or a Mansoos. But PW2 accepted in cross-examination that he 52nd Dai never used any of these honorifics for the Original Plaintiff.[70]

288. Maula was shown to be used for others and even for the Original Plaintiff before 10th December 1965.[71]

289. Lofty honorifics seem to be widely used as a mark of respect for stature, learning, wisdom and all the rest of it — but there is no evidence, even circumstantial, of a *reservation*, that is to say that these terms claimed by the Plaintiff cannot be used except for the Dai or the Mansoos.

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69 PW2, Further EIC, Q&A. 28, 29.

70 PW2, X/E, Q&A. 1222.

71 PW1, X/E, Q&A. 370.

290. Umdatul Ulema Al-Muwahhideen (which has variants) was expressly said by the Plaintiff to be reserved for the Dai or his Mansoos. This was not asserted in the plaint or in the AOE of the Original Plaintiff. It came from PW2 in his AOE and further EIC.

291. But this is a degree. It is conferred by the Aljamea-tus-Saifiyah, the community's foremost educational institution. It is the highest degree. It features in a register of degrees. The 52nd Dai received in 1941, the citation describing him as a Mazoon. The Original Plaintiff received the eight degree in 1966. The citation describes him as the Mazoon too. While the Original Plaintiff agreed that there were degrees, he said this one was a 'title'. But this is not good enough.

292. Finally, Mr DeVitre and his team put together a set of tabulations:

(a) Pairing (in conjunction and in proximity) of persons with dais and praising them together — eight items;

(b) High praises by dais to persons who did not become Dai or Mansoos — 41 items;

(c) Praises by the 52nd Dai for the Defendant, from 1971 onwards — nine items;

(d) Praises for the Defendant by dignitaries and community members, from 1971 onwards — nine items;

(e) Praises by dignitaries / community members for dignitaries who were not the Dai or the Mansoos — 22 items.

293. Each is fully cross-referenced to exhibits. Little is to be gained by examining each entry and reference. The question is this: *has the Plaintiff proved his case in any respect*? Of the actions or the words being exclusively reserved to the Original Plaintiff *as the Mansoos*? This must be shown unambiguously, by direct evidence (not by referencing letters from others but not calling them) or necessary and permissible inference. The Defendant does not have to *disprove* the allegations. It is sufficient for the Defendant if the Plaintiff's case is *not proved*.

294. The burden is and always was on the Plaintiff, for all this was part of his affirmative case. It had to be. The Original Plaintiff had no direct evidence — none at all — of the nass he claimed was conferred on him. That left him with the circumstantial evidence route; but that is a much thornier and treacherous path, and it requires not just careful navigation but for every single element to be properly proved according to law. It was *never* enough for the Plaintiff to say "Look, this is what so-and-so said or did; therefore I believe he understood me to be the Mansoos, the one with the crown of the nass." He had to call the person who so acted or spoke, and derive from him *his* understanding or explanation for why he acted and spoke as he did. Failing that, he had to be able to show unambiguously that but for being a Mansoos, the other person *would not have acted or spoken* as he did. None of this was a matter of inference unless an evidentiary foundation was first established. Cobbling together masses of references could not establish exclusivity in action or speech.

XI The Original Plaintiff's own family

295. And then there is the problem with the Plaintiff's own family. Not one of his siblings, male or female, support his claim. Not one pledged allegiance to him. The brothers were all MOHSL. The Original Plaintiff says three sisters offered him sajda. He refers to two letters from one of them — but they refer to the Original Plaintiff as the Mazoon.[72]

296. None of the children of the 51st or 52nd Dais have pledged allegiance to PW2.

297. And no one, not even the supposedly in-the-know MOHSL, ever approached the Original Plaintiff for any clarification.

XII Conclusion

298. Issue No 3-A is answered in the negative.

299. Resultantly, Issue No 3-B, which is to be answered only if the answer to Issue No 3-A is in the affirmative, does not survive and will not arise.

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72 Ex P150, 27th December 1976; Ex P225, trans Ex P260, 7th April 1978.

J. ISSUES NOS 2 AND 4

I Prefatory

300. With Issue No 3-A answered in the negative, and Issue No 3-B therefore not surviving, the suit really ends. Issues Nos 2 and 4 cannot possibly survive the failure of Issue No 3-A. But they have been framed, and I therefore proceed to answer them.

II Issues Nos 2 and 4

301. The issues are framed thus:

> 2. What are the requirements of a valid Nass as per the tenets of the faith?
>
> 4. Whether a Nass once conferred cannot be retracted or revoked or changed or superseded?

302. They have to be taken together: both are doctrinal. Issue No 4 is slightly different in the sense it does not speak to what must be done to validly pronounce a nass of succession, but to a stage after that pronouncement; for it is the Plaintiff's case from the beginning that a nass once pronounced cannot be altered, changed, recalled, revoked or superseded by a later nass.

303. But I do not think it is appropriate to address Issue No 2 as framed. It is not for a secular court to pronounce in a dispositive fashion on religious doctrine. If that was demanded, there might well

be jurisdictional issues. On the tenets of a central aspect of the faith, the nature of a nass (what is it exactly?), its requirements (whether it needs witnesses or a proclamation), and its immutability or revocability there is evidence on both sides. There is cross-examination. My task will be not to arrive at a determinative pronouncement of 'the requirements of a nass as per the tenets of the faith', though this is the wording of Issue No 2, but to see if the Plaintiff has proved *his* case on the requirements of a nass, especially that it need not have witnesses other than, if I may be permitted a stab at a Denningism, the *nasser* and the *nassee*. An issue can be recast at any time, and I see no reason at all why there ought to be a pronouncement of a court on a religious tenet or a doctrine. That might conceivably lead to even greater problems within the faith. As worded, Issue No 4 invites some scholarly exploration rather than focussing on proof of an affirmative case.

III The components of the Plaintiff's case regarding the requirements of a valid nass

304. The Plaintiff's case is that for a valid nass—

304.1 There must only be a clear communication by the appointer that he is nominating the other as his successor.

304.2 This need not be in writing. It can be by words or indications.

304.3 No independent witnesses are required.

304.4 There is no requirement of a public proclamation or announcement at the time of appointment or at any time

thereafter. It can remain hidden until the end of the appointer's days.

304.5 Once pronounced, a nass is irrevocable. It cannot be altered, changed, or superseded.

305. The Plaintiff must prove each of these. The Plaintiff's task is not just to show that these are *likely* to be the components or ingredients of a valid nass, but that these are indubitably, demonstrably and without ambiguity the components; and there are no others, and none contrary to what the Plaintiff asserts. The Plaintiff has a dual task on hand: to show that these are the components in accepted doctrine, and to explain everything that is inconsistent with his construct.

IV Conundrums and questions in the Plaintiff's formulation

306. But the Plaintiff's formulation is *inherently* problematic and raises awkward questions — which, too, the Plaintiff must deal with. What if the appointed successor dies before the appointer or becomes infirm or is too incapacitated to function — in a vegetative coma, say? What if there are two or more 'secret' nussoos? At the time of succession, which one is going to be accepted? By whom and by what process? Can an openly declared and pronounced nass be defeated by a claim to an earlier secret one?

307. These are situations that arise from the Plaintiff's own case as pleaded, attempted to be proved, and argued. The Plaintiff must address all of these.

V The Plaintiff's case

308. Mr Desai puts the case like this:

308.1 The chain of succession must remain unbroken. Appointing a successor is the solemn and sacred duty of every Imam and, while the Imam is in occultation, the Dai.

308.2 The successor is 'pre-ordained'; the names of the successors to the end of time are said to be in a sacred (hidden) text. No deviation is possible.

308.3 A nass has no prescribed form, word, ritual, ceremony or rite. As long as the communication is clear, that is enough. The communication may be directly made or through another person.

308.4 No independent witnesses are needed. The appointer and the appointee are sufficient. There is no minimum number of witnesses.

308.5 If there are multiple contenders, then the one who demonstrates superior knowledge is the worthier.

308.6 The 51st Dai and the 52nd Dai in their own sermons did not say that independent witnesses were always necessary.

308.7 There are examples of the 8th Dai and the 51st Dai's risalah as to the need of witnesses.

309. There is some mileage sought to be obtained by pointing out that the Defendant has made various claims about the number of

witnesses. But this will not assist the Plaintiff in his claim that *no* witnesses are needed.

VI The evidence of the Plaintiff's expert, Prof Devin Stewart, PW3

310. I choose to begin not with the evidence of PW1 and PW2, no matter how strong their claim to higher learning, but with PW3, an expert. Though giving evidence at the request of the Plaintiff, one could reasonably expect greater objectivity. PW3, Prof Devin Stewart, is a scholar of Islam and Arabic. His credentials are not in doubt. He gave evidence as an independent expert on Islamic and Arabic studies. In paragraph 4 of his AOE, he said would address the following questions:

(a) Whether a private communication of anointment as successor between the anointer and anointed Imam amounts to a valid nass.

(b) What are the requirements of a valid nass according to the tenets of the Ismaili Shi'a faith?

(c) Whether nass conferred on a successor can be retracted or revoked or changed or superseded under the tenets of the Ismaili Shi' a faith.

(d) The effect of the predecessor's identification of a future Imam other than his immediate successor.

(e) The meaning of the excerpt below from the Arabic text in the treatise Risa/at Mashrabat Tasnim Nur (1363

> AH/1944 AD), p. 145, by the 51" Dai Syedna Taber Saifuddin.

311. On the first question, it was his evidence (expert opinion) that "a private communication of anointment as successor between the anointer and anointed Imam amounts to a valid nass, and no other witnesses are required for the nass to be valid."[73] He referenced supporting material: the nass on the 13th Imam by the 12th Imam, said to have been done privately without any other witnesses; and the nass by the Prophet Sulayman on his successor without any other witnesses.

312. Prof Stewart then outlined the requirements of a valid nass for an Imam or a Dai according to Shia Ismaili faith. These are:[74]

> (i) a clear communication by the anointer, (ii) which may be by a direct statement regarding the anointment, or by words or deeds which clearly indicate the anointment, (iii) to the anointed, or a person or persons who in turn communicate the anointment to the successor if the successor is not present.

313. He gave two instances of a clear nass by indication: the conferment by the Prophet of a nass of Imamate on his successor Ali 'by making him his brother'; and the conferment by the Prophet of a nass on Ali at Ghadir Khumm.

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73 PW3, AOE, para 6.

74 PW3, AOE, para 7.

314. On revocability, Prof Stewart maintained that a nass once pronounced cannot be retracted, revoked, changed or superseded. It is not a testament. The Ismailis became Ismailis, he deposed, because they believe in the finality of a nass once conferred. He claimed this was recorded in several texts, including one by the 5th Dai (a reference to the split between the Ismailis and the Ithna Asharis at the time of the 4th Imam; and the 5th Dai said that it was inconceivable that having once conferred a nass on Ismail, he could later have conferred it on Musa Kasim).[75] The second reference is to a writing by the 5th Dai that an Imam will not confer nass except from among his sons who, by name, has been pre-ordained by God, and who is, like the Imam himself, infallible. He referenced two additional texts, both in the context of an Imamate, to support his opinion that a nass was irrevocable.

315. Incidentally, it is accepted that the Imamate passed from father to son. The office of Dai has no such requirement. A Dai may appoint anyone from the faith as his successor.

316. The risalah of the 51st Dai refers to the succession of the 8th Dai after the 7th Dai. The risalah, according to Prof Stewart, says this appointment was without witnesses and without a public declaration on account of a special reason and exigency.

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75 DW3, AOE, para 8(a)(i).

317. Now before Prof Stewart, the Plaintiff has proposed another expert. Prof Stewart's evidence, the Defendant claimed, was verbatim that of the previous expert. Prof Stewart denied this.[76]

318. On the aspect of the 12th and 13th Imams and the private nass, there was an interesting answer:

46.Q.	**Would you agree that the 12th Imam conferred nass on the 13th Imam in the presence of witnesses before the 12th Imam passed on?**
Ans.	**Yes, I am aware of this. It occurred in the year 334 AH (corresponding to 946 CE).**
Witness volunteers:	I am also aware that **there was an earlier conferment of nass by the 12th Imam on the 13th Imam twelve years earlier without any other witnesses being present at that time**.

(*Emphasis added*)

319. This answer considerably weakens the Plaintiff's case. The Plaintiff must prove that a private communication of nass without witnesses was effected and effective without there *ever* being a later witnesses conferment in the lifetime of the Imam or the Dai.

320. The Defendant put the case most emphatically: that there was not a single recorded instance of an Imam succeeding to the Imamate without a nass conferred in the presence of at least two witnesses. Disagreeing, Prof Stewart pointed to the communication or Sijill al-Bishara from the 20th Imam to al-Malika al-Hurrat in Yemen. She was the recipient of the letter, but she understood from it, Prof

76 PW3, X/E, Q&A. 45.

Stewart said, that *a nass had been validly conferred by the 20th Imam on the 21st Imam* (then an infant).[77] On its own, this answer does not meet the question. The next question to Prof Stewart was whether the 20th Imam conferred nass on the 21st Imam in Cairo in the presence of witnesses before the 20th Imam passed away (was killed). The witness said this was 'possible'.[78] He later said that the sijill was silent about witnesses.[79] He was then asked whether the text he was shown indicated that the emissary who brought the sijill to al-Malika al-Hurrat was himself a witness to the nass. He agreed that the text did have such a reference.[80] He then said the sijill itself was a nass,[81] but the texts shown to him[82] did not indicate that al-Malika al-Hurrat was a witness.[83] To my own questions, he then said it was his opinion that a nass could be validly conferred without any independent witnesses, the appointer and the one appointed being the only ones present; and this was true of the succession of an Imam or a Dai.[84] He was then a shown a document and an extract and agreed that it said that the 20th Imam conferred nass on the 21st Imam in the presence of others;[85] but said the later, witnesses nass was a renewal of the earlier nass.[86] This aspect of a later witnessed nass and an earlier one arose in the

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77 PW3, X/E, Q&A. 48.

78 PW3, X/E, Q&A. 49.

79 PW3, X/E, Q&A. 54, in response to a query from the Court.

80 PW3, X/E Q&A. 63, 64, 254. He disagreed about the person being the emissary, not about being a witness.

81 PW3, X/E, Q&A. 260.

82 Exs D330, D331.

83 PW3, X/E, Q&A. 261.

84 PW3, X/E, Q&A. 50, 51.

85 PW3, X/E Q&A. 60.

86 PW3, X/E Q&A. 61.

context of the Prophet Sulayman's nass on his successor; the witness agreed that the later event had others present.[87] As to the evidence of a nass by indication, Prof Stewart was confronted with three extracts and asked if he agreed that the Prophet Muhammad conferred nass on Ali explicitly by words and not merely by indication. He said that might be the view of authors of the texts he was shown, but was not the view of the author of the text he cited, Hamid al-Din al-Kirmani.[88]

321. At this stage, I must note questions 111 to 114 in his cross-examination:

111.Q.	Did you not in the course of your research have any occasion to see the three texts just shown to you?
Ans.	No.
112.Q.	Had you seen these texts, would your opinion have been any different?
Ans.	No.
Witness volunteers:	**There are many references to anointments at different times in history that do not mention an explicit statement of anointment. The fact that explicit statements do occur in other cases does not invalidate or supersede an anointment by indication.**
113.To Court:	Is it your opinion that an explicit statement of anointment is neither invariably necessary nor consistently known?
Ans.	Yes.
114.Q.	**Have you in your evidence affidavit mentioned any other 'references to anointments at different times in history that do not mention an explicit statement of anointment'?**

87 PW3, X/E Q&A. 82.

88 PW3, X/E Q&A. 110.

Ans. **No. But I do know of such instances.**

(*Emphasis added*)

322. Even on Ghadir Khumm, Prof Steward agreed that a text shown to him said that the nass on Ali was explicit and not by indication.[89] He also agreed it was before a large gathering.[90] He then said that it was his opinion that different Shia scholars refer to the Ghadir Khumm incident as constituting *either* a nass by indication or an explicit pronouncement. Then there was questions on a nass-e-jali (an explicit one) and nass-e-khafi (a secret or hidden one). He maintained that identifying the successor by some means was the only requirement of a valid nass.[91] He agreed that scholars differed on whether the nass at Ghadir Khumm was explicit or by indication.[92]

323. Then Prof Stewart was asked about the succession to the 3rd Dai. He had first appointed Syedna Ali bin Mohammed and later his own son Syedna Ali bit Hatim as the 4th Dai. Prof Stewart said the appointment of Syedna Ali bin Mohammed was as the tutor of the son Ali bit Hatim, but agreed that Syedna Ali bin Mohammed became the 5th Dai. Shown an extract,[93] he was asked if it said that the 3rd Dai conferred nass on Syedna Ali bin Mohammed. He agreed that the text used the word, but said he could not tell the context or intended meaning.[94]

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89 PW3, X/E Q&A. 115.
90 PW3, X/E Q&A. 110.
91 PW3, X/E Q&A. 142–143.
92 PW3, X/E, Q&A. 266.
93 Ex D26.
94 PW3, X/E Q&A. 183–188.

324. The question is not whether Prof Stewart is credible or not credible — I have found little reason to discredit his testimony per se — but the testimony taken as it stands does not unequivocally support the stand of the Plaintiff on (i) a nass only by indication; (ii) a nass without any witnesses at all (other than the appointer and his successor) and (iii) revocability. The reason I began with Prof Stewart is evident. The evidence of PW1 and PW2, being self-serving, needed corroboration. The Plaintiff knew that, and therefore introduced Prof Stewart. But if an overall assessment of his testimony does not support the case of the Plaintiff on an unambiguous doctrinal position on any of these three matters, then no amount of deposition by the PW1 and PW2 can improve the case.

VII Judicial precedent

325. The Plaintiff's reliance on the Privy Council decision in *Hasanali & Ors v Mansoorali & Ors*[95] is misplaced. This passage is cited:

> Both sides agree that a valid appointment can only be made by "Nas," and "Nas," say the appellants, is defined in a translation accepted by both parties from the respondents' book "Kitabul Wasia": "What is that thing by which 'Nas' is proved?" it asks, and replies: "**As to those who are present and see, to them 'Nas' is proved by pointing out to them and informing them of the successor, and to those who are absent 'Nas' is proved by information communicated to them by such persons who will be considered as authority.**"

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95 1947 SCC OnLine PC 63 : AIR 1948 PC 66. Considered in

(*Emphasis added*)

326. The emphasized portion is entirely against the Plaintiff.

VIII Other submissions and material by the Plaintiff

327. The Plaintiff then cites the case of the 8th Dai as one of a nass without witnesses, and a private nass by the 13th Imam.

328. At some point, the Plaintiff's arguments segued into this, that manuscripts and old texts are 'replete with errors'. Scholars consult multiple texts while editing.

329. The range of errors is not small. DW6 was asked if there might be copying errors, interpolations and *fabrications* in copies.[96] He agreed that spelling errors could occur, but not interpolations or fabrications unless the scribe wanted those. The Plaintiff mentions an extract of the 51st Dai's sermon and its transliteration[97] as examples of text attributed to the 3rd Dai which the 51st Dai said were wholesale 'fabrications of several chapters'. There also case of misattributions of authorship. This goes on a bit, but the intention is to show that the reliance by a Defendant's witness, DW6, on some texts is unworthy of credence because such texts are inherently unreliable.

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96 DW6, X/E, Q&A. 90.

97 Exs P378A, 378B.

330. I confess I am unable to grasp why such a line of argument was even adventured. One expects some variation. For instance, an example is held up of Burhan al-Deen, a text, which says that four witnesses are needed for a nass, and it is argued that this is not even the Defendant's case. Maybe so; but it does not establish the Plaintiff's case that *no* witnesses are *ever* necessary.

IX The doctrinal burden on the Plaintiff is not discharged

331. The Plaintiff has materially misunderstood the burden on him. He had to show that there were cases, not exceptions but regular, by which an unwitnessed nass went through and took effect *without there ever being a later witnessed affirmation*.

332. The Plaintiff cannot canvas a case beyond his pleadings. His case is that there was an unwitnessed nass by indication in private on the Original Plaintiff on a specific date without ever having a later witnessed reaffirmation. He must show that this is valid in doctrine — and that means showing that there are other cases *exactly* like this. I do not see how it assists the Plaintiff to point to one nass that had no witnesses and ignore a later witnessed affirmation. That does not answer the question at all.

333. Incidentally, throughout the discussion, the 'without witnesses' expression is to be understood and read to mean without independent witnesses; for the Plaintiff agrees that the Dai and his appointee may be/are the only witnesses necessary.

334. The fundamental problem is with the accepted doctrinal imperative of conferring a nass. It *has* to be done. There is no dispute about this. No Dai or Imam can pass without appointing a successor. The appointment is divinely inspired. This, too, is not contentious.

335. On all the rest of it, the two sides are divided:

(a) the Nass must be an explicit statement

(b) It must be in the presence of witnesses;

(c) an Imam or a Dai appoints his successor by Nass Jali;

(d) a Nass cannot be conferred by allusions, glad tidings or subtle hints or intimations;

(e) a Nass is a wasiyyah (will) and like a wasiyyah is valid only if there are at least two witnesses to the Nass.

336. At the heart of this lies a conundrum never explained by the Plaintiff. How can there ever be ambiguity about the successor? If, as the Plaintiff claims, a nass can be entirely private, by elliptical non-specific indications, and with none but the incumbent and the claimant successor in attendance (which is the Original Plaintiff's case), how would the central ambiguity ever be resolved? The Plaintiff suggests some sort of debate to establish who is the one of better accomplishment in learning. But what would *that* mean? Some sort of popular *vote*?

X The Defendant's position on doctrine

337. The Defendant's case, as presented by Mr DeVitre is this:

(a) No Imam or Dai has ever succeeded his predecessor only on the basis of an entirely private communication with only the incumbent and the conferee present.

(b) Even when there was a private occurrence, it was always followed by a nass conferred publicly or a nass in private but in the presence of other independent witnesses.

(c) The nass must be explicit and unambiguous about (i) the identity of the successor and (ii) that the appointment is as the successor (and not to some other rank).

(d) For a Nass to be valid, it must be independently witnessed by at least two persons. Neither can be the appointee.

(e) At least two independent witnesses are needed so that the Dawat can be informed about the identity of the successor without ambiguity.

XI Principal texts referenced by the Defendant

338. The Defendant has relied on the following texts:

(i) al-Burhaan al-Jaaliyah;[98]

(ii) Burhaan al Deen;[99]

(iii) Daamigh al–Baatil (5th Dai);[100]

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98 Ex. D20, trans Ex D246, Ex D767, Ex 1065, trans Ex. D721.

99 Ex D1011.

100 Ex D378, trans Ex D819.

(iv) Risalat Asimat Nufus al–Muhtadin (19th Dai);[101]

(v) Durar al–Huda al Mudi'a (51st Dai);[102]

(vi) 51st Dai's hand–written document;[103]

(vii) Majmoo fi al–Hujaj 'ala Al–Sulaymaaniyyah.[104]

339. The second-last of these, Ex D540, is eight loose sheets with writing in pencil. DW3 attributes the handwriting on seven sheets to the 51st Dai. Nobody recognized the handwriting on the reverse of the seventh sheet. DW10 translated this document. DW13 relied on that translations. This was led in evidence on the aspect of witnesses being required and of supersession (that the last pronounced nass would govern). Leaving aside any other assault on the document, I do not believe anything is to be gained by this because these writings admittedly do not find reference anywhere else.

340. I do not have to go through these texts one by one. It is sufficient to note broadly the tenor of the evidence. All these documents indicate, in one form or another, that outside witnesses are needed. It is immaterial how many — for the Plaintiff's case is *none* (other than the incumbent and the conferee). I will take a few.

341. The al- Burhan al-Jaaliyah li al-ifk wal al-Bohtaan was authored by Syedi Hasan bin Idris around the 17th Century CE. It says that the

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101 Ex D995.

102 Ex D16, trans Ex D17 and Ex D996.

103 Ex D540, trans D837.

104 Ex D252 (internal pages 150–151 and 216–217); trans Exs D863 and D870.

nass needs witnesses.[105] There are many translations. The Plaintiff's[106] said that the prescription was about the manner of a nass and to ensure that it does not take place without witnesses. DW10, the expert Prof Baalbaki, translated it similarly.[107] The text references a Quranic verse.[108] The book is widely acknowledged and its author praised including by the 51st Dai, in his book Durar al-Hudaa al-Mudi'ah.[109] The Plaintiff agreed that the 51st Dai had praised it.[110] So did Prof Stewart.[111] The 51st Dai quoted a poem from the text in his own work Ne'am.[112]

342. Burhaan al-Deen also reiterates the need for independent witnesses. It had the approval of the 47th Dai. In his risalah of 1841 CE, he sent it to Yemen where he instructed it be taught.

343. A good example of PW2 is stretching credulity is his response to questions about Durar al-Hudaa al Mudee'ah by the 51st Dai. The appointment, the text said, should be in the presence of a group from the people of the Dawat. The word jamaat was translated as 'group'. When put to PW2, he moved from testimony to argument, claiming since the Mansoos is part of the Dawat, the reference could be to him

105 Ex. D20, trans Ex D767.
106 Ex D246.
107 Ex D767.
108 Ex D1065, trans Ex D721.
109 Ex D249, trans Ex D858.
110 PW2, X/E, Q&A. 611–613.
111 PW3, X/E Q&A. 262–264.
112 Ex D336, trans Ex 817.

in isolation. He also said the word jamaat was not collective; a single person could be the jamaat.[113]

344. The phrase in the presence of the people of the Dawat is not stray or isolated. It is in authoritative texts such as the 18th Century work Majmoo fi al-Hujaj 'ala Al- Sulaymaaniyyah ("Al-Sulaymaaniyyah") by Syedi Luqmanji.[114] PW2's response was to challenge the 'authenticity' of the book, an utterly remarkable move, all things considered. The point is his own opinion was irrelevant and certainly coloured by his interest in the outcome. He had to show aliunde that the work was widely accepted as unreliable or not authentic. Syedi Luqmanji was an eminent dignitary. He served many Dais of his time. He was held in the highest esteem: the 51st Dai and 52nd Dai performed sajda at his grave. *So did PW1 and PW2*. His work is referenced frequently, including in a scholarly work by PW2's sister, Dr Tahera Qutbuddin (never called as a witness to support her father or bother). The Defendant corroborated the work with manuscripts from the Khizana. PW2's bland and blithe response was to say that he had not heard of this work at all in any authoritative text.[115] But he accepted that Syedi Luqmanji was a high dignitary in the time of the 39th Dai and that he was considered an authority and wrote various treatises, including treatises containing polemics against seceding sects.[116]

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113 PW2, X/E Q&A. 551, 555.

114 Ex D252, trans at Exs D870, D864 and D863.

115 PW2, X/E, Q&A. 588–597, 629–636 and 656.

116 PW2, X/E Q&A. 589–597.

XII Doctrinal ambiguities never explained

345. The Plaintiff introduced, as I noted, inherently ambiguities. Self-testifying was one of them. As a cardinal principle, given that this is succession, this seems to me to highly problematic and extremely unlikely as an *accepted* doctrine. The Plaintiff claims the 52nd Dai testified to his own nass on 22nd August 1988. But that surely cannot hold. There is no doubt that the appointment of the 52nd Dai as both Mazoon and Mansoos was open. That happened in 1935. The 52nd Dai ascended to the office in 1965. All that the 52nd Dai said — and it was no testimony of the appointment, and could not have been — was that he and others before him were appointed Dai of the age.[117]

346. Far from supporting this remarkable proposition, the Plaintiff's own expert, Prof Stewart agreed that in Fatimid jurisprudence, a person cannot be a witness for his own benefit; a matter equally true in ordinary law.[118]

347. Adding to this doctrinal quicksand, the Plaintiff then supplied what he called were instances of nass conferred only in private with no outsiders, a matter passing between the incumbent and the successor (i.e., those two being the only ones present, and the successor thus being able to 'testify' to a nass on himself). He claimed that these were all 'private' nussoos without other witnesses:

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117 Ex P279, trans Ex P279B; DW13 AOE, para 148.

118 PW3 X/E Q&A. 271.

(a) By the Prophet Sulayman on his successor Aasif bin Barkhaya.

(b) By the 12th Imam on the 13th Imam

(c) By the 7th Dai on the 8th Dai

(d) By the 42nd Dai on the 43rd Dai

(e) By the 50th Dai on the 51st Dai.

348. That is not the evidence on record. Every single one of this is successfully shown to have been *witnessed by others*, though some of these may have been private; while others featured a *public* announcement on the successor during the lifetime of the incumbent.

XIII Final analysis of the Plaintiff's evidence

349. Now let us consider the trajectory of the Plaintiff's case. It is a shape-shifting thing. It begins in the plaint with a set piece, a *mise en scène*: The 52nd Dai and the Original Plaintiff in a private chamber; some indications alleged to have passed, words said to have been spoken, a ring placed — and thus a nass of succession. Plus, this was never disclosed at any time to anyone at any time. We are asked to accept his evidence that others *understood* — but no one ever witnessed — this private, unwitnessed nass.

350. This is now being sought to be proved by saying that there were some incidents of a nass in private, and that these private nussoos were witnessed in private or later publicly proclaimed is *immaterial*, and ought to be ignored.

351. That is not possible. If a plaintiff adduces evidence, and an explanation is proffered for it, the plaintiff must explain it and cannot wish it away. In essence, the Plaintiff here is saying that a later public disclosure is immaterial or irrelevant.

352. On Issue No 2, the Plaintiff's evidentiary burden is *not* discharged.

353. Consequently, it is *not* proved that:

(a) A nass can be pronounced in private without any witnesses other than the incumbent and the nominee;

(b) A nass can be validly pronounced by oblique indications;

(c) A nass can remain hidden without proclamation or witnesses until the end of the Dai's days.

354. Beyond this I am not required to — and I do not care to — elucidate affirmatively or prescriptively what *are* the requirements of a valid nass.

XIV Issue No 4 — the Plaintiff's case of irrevocability of a nass

355. The Plaintiff's case on a nass being irrevocable (immutable, incapable of being altered or substituted etc) proceeds on this fundamental construct:

355.1 Every Imam and every Dai is infallible.

355.2 The choice of a successor is divinely inspired, and it happens only once.

355.3 The choice of a successor can never be wrong. Otherwise, the Imam or Dai would not be infallible.

355.4 No Mansoos has ever been superseded or substituted by another Mansoos in the first Mansoos's lifetime.

XV Revocability of a nass — the Defendant's stand

356. The Defendant contests this formulation, except that the choice is indeed divinely inspired. But he says that *every* choice, and there may be many, is divinely inspired. There are no limitations by doctrine placed on an Imam or Dai in the matter of choice of successor. In summary, the Defendant said:

356.1 that nass can be changed and there are instances when nass has been changed or superseded in the past.

356.2 The Dai can choose to confer nass and retract, change or supersede it whenever he wishes until his last drawn breath.

356.3 He who was last conferred a nass is the successor.

356.4 The fact that the Imam's or Dai's choice of successor is divinely inspired does not proscribe a change, nor does a change cast doubt on the inspiration — even the change is divinely inspired.

356.5 A nass is like a wasiyyah or testament. It takes the form of a wasiyyah. Like every testament, the later revokes the earlier.

356.6 There is neither any Dawoodi Bohra text nor any authoritative declaration or statement by any Imam or Dai that a nass of succession cannot be changed.

XVI The inconsistency in the Plaintiff's case

357. A fundamental inconsistency in the Plaintiff's case, never reconciled is precisely about infallibility — not per se, because both sides accept that the Imams and the Dais are infallible — but the postulate that should a Dai change a nass he would no longer be infallible. The conclusion does not follow from the premise. The infallibility of a Dai is expansive, all-inclusive, all-encompassing and limitless. What the Plaintiff is actually advocating is that the Dai's infallibility is constricted by a choice he makes. Above all, a Dai is in the service of the Dawat and must do what is divinely inspired for the betterment of the Dawat. The lightning of a choice of successor, the Plaintiff argues, only strikes once. And then it is forever gone.

358. The self-serving testimony of PW1 and PW2 will add nothing of value to this discussion unless shown to be corroborated. We have to therefore see what the Defendant has adduced, and whether the Plaintiff has been able to dislodge the opposing case.

359. The Defendant introduced a formidable amount of doctrinal evidence. Before I proceed it to the extent I believe necessary — and not every niggling detail is required to be addressed — I must highlight a remarkable series of answers from PW2 during his cross-examination.

797.Q. **Does the later appointment of an Imam or a Dai revoke an earlier appointment?**

Ans. **No, that never happens.**

798.To Court According to you, does a Dai who confers nass have the power to recall, rescind or revoke a nass that he has conferred if he feels that there are circumstances that so warrant?

Ans. **In my view, and for the reasons I will explain, I do not believe that, once exercised, i.e. once a nass is conferred, the power to select another for appointment continues. The reason, which is to be found in our texts and doctrines, is that the appointment of a successor is not only the entrustment to one who is entitled; but also to one who the Dai perceives not only to be like himself but about whom he has received divine guidance. Once, therefore, this is done and all these elements have come into play, there is no question of exercising any authority or power to effect a change.** The conferment of a nass is in exercise of a spiritual or divine authority and not in exercise of a worldly or temporal power. Indeed, the 51st Dai in testimony solemnly given in Court was asked precisely this question as to whether a nass can be changed once it had been conferred. He made it abundantly clear that this could not be done. As far as I know there is no recorded instance in our history of a nass once conferred being revoked or changed while the successor was alive.

800.To Court **In a completely hypothetical scenario, if the person who was conferred nass was alive but rendered incapable due to illness or other reasons from**

functioning as a Dai, what, in your view, would be the recourse available to the Dai who conferred nass on him?

Ans. **The belief in the community is that this can never happen because the initial choice is so firmly divinely ordained.**

801.Q. Is it your suggestion, in view of your previous answer that once a nass is conferred on a Mansoos, **there is no possibility of a situation where the Mansoos dies without ever assuming the mantle of the Dai?**

Ans **That is not my suggestion.** In my evidence in chief and testimony I had in fact made it clear and pointed to historical events where a Mansoos once conferred with a nass passed away during the lifetime of the Prophet or the Dai who appointed him. The person who passed away achieved a high station in heaven. The Prophet or Dai appointed another successor in his place.

(*Emphasis added*)

360. Therefore, the case is that in the conferee's *lifetime*, there can be no fresh change or supersession of a nass. If the conferee dies before he becomes a Dai, a new conferment will be made. No conferee can ever be so incapacitated as to be unable to function. But if that is true, then it must equally be true — for the same reasons of divine inspiration etc — that no conferee could ever die before his time; if he did, the choice of him as successor was faulty and could not be divinely inspired and therefore immutable.

361. Consequently, the Plaintiff accepts that a Mansoos may die before he becomes Dai. Factually, this happened many times: to the initial appointments made by the 8th, 16th, 17th, 19th, 38th, 43rd and 47th Dai. None were destined to succeed as Dais. What does that tell us of the divine inspiration and infallibility of the choice of the Dais who appointed them?

XVII The evidence on revocability: a sampling

362. DW13, Kinana Mudar Dawoodi (Jamaluddin), a close relative of the Defendant (his mother and the Defendant's spouse are sisters), gave evidence on texts and teachings. He is the Assistant to the Rector the Jamea. He deposed that believe that the death of a Mansoos before he becomes Dai does not imperil the divinity of the inspiration that resulted in the nomination. Both the original and the new are equally divinely inspired, as is the reason for the change.[119] It is just fate, or the destiny, of the individual.[120] A document from the Plaintiff himself supports this — the passing of a Mansoos during the lifetime of his Dai is nothing new.[121]

363. But the Plaintiff's suggestion that death of the Mansoos is the *only* circumstance that allows for a new nass is not shown to be correct. In his book, *Ne'am al-Sibghah al-Ilaahiyyah*, the 51st Dai — the Original Plaintiff's father — wrote that the 25th Dai, Syedna Jalal, initially conferred nass on Syedna Dawood bin Qutubshah (the

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119 DW13 AOE, para 504.

120 DW13 AOE, paras 507–508.

121 Ex P206.

future *27th* Dai). While Syedna Qutubshah was alive, the 25th Dai changed the nass and conferred it on Syedna Dawood bin Ajabshah, who became the 26th Dai. The initial appointee, Syedna Qutubshah, became the subsequent Dai. The 51st Dai wrote of a stream of incessant guidance. Similarly, the author of *Burhaan al-Deen*, Syedi Wali Bhai said that a retraction according to Allah's inspiration was not part of the doctrine of divine inspiration.[122]

364. On the aspect of infallibility, the Plaintiff's case is that the Dai is 'masoom' — not innocent, but infallible. The Plaintiff relied on the 51st Dai's risalat[123] to say that the expression used there "*ma'sum min al-khiyanah*" is correctly translated as "*infallible (masoom) and incapable of deception*." DW10, Prof Ramzir Mounir Baalbaki, is a philologist from Beirut, Lebanon. His formidable credentials went unquestioned. He explained that in Arabic, words used in conjunction may take other meanings; a contextual understanding is necessary. He said that the Arabic word *ma'sum*, when seated with another word, must receive such a contextual understanding. His translation of the words in the Plaintiff's document was '*curbed, prevented or protected from deception*'.[124] He was not cross-examined on this. The Plaintiff also did nothing to adduce evidence even in rebuttal as to which of the two translations should be preferred.

365. Incidentally, DW13 Jamaluddin was not cross-examined on the footing that he was a mere assistant to the Jamea's Rector. But this is

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122 Ex D582 trans at Ex D902; DW13 AOE, para 406.

123 Ex P186.

124 DW10 AOE, para 213

easily met: for the truth no more entails justice than high office entails wisdom.

366. At this point in the arguments, the Plaintiff's case took a very strange turn. Many texts relied on by the Defendant were sought to be sidelined by saying these contained errors, were unreliable or obscure. But that is not evidence, and that is not proof. The Plaintiff's own testimony on errors etc would be an unsafe guide. The Plaintiff was bound to lead evidence showing *authoritatively* through some witness that those texts could not be relied on; and that witness had to survive a cross-examination. Similarly, the assertion that oral statements are 'more authoritative' and on a higher level than written texts is simply not credible. If anything, it should be the other way around.

367. The Defendant led evidence of a change of nass in the lifetime of the conferee. One specific instance is that of the 18th Imam. He first appointed his son Nizar as his successor; then appointed another son Abdullah; and finally appointed a third son al-Musta'li (who succeeded him as the 19th Imam). On its own, this would substantially dislodge the Plaintiff's case. The Defendant relied on a text: *al-Hidaayah al-Aamiriyyah* by the 20th Imam. Various extracts from both sides are on record. Obviously, the Plaintiff had to find some way to explain this.[125] The evidence of PW3, Prof Stewart, was that the appointments of Nizar and Abdullah were as ***wali 'ahd al-muslimeen*** (crown prince of the Muslims). These were not, he said,

125 This is the incident of the Imam pointing to his 'blessed loins' to indicate the Imam had yet to be born. Al-Musta'li was not yet born at the time the other two were bickering.

appointments of succession to the Imamate. Among Ismailis, the word *Muslimin* is generally inferior to the expression *Muminin*, meaning believers (or the Ismailis themselves). Thus, Prof Stewart said, the appointment of Nizar was not an appointment of succession at all but only to an administrative position, possibly driven by political expedience.[126]

368. Prof Baalbaki, DW13, countered this with his expert testimony that in Medieval Islamic Empires, the expression *wali 'ahd al-muslimeen*, was used to appoint the heir apparent. The phrase means the 'crown prince of the Muslims' or one who takes oath from the Muslims.[127]

369. The end result of this and other evidence is that the appointment as a *wali 'ahd al-muslimeen* might or might not result in succession. Some walis did succeed: the 12th, 13th and 14th Imams. Others did not: Prince Abdullah, the son of the 14th Imam; and Nizar and Abdullah, the sons of the 18th Imam. Now Prince Abdullah died before he could succeed, but there is yet no compelling answer to the case of the sons of the 18th Imam.

370. There is important material adduced by the Defendant that the operative nass is the last in time in the Imam's or Dai's life. In *Idaah al-Ma'aani* authored by Syedi Qadi Khan bin Ali (the Mazoon of the 38th Dai), there is a reference to another text, that by Syedna al-Qadi

126 PW3, X/E, Q&A. 156–161, 179 and 211–212.

127 DW13, AOE, para 490–502.

al-Nu'man in his book *Asaas al-Taa'we'll.* This quotes the 5th Imam's response to the question:[128]

> "When does the successor attain the rank of his predecessor?"

The 5th Imam replied:

> '**During the very last moment of the predecessor's [life]; so that pre-eminence and excellence is not shared by two people [at the same time], and do not exist except in one after the other** …"
>
> (*Emphasis added*)

371. The story of the 5th, 6th and 7th Imams is possibly the strangest in the Fatimid Imamate. I am cutting it short. The 5th Imam was Ja'far al-Sadiq. He conferred nass on his son, the 6th Imam Ismail (in the presence of others). Imam Ismail died in his father's lifetime. Before he died, Imam Ismail was told by the 5th Imam, his father, to confer nass on the Imam Ismail's own son, Imam Mohammed bin Ismail. Imam Ismal did so. After Imam Ismail died, Imam Ja'far, the 5th Imam, conferred nass on one of his sons Moosa al-Kaazim aka Musa Kazim. The Dawoodi Bohras do not accept Moosa al-Kaazim as an Imam. The 5th Imam then conferred Nass upon Imam Mohammed bin Ismail — the son of the 6th Imam — and who became the 7th Imam. The Imamate proceeded through this nass to Imam Mohammed bin Ismail. Clearly, Imam Ja'far's nass on Imam Mohammed bin Ismail had to have abrogated the nass on Moosa al-Kaazim. It is the Twelvers who believe that Moosa al-Kaazim was the successor of the 5th Imam, not the Ismailis. This is important because

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128 Ex D1064, trans Ex D719; DW13 AOE para 84 and 385.

it occurs at a critical juncture in the history. These events are not in dispute.

372. The Plaintiff relied on text to assert that a nass cannot be revoked and is unchangeable. The cited text does not support this.[129] The 5th Dai's statement was that since the nass of the Imamate had already been conferred on the 6th Imam, it could devolve on Moosa-al-Kaazim. But the 5th Imam had conferred nass on Moosa al-Kaazim. The belief is that this nass on Moosa al-Kaazim was not a nass of Imamate because the Imamate had passed on to the 6th Imam, Imam Ismail, and continued in *his* progeny. His son, in turn, Imam Mohammed bin Ismail became the 7th Imam. Prof Baalbaki deposed to this.[130]

373. I have already mentioned the case of the 25th, 26th and 27th Dais. I utterly fail to understand what the Plaintiff would have any court do when he contests this narrative by saying that the 25th Dai did not appoint Syedna Qutubshah first. In summary, it went like this: Syenda Yusuf, the 24th Dai, conferred nass on Syedna Jalal, the 25th Dai, some eight years prior to his death. Syedna Jalal fell ill in Ahmedabad. He heard that Syedna Yusuf was also ill and ailing in Yemen. Syedna Yusuf learnt of his successor's illness. He assured the faithful that Syedna Jalal would become Dai and would appoint his successor. Syedna Yusuf died in Yemen. Syedna Jalal learnt of it. Syedna Jalal conferred nass on Miyan Dawood bin Qutubshah (incidentally in public). Then Syedna Jalal received a letter with news

129 Ex P313, trans Ex P314; Ex P140.

130 DW13 AOE, para 470.

of Syedna Yusuf's passing and of his own appointment. Syedna Jalal received divine inspiration to first appoint Dawood bin Ajabshah, as he was the elder. Sydena Jalal did so. He directed that Qutubshah would succeed Ajabshah. Thus, Syedna Jalal, the 25th Dai, first conferred nass on Qutubshah, then, in his lifetime, on Ajabshah; and Ajabshah went on to become the 26th Dai, followed by Qutubshah, the 27th Dai (on whom Ajabshah had also conferred nass).

374. The Defendant relies on several texts from the 17th century to the 20th century. *Al-Najm al-Thaaqib* by Syedi Wali Bhai;[131] *Al-Muzayyanah* by al-Moula Hasan Khan bin Ali bin Taj;[132] *Burhaan al-Deen* by Syedi Wali Bhai;[133] *Daamighat al-Ifk wa al-Buhtaan* (also spelt al-Bohtaan) by Syedi Wali Bhai;[134] *Muntaza' al-Akhbaar* by Syedi Shaikh Qutub Bhai (Burhanpuri);[135] and *Ne'am al-Sibghah al-Ilaahiyyah* by the 51st Dai.[136]

375. How does the Plaintiff deal with this? He denies any prior nass on Qutubshah, and relies on two risalahs of the 51st Dai,[137] two sermons of the 51st Dai,[138] a sermon of the 52nd Dai,[139] and an extract

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131 c. 19th Century, as the mouthpiece and on behalf of the 47th Dai, Ex D418 trans Ex D681.

132 c. 17th Century. Ex D286, trans Ex D1020.

133 c. 19th Century, Ex D582 trans Exs D890, D901 and D903.

134 c. 19th Century, Ex D1071 trans at Ex D783.

135 c. 19th Century, Ex D146 trans at Ex D736.

136 1952 CE, Ex D28 trans at Ex D669.

137 Exs P90, P119.

138 Ex P59, trans Ex P60 and Ex P220.

139 Ex P169.

from the Jamea's 2011 edition of the *Muntaza' al-Akhbaar*.[140] These are not shown to be in conflict with the narrative. Then the Plaintiff tries to capitalize on scribal errors: the word Ajabshah is mentioned instead of Qutubshah as the first nass in one text. The error is evident, and requires no great scriptural learning; for in the later portion, the name Qutubshah is seen as the first conferee. Otherwise, it would make no sense (Ajabshah being appointed twice). DW11, another expert from Beirut, this time Fatimid history and scripture, explained these errors.

XVIII Assessment of the Plaintiff's case on revocability

376. None of the texts relied upon by the Plaintiff negate the overwhelming evidence on the record that a Nass appointing a successor-designate can be changed.

377. Clearly, the Plaintiff has been clutching at straws. There is a reference to the testimony of the 51st Dai in the *Gulla* case[141] to suggest that the 51st Dai had deposed before this very court that a nass was irrevocable. In his cross-examination, PW2 said:

798. To Court	According to you, does a Dai who confers nass have the power to recall, rescind or revoke a nass that he has conferred if he feels that there are circumstances that so warrant?
A.	…
	Indeed, the 51st Dai in testimony solemnly given in Court was asked precisely this question as to

140 Ex P1.

141 Ex P299.

> **whether a nass can be changed once it had been conferred. He made it abundantly clear that this could not be done.**
>
> (*Emphasis added*)

378. But this was not the testimony of the 51st Dai at all. The trial records are part of the appeal. The relevant portion is this:

> **Q.** Have you appointed your successors?
> **A.** I can't answer that question.
>
> **Q.** **Suppose for sake of argument you had not, and today you said "I think of appointing or intend to appoint A. B.", could you change your mind and appoint X. Y. tomorrow?**
> **A.** **I can.**
>
> **Q.** It comes to this doesn't it you must have an actual Nuss?
> **A.** Yes."
>
> (*Emphasis added*)

379. Now this may relate to a change before an actual nass. So PW2 was asked where the 51st Dai had said a pronounced nass could not be changed. He agreed there was no specific testimony, but insisted it had to be gathered 'from context'.[142] There is nothing in this testimony of the 51st Dai to support the Plaintiff's assertion that he maintained that a nass once conferred cannot be changed.

380. There is no question of 'context'. This is the kind of statement one expects to find in some interim application for a prima facie case

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142 PW2, X/E, Q&A. 803–805.

(and there is not even that) merely to fetch prejudice to the other side. In a trial, a statement cannot be warped into an altogether different meaning by claiming 'context'.

381. From the Plaintiff's perspective, this is hardly compelling evidence to show that there is *no* case of supersession. Indeed, I entirely fail to understand the litigation strategy being pursued here. I should have thought that the intent would be to *remove* ambiguity, not introduce it; to show that there was no dispute about revocability rather than canvas the case that the Defendant had not proved revocability.

382. We need to test this. Suppose the Defendant had said nothing at all as an affirmative case on revocability. The Plaintiff would still need to prove irrevocability and do so without ambiguity. It wholly escapes me what it is the Plaintiff has come to court seeking — that a judge of the High Court should function as some sort of super-Dai and prescriptively pronounce on scripture and doctrine? That cannot possibly be the frame of a civil law suit of this kind. The Plaintiff had to show affirmatively and without ambiguity that doctrine prohibited revocation and that there was no case of a revocation, substitution or alteration; and that no text even remotely suggested it.

383. There are many documents and materials in evidence. I do not propose to look at each one, for this simple reason: I will need to be shown something authoritative and conclusive, and unambiguously so, that no nass of succession can ever be revoked, rescinded, changed

or altered in the lifetime of the conferee. Absolutely nothing short of that will do. Hinting at this or that possibility is insufficient.

384. Even on a balance of probabilities, it is impossible with this material to hold that there is no case of revocation in recorded Dawoodi Bohra history, or that there is a proven and unambiguous proscription against in in doctrine.

XIX Answer to Issue No 4

385. Issue No 4 is answered in the negative.

K. ISSUE NO 5

I Prefatory

386. This is in four-and-a-half parts:

> 5. Whether the Defendant proves that a valid Nass was conferred on him by the 52nd Dai:
>
> (a) On 28th January 1969
>
> (b) In the year 2005
>
> (c) On 4th June 2011
>
> (d) On 20th June 2011
>
> as stated in the written statement and—
>
> **if the answer to Issue 4 is in the *negative*** then whether any Nass proved on the Defendant as above consequently amounts to a retraction or revocation or change or supersession of any Nass previously conferred on the Plaintiff by the 52nd Dai?

387. But Issue No 4 was, as we have seen, whether a nass once conferred *cannot* be retracted, revoked, changed or superseded. If answered in the negative, as I have done, it would mean that a nass can be retracted, revoked, changed or superseded. The second part of this issue is actually tied to Issue No 3-A, whether the Plaintiff proves that a valid nass was pronounced on the Original Plaintiff. If that is not proved, no question arises of deciding whether the nass on the Defendant is a supersession of a nass on the Original Plaintiff.

388. The issue is purely one of fact. The same standards apply to the Defendant on this case as they do to the Plaintiff on *his* positive case.

II Overview

389. The issue has four time-zones. The Defendant was not present for the first three (even on 4th June 2011, he was not present at the time of conferral of the nass). He was present only at the last of these.

390. Proving even one of these is enough for the Defendant.

III The nass of 28th January 1969

(1) The evidence on behalf of the Defendant

391. On 28th January 1969 the 52nd Dai was to go to Mecca and Medina on a Hajj pilgrimage. At 1.00 am in the morning of 28th January 1969, he summoned to his private chambers on the 1st floor of Saifee Mahal (i) Shaikh Ibrahim Yamani (d, 1986), his personal secretary of many years, who had also served the 51st Dai; (ii) Shaikh Abdulhusain Tambawala (d 2000); and (iii) Shaikh Abdulhusain Shaikh Ibrahim Abdulqadir, (aka Abdulhusain Shipchandlerwala, (d 2005), the father-in-law of Shahzada Huzaifa Bhaisaheb Mohiyuddin, a son of the 52nd Dai. In that company, the 52nd Dai is said to have pronounced nass on the Defendant with the three persons as witnesses. They were sworn to secrecy.

392. There are documents led by the Defendant to support this. The first is the Champion notebook with Yamani's handwriting. Then there is a calendar diary of 27th January 1969 by Tambawala. Then there is a journal entry by Yamani on 9th December 1994.

393. The Defendant led oral evidence to prove all these.

(a) DW3 to prove the custody of the Champion Notebook as well as the handwriting and signature of the 52nd Dai;

(b) DW4 to prove the custody of the Calendar Diary of his father Shaikh Abdulhusain Tambawala with the entry on 27 January 1969 and to prove the handwriting of his father Shaikh Abdulhusain Tambawala in the said Calendar Diary.

(c) DW5, the grandson of Shaikh Ibrahim Yamani to prove (i) the handwriting of Shaikh Ibrahim Yamani in the Champion Notebook and his Daily Journal; (ii) the handwriting and signature of the 52nd Dai in the Champion Notebook; and (iii) the handwriting of Shaikh Abdulhusain Yamani (his father) in the Notebook entry of 9 December 1994.

(d) DW6 to prove the custody of the (i) the Daily Journal of Shaikh Ibrahim Yamani; (ii) Shaikh Ibrahim Yamani's Daily Journal as transcribed by Shaikh Tayebali Mehsari; and (iii) to prove the handwriting and signature of the 52nd Dai and the handwriting of Shaikh Ibrahim Yamani.

(e) DW9 who is the son of the 52nd Dai to prove the handwriting of the 52nd Dai and to prove the truth of the contents of the Champion Notebook.

(f) DW12 (handwriting expert) to prove that the handwriting in the various documents relied on by the Defendant is genuine; and

(g) DW13 to prove the translation of the various documents brought on record.

394. A summation of the evidence adduced by the Defendant runs like this:

(a) The Champion notebook with handwriting of Shaikh Ibrahim Yamani in his own handwriting, in a small red notebook which bears the name "Champion NOTE BOOK" on the front cover.[143]

(b) Daily Journal of Shaikh Ibrahim Yamani and in particular the entries dated 25, 26 and 27 January 1969.[144]

(c) Shaikh Ibrahim Yamani's Daily Journal as transcribed by Shaikh Tayebali Mehsari.[145]

(d) Calendar Diary of Shaikh Abdulhusain Tambawala with the entry on 27 January 1969.[146]

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143 Ex D488/P412 Colly (five pages), (trans at Exh. D488A)

144 Ex D556, trans Exh D556A.

145 Ex D557 trans Ex D557A.

146 Ex D550 trans DW4 AOE: para 9.

(e) Note of Shaikh Abdulhusain Yamani dated 9 December 1994 recording the 1969 Nass as informed to him by the 52nd Dai.[147]

(f) Testimony of Abdulqadir Nooruddin (DW3) that

(i) the Defendant disclosed to the community members during the sermon delivered on 4th February 2014 the fact that the 52nd Dai showed the Champion Notebook to the Defendant in around 2009.[148]

(ii) Shahzada Qaidjoher Bhaisaheb, in his presence, informed the Defendant and his family members on 4 June 2011 that the 52nd Dai had conferred Nass on the Defendant a few years earlier. DW3 also deposed that at this time, Shahzada Qaidjoher Bhaisaheb also informed the Defendant and his family members that the 52nd Dai had informed him of the Nass being previously conferred.[149]

(iii) the 52nd Dai had shown the Champion Notebook to him (DW3) and to his father a few weeks after returning from the hospital, i.e., after 26 June 2011 in the presence of the Defendant.[150]

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147 Ex D569 trans Ex D569A.

148 DW3 AOE: paras 182, 183, 186/ pgs. 116-117.

149 DW3 AOE: para 76.

150 DW3 AOE: paras 119 & 120, DW3 X/E Q&A. 150–152.

(iv) x. Abdulqadir Nooruddin (DW3) has deposed that the Risalah Zaat al-Noor — a publication prepared on the instructions of the 52nd Dai and which was finalised and approved by the 52nd Dai — records that the 52nd Dai had secretly confided the matter of the Nass previously to those whom he confided in, and made this secret a safe-guarded entrustment with them.[151]

(v) He (DW3) the contents of the Champion Notebook to other family members of the 52nd Dai who had gathered on 18 January 2014, after the 52nd Dai had passed away.[152]

(g) Testimony of Shahzada Malekulashter Bhaisaheb Shujauddin (DW9), a witness to the November 2005 Nass. He deposed that at the time of conferring the Nass on the Defendant in November 2005 the 52nd Dai informed him and Shahzada Qaidjoher Bhaisaheb about the previously conferred Nass.[153]

(2) The Champion notebook

395. DW3 identified the handwriting of the 52nd Dai on two lines in lighter blue and the full signature of the 52nd Dai on the last line;

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151 DW3 AOE: para 8, 38, 45; Ex D435 trans Ex D776.

152 DW3 AOE: para 180.

153 DW9 AOE: para 12/pg. 5.

as also the word 'Abdulqadir' on the fourth line of the fifth page as being in the handwriting of the 52nd Dai.

396. DW5 identified the remaining handwriting as that of his grandfather, Shaikh Ibrahim Yamani. He also identified the handwriting and signature of the 52nd Dai.

397. DW12 (the handwriting expert) examined the Champion Notebook. I approach this cautiously. It is not necessarily dispositive.

398. A translation of the relevant part of the notebook entry is:[154]

> "On the eve of Tuesday, the 11th of Zilqa'dah al-Haraam, 1388 H, Maulana (our Master), the munificent, the veil of the Imam of this age, Abu al-Qaidjoher Mohammed Burhanuddin, may Allah extend his life and eternalise his sultanate until the Day of Judgement, at approximately 1:00 AM called his lowly servant Ibrahim Yamani, Shaikh Abdulhusain Shaikh Ghulamali Tambawala and Abdulhusain Shaikh Ibrahim to his private chambers. He bid them to come extremely near to him and shared with them a most significant and well-protected secret as mentioned below. He bestowed upon us, His servants, this great honour for which we offered many prostrations of gratitude.
>
> (Syedna Burhanuddin states the following:)
>
> I wish to disclose a confidential matter
>
> … …
>
> I am the 52nd Dai. I have thought and deliberated over appointing my successor which will gladden my soul.

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154 Exh D488A.

> Tonight, I confer nass upon my most beloved and radiant son, the coolness of the eye, Bhai Mufaddal Saifuddin. May Allah, the Exalted aid him in his deeds. May he serve the Imam of our Age. His title has been given, seeking the blessings of the title of our Maula Taher Saifuddin. May he please the Imam of this Age. may he please my soul and may he please the soul of my father May Allah grant him a long life and may Allah aid him
>
> I ask of you all to bear witness:
>
> Shaikh Ibrahim
>
> Shaikh Abdulhusain Tambawala
>
> Abdulhusain Shaikh Ibrahim Abdulqadir
>
> This matter is to remain confidential and is to be revealed at the appropriate time. We should sacrifice ourselves for [the cause of] the Imam of our age: his blessings are numerous. He is a Maula of lofty stature. How can we express our gratitude? Even if I were to sacrifice my soul a thousand times, what has been obligated cannot be fulfilled
>
> And I am the Servant of the Pure and Pious Descendants of Mohammed, salaams be upon them.
>
> Mohammed Burhanuddin"

399. DW3's evidence is that a few weeks after the 52nd Dai returned to his residence from the hospital (i.e., after 26 June 2011), he asked him to bring him a particular bundle of documents, wrapped in red cloth, kept in his private cupboard on the first floor of Saifee Mahal. DW3 did so. The Defendant was also present. The bundle contained a small notebook with a red cover bearing the words "Champion Notebook", which was shown to him and his father. DW3 and his father read what was written. He had earlier learnt from Shahzada Qaidjoher Bhaisaheb of a witnessed nass on the Defendant. But this

was the first time he saw a written record. The Defendant had a quick look at the other documents, wrapped them in the cloth and gave the bundle back to DW3. He (DW3) asked the 52nd Dai if he should return these to the same private cupboard. The 52nd Dai bade him do so.

400. Then, on 3 February 2014, the Defendant asked DW3 to get the Champion Notebook from the 52nd Dai's cupboard, which he did and gave to the Defendant. The Defendant held up the notebook at his first public sermon on 4th February 2014. After that, DW3 put it back. At the Defendant's instance, the notebook is with the Jamea Team.

401. The Plaintiff's attempt to dislodge this case is clumsy in the extreme. It begins with a challenge to 'proper custody'. I have no idea what this is supposed to mean. It was in the 52nd Dai's private cupboard. He was unwell. He asked someone to get it (DW3). That was what DW3 said.[155] There was no further cross-examination to show that the notebook was not in the possession of the 52nd Dai. In cross-examination, his stand on the handwriting in the notebook was not disturbed. He went further. He said that soon after this suit was filed, the Defendant gave DW3 three original documents, namely (i) the Champion Notebook (ii) the Original Will and document of Nass of the 49th Dai, written by the 49th Dai and the 51st Dai dated 13 October 1905;[156] and (iii) Original Document of Nass written by the

155 DW3, X/E, Q&A. 150, 152.

156 Ex D489 trans Ex D670.

51st Dai dated 29 January 1937.[157] DW3 said he gave all three to Alaqmar Bhai of the Jamea Team. In cross-examination, he maintained these were complete documents.[158] He identified or reaffirmed authorship of all three.[159] All documents are marked without qualification.[160]

402. DW5, Kausarali Shaikh Abdulhusain Yamani, the grandson of Shaikh Ibrahim Yamani identified the handwriting of (i) his grandfather Shaikh Ibrahim Yamani and (ii) the 52nd Dai's handwriting and signature in the Champion Notebook.[161] PW2's bland disputes about how Shaikh Ibrahim Yamani wrote his name are hardly dispositive evidence.[162] If the Plaintiff wanted to show that Yamani wrote his signature only in one way, he had to prove that.

403. DW9, Shahzada Malekulashter Bhaisaheb Shujauddin, also deposed to his familiarity with the 52nd Dai's handwriting and has identified his handwriting in the Champion Notebook. He referred to November 2005, and said he was present with his brother Shahzada Qaidjoher Bhaisaheb when the 52nd Dai said that he had previously conferred nass on the Defendant before the three witnesses, whom he named.

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157 Ex D490 trans Ex D763.

158 DW3, X/E, Q&A. 148.

159 DW3, X/E, Q&A. 149.

160 Exs 488, 489, 490.

161 DW5 AOE: para 19/pg. 10. He also deposed to the use of an alif by his grandfather while writing his name because PW2 disputed this, as he disputed just about everything.

162 See further EIC of DW6, Q&A. 5–8, and Ex D615 colly.

(3) Handwriting and signatures: expert testimony

404. DW12 was the handwriting expert. He made a report.[163] He analysed the handwriting in the Champion notebook in two groups or parts. Group 1 was the writing on pages 1 to 4 and most of the writing on page 5, in black ink, similar, natural and likely to be of one person. Group 2 was of the blue ink portions, internally consistent, but different from the black portions. He reported his opinion that on a descending scale of 1 to 9, he would assign a score of 2 that the black ink portion was by Shaikh Ibrahim Yamani; and a score of 4 (moderate) that the additional entries on page 5 of the Champion Notebook were written by the 52nd Dai. He justified the latter conclusion in his report. In cross-examination, he was asked why he had not excluded some portions that appeared to be in pencil. He said this was because it formed a continuous text, i.e., the writing was continuous and there is no evidence of a later addition.[164]

405. In submissions, Mr Desai attempted an argument that this answer was contradicted by a passage in a book authored by the witness. The contradiction claimed was never put to the witness. That cannot be done: A witness whose testimony or credibility is impeached must be given an opportunity to defend his case and to meet the case of the party cross-examining him.[165]

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163 Ex D1035.

164 DW12, X/E, Q&A. 55, 56.

165 *Harish Loyalka & Ors v Dileep Nevatia & Ors*, 2014 SCC OnLine Bom 1640 : (2015) 1 Bom CR 361, considering *AEG Carapiet v AY Derderian*, 1960 SCC OnLine Cal 44 : AIR 1961 Cal 359. *Carapiet* was approved by the Supreme

406. The Plaintiff did not lead the evidence of his own handwriting expert.

407. DW13 deposed to the translations of the Champion notebook. There was no effective cross-examination of this witness.

(4) The Plaintiff's allegation of fabrication

408. The Plaintiff's case was that the Champion notebook was fabricated. To this day, I do not know what this is supposed to mean. Fabrication is not a word to fling around in a lawsuit. It demands proof. There is no evidence from the Plaintiff to disprove the signatures, the handwriting or the artefact itself. Interestingly, neither PW1 nor PW2 explained why they said that the signatures and handwriting were not those of the 52nd Dai. The case of fabrication is not answered by saying that the three witnesses offered sajda to PW1 or that Shaikh Ibrahim Yamani referred to PW1 with honorifics allegedly reserved for those who the hold the position of Dai or Dai to be.[166] No evidence is led of anyone else who might be familiar with the handwriting or signature of the 52nd Dai.

409. On its own, the Defendant has discharged his primary evidentiary burden of proving the Champion notebook and its contents. The Plaintiff, on the other hand, has not met the burden of proving fabrication nor dislodged the Defendant's case.

Court in *CBI v Mohd Parvez Abdul Kayuum*, (2019) 12 SCC 1. This is very old law. See: *Browne v Dunn*, (1893) 6 R 67.

166 PW2 X/E Q&A. 1369.

(5) Other corroborative material

410. But as to the contents of the notebook, there is other corroborative material:

(a) The Daily Journal of Shaikh Ibrahim Yamani and in particular the entries dated 25, 26 and 27 January 1969, produced through DW6, who said that three witnesses did in fact assemble in the early hours of 27th January 1969.[167] DW6 is the curator of the Khizana. The daily journal entry corresponds to the Champion notebook. The same three witnesses' names appear. The Khizana is the Dai's personal library. All religious manuscripts as well as historical documents are maintained in the Khizana.

(b) DW5 deposed that his grandfather maintained such a daily journal of all events pertaining to the 51st Dai and the 52nd Dai.

411. For PW2 to simply say he was not sure that Shaikh Ibrahim Yamani ever maintained a diary was worthless.[168] He had to show that he or one of his witnesses knew Yamani's routine and practices and that there was no such journal. PW2's lack of awareness is not proof.

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167 Ex D556 (the original is in LUD), Ex D556A (transcript and translation).

168 PW2, X/E, Q&A. 1370. "I do not accept that this is in fact a diary of Shaikh Ibrahim Yamani. I am not sure that he maintained any such diary." Q&A. 1371: "I maintain that I am unaware that the diary claimed to be that of Shaikh Ibrahim Yamani was indeed genuinely one that he kept."

The cross-examination of the handwriting expert too does not go further.

412. I will not trouble with the evidence of Shaikh Ibrahim Yamani's journals as transcribed by Shaikh Tayebali Mehsari, in the evidence of Kausarali Yamani (DW5). There is no cross-examination on this. Then there are translations by DW13.

413. Another chunk of corroborative material is the calendar Diary of Shaikh Abdulhusain Tambawala.[169] This is using a sledgehammer to slay an ant. Even without the Tambawala diary, the Champion notebook is proved.

414. Finally, there is the notebook of Shaikh Abdulhusain Yamani of 9 December 1994 recording the 1969 nass.[170]

415. DW5, Yamani the younger, produced a notebook entry written by his father, Shaikh Abdulhusain Yamani, bearing the date 9 December 1994 in a notebook in which he noted certain confidential information. He reports that the 52nd Dai told his father of the nass on the Defendant. He had also told his wife. Shaikh Abdulhusain Yamani, the son of Shaikh Ibrahim Yamani, was the personal secretary of the 52nd Dai after the demise of his father. In the note, Shaikh Abdulhusain Yamani recorded that the 52nd Dai had informed Shaikh Abdulhusain Yamani in Karachi (in the year 1994) of a nass conferred by the 52nd Dai on the Defendant in the presence

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169 Ex D550, trans DW4 AOE, para 9.

170 Ex D569 trans Ex D569A.

of three witnesses. Shaikh Abdulhusain Yamani died on 11 July 2016. He had filed an affidavit in the Notice of Motion. Thus DW5 deposed to these events. The Plaintiff only suggested to DW5 in cross-examination that these events had not transpired. The witness denied it.[171] There is no other cross-examination.

416. I am leaving aside the events of February 2014 — by that time, the battle lines had been drawn. These would not prove the Champion notebook. Later disclosures of the Champion notebook or references to it will only go to undermining the case on fabrication — one that has not been established.

417. There has been no cross examination on this portion of the evidence and the same therefore stands proved.

418. The Plaintiff has not discharged the burden of establishing that the diary entry i.e., the Champion Notebook, is fabricated, as alleged in the Plaint.

419. The one person who would have been the most familiar with the handwriting and the signature of the 52nd Dai as well as of Shaikh Ibrahim Yamani would have been the Original Plaintiff. The Original Plaintiff did not depose that the handwriting/signature of Shaikh Ibrahim Yamani or the 52nd Dai appearing in the Champion Notebook were not in fact their handwriting / signature.

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171 DW5, X/E, Q&A. 162.

IV The Nass of November 2005

(6) The Defendant's affirmative case as pleaded

420. In November 2005, while at Bonham House in London, the 52nd Dai summoned two of his sons, Shahzada Qaidjoher Bhaisaheb and Shahzada Malekulashter Bhaisaheb Shujauddin (DW9). Then, after ensuring that no one else could listen in, the 52nd Dai told them to bear witness that the 52nd Dai had chosen the Defendant as his successor and thereby conferred Nass on the Defendant. The 52nd Dai swore them to secrecy.

421. The 52nd Dai also revealed that he had conferred Nass on the Defendant in the presence of three witnesses in 1969. He named all three witnesses.

422. Shahzada Qaidjoher Bhaisaheb revealed this after the public nass of 4 June 2011 first to the Defendant and other family members present at the Defendant's residence in London and later on to his own family.

423. The Defendant led the evidence of DW9 and DW3.

(7) The Plaintiff's case in opposition

424. The Plaintiff says the entire story is unbelievable, unworthy of credence and false. No reason is given why the 52nd Dai did this. There is no explanation why the Defendant was not told.

425. This stand requires the Plaintiff to dislodge the Defendant's case by cross-examination or independent evidence (possibly in rebuttal). There is no such separate evidence or rebuttal evidence.

(8) The Defendant's proof: the evidence of DW9

426. DW9, Shahzada Malekulashter Bhaisaheb Shujauddin, is the third son of the 52nd Dai and the younger brother of the Defendant. He gave evidence of the event at Bonham house with some details. The 52nd Dai was not keeping well. DW9 and others would visit the 52nd Dai at his Bonham House residence. The 52nd Dai remained in London for the entire month of Ramadan (the first and only time he was not in Mumbai during that annual period). During this time, DW9 and his siblings then in London regularly met the 52nd Dai at his residence. After that, DW9 and his brothers would meet in the adjacent flat to discuss general issues about Dawat administration. A few days after Eid al-Fitr, in November 2005, the 52nd Dai attended a family function in one of the other flats in Bonham House. DW9 was present. While leaving, the 52nd Dai asked DW9 to meet him in the 52nd Dai's flat. Before he could do so, and while he was waiting with other family in the adjacent flat, DW3 told Shahzada Qaidjoher Bhaisaheb and DW9 that the 52nd Dai had summoned both of them to his flat. They went across. The 52nd Dai was seated in his bedroom. He called them in. He asked them to ensure there was no one else present in the corridor outside. The 52nd Dai complained about his health. He then recited a version and said these two were witnesses to his conferment of a nass on the Defendant, whom he had chosen as his successor. They were to serve the Defendant as they served the 52nd Dai; but this had to be kept secret until the 52nd Dai

passed away. The 52nd Dai then told them of the previous nass when three witnesses were present. He named them. Shahzada Qaidjoher Bhaisaheb suggested to DW9 that they should record this, but DW9 said no, since it had to be kept confidential. They went back to the adjoining room. Their younger brother Shahzada Huzaifa Bhaisaheb and DW3 were present. Asked what had happened, they kept the confidence to which they were sworn. They then left Bonham House.

427. The scene shift to the afternoon of 4 June 2011. DW9 was in America. Shahzada Qaidjoher Bhaisaheb telephoned to say that the 52nd Dai had pronounced nass on the Defendant in London at the hospital that day. Qaidjoher told him how the nass had been performed and also that the 52nd Dai had said all should be informed.

428. DW9 has scheduled to preside over a majlis in Houston that evening. He made a public announcement of the 4th June 2011 nass. He also mentioned the nass conferred by the 52nd Dai privately a few years earlier, with himself and Shahzada Qaidjoher Bhaisaheb as witnesses. There is a video of the majlis and a transcript.

429. 30. Though DW9's deposition was restricted only to the facts relevant to the conferral of the Nass on the Defendant in November 2005, to which he was kept as a witness, the Plaintiff has cross-examined DW9 extensively on other unconnected issues of doctrine. Only the relevant cross-examination in relation to his deposition with regard to his being a witness to the conferral of the Nass by the 52nd Dai on the Defendant in November 2005 is discussed hereinbelow.

430. Trouble began early in the cross-examination of DW9. He was asked whether the 52nd Dai used the words "53rd Dai" for the Defendant during the events of November 2005. DW9's answer was that the 52nd Dai did use the words "treppan ma che" for the Defendant — in number 53 position.[172] And then it got worse; much worse. DW9 was asked whether according to him, the 52nd Dai used the word "Nass" in relation to the Defendant during what transpired in November 2005.[173] "Yes,", the witness replied. The 52nd Dai said "*Bhai Mufaddal Bhai Saifuddin par nass karu chu ane ene dawat na rutba ma qaim karu chu, aane mara pachi treppan ma ye che.*" There was no further cross-examination.

431. Then there followed some cross-examination about the weather (this was in London, after all), the layout of the flat and so forth. But this is of importance. He was asked if the 52nd Dai gave a reason for asking the windows to be closed. His answer was so that no one could listen, because he spoke in a loud voice.[174]

432. (The evidence of DW3 on this is immaterial; he was not present in the room with the 52nd Dai).

433. This evidence is not dispelled apart from saying it is not credible and asking why the Defendant was not informed.

434. The second nass is proved.

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172 DW9, X/E, Q&A. 43.
173 DW9, X/E, Q&A. 44.
174 DW9, X/E, Q&A. 183.

V The nass of 4th June 2011

(1) The Plaintiff's inconsistent (and controversial) stands

435. The Plaintiff's assault on the 52nd Dai's 'capacity' on 4th June 2011 was, from the beginning, problematic given the stand regarding infallibility, divine inspiration and the answers I have noted earlier on revocation of a nass that a Dai could never choose a successor who became incapacitated. If this be so, the attack is on the 51st Dai's choice of the 52nd Dai as his successor — and the 51st Dai is PW1's father, and PW2's grandfather.

436. It poses an enormously difficult problem in the theology and the doctrine, for it is now a frontal assault on the 52nd Dai himself, saying that he knew not what he was doing, and was being manipulated.

437. Far too much time was spent combing through medical records to discern some nugget that might show the 52nd Dai's total incoherence and incapacity. But, as we shall see, there is a recording; I have heard it. No amount of complaining that it is unclear will assist. And if the case is that it was manipulated — some sort of deep fake — that had to be *proved*. It could not remain at the level of argument.

438. The Plaintiff's stand on this, as it emerged from cross-examination, must be noted:

> **1062 Q.** Is it your belief that no Dai can ever be so physically or mentally incapacitated or incapable as to be unable to function as a Dai?

Ans. The principal duty of any Dai is to appoint a successor and the belief in the faith is that no Dai can ever be so physically or mentally incapacitated or incapable as to be unable to appoint a successor. **That incapacity or lack of capability may occur, and has in fact occurred, after the appointment of the successor, never before.** The 48th Dai appointed his successor and thereafter suffered a serious stroke that left him deprived of speech.

(*Emphasis added*)

439. Now this is a peculiar muddling of fact and a doctrinal belief. The Plaintiff's say-so had to be supported by some material. It also does not address the inherent conflict with the accepted doctrine of *infallibility*. PW2 also said that he believed the 52nd Dai was not in full possession of his mental faculties. He claimed this was borne out by medical records and his own observation.[175] For his part, PW1 only said he was unsure if the 52nd Dai was capable of taking decisions, because he had noticed 'a significant difference' in him, and that he was not as physically or mentally active as he once was.[176]

440. The father was far more circumspect than the son. There is a recklessness in the approach when the assertion was that the 52nd Dai was not 'in full possession of mental faculties'. It is also ambiguous. Since 2005, the 52nd Dai had been unwell off and on. By 2011, he was well into his nineties. *Of course he was not as physically or mentally active as before*; but therefore what? What doctrine says that

175 PW2, X/E, Q&A. 1048–1050.

176 PW1, X/E, Q&A. 526, 529, 530.

to appoint a successor a Dai must be capable of running a marathon? That is not even testamentary law in the making of wills.

441. The Plaintiff's task in dislodging the Defendant's case was *not* to point to *some* infirmity and then claim incapacity. It was to show that there was such a full-spectrum incapacity — virtually being vegetative — that the 52nd Dai *could not possibly have made an appointment of a successor*.

442. And the 52nd Dai lived for another two-and-a-half years after June 2011. And during that time he was seen in public and at discourses. The story of the Plaintiff that this was all showboating and that a vegetative 52nd Dai was being carted around is, to my mind, an egregious attack on a fundamental tenet of the faith and the belief *in the Dai*.

(2) Inconsistency between the case on revocability and the capacity of the 52nd Dai

443. The other significant inconsistency is this. If, according to the Plaintiff, a nass once pronounced is irrevocable, etc., then the conclusion or presumption invited that, of all living persons, no one would have known this better than the 52nd Dai. This leads us to a binary: either (1) there is no such doctrine of irrevocability and therefore the 52nd Dai acted in accordance with the doctrines of the faith, or (2) the 52nd Dai breached a doctrine, wittingly or unwittingly — for the case is not of no appointment in June 2011, but of an invalid or improper appointment. There is no third alternative.

444. The second is entirely unstatable. No one could ever urge that a Dai knowingly acted contrary to the faith. That argument questions the legitimacy of the Dai and his position. The faith tells us that the Dai, being infallible, could not even unwittingly have acted contrary to the tenets of the faith. Consequently, this reduces to rubble the entire case on revocability in one go.

(3) The events leading up to and of 4th June 2011

445. The burden of proof is entirely on the Defendant. This is the Defendant's narrative.

446. In late May 2011, the 52nd Dai was in London. Many others were there too. He was at Bonham House. On 30th May 2011, the 52nd Dai attended the majlis for the urs of the 32nd Dai. This majlis was at Husaini Masjid in London. DW3 was present. Over 2000 community members are said to have attended. The 52nd Dai's sermon ran for over an hour.

447. The 52nd Dai began to feel unwell the next day, 31 May 2011. He had a cough. He had not eaten much, and hardly had anything to drink. DW3's father, Dr Moiz Bhaisaheb Nooruddin, called Dr Moez Dungerwala, a local doctor from the community. Dr Dungerwala came at about 10 pm and took a sputum sample for the cough. They decided to administer a dextrose drip to the 52nd Dai. DW3 was present throughout.

448. The next day, 1st June 2011, the 52nd Dai was admitted to the Bupa Cromwell hospital in London. Cutting a long and extremely

tedious story short, the 52nd Dai was ultimately found to have suffered a pontine stroke. This had affected the right pons in the lower brain stem. There was no cortical event noted. The medical evidence, of which more a little later, indicates dysphagia (impaired swallowing) and dysarthria (speech articulation deficit).

449. The Defendant claims that the 52nd Dai conferred nass on the Defendant in the evening of 4 June 2011 at around 8 pm. Present were three of the 52nd Dai's sons Shahzada Idris Bhaisaheb Badruddin, Shahzada Qusai Bhaisaheb Vajihuddin, Shahzada Ammar Bhaisaheb Jamaluddin, the 52nd Dai's daughter, Shahzadi Husaina Baisaheba, his son-in-law, Dr Moiz Bhaisaheb Nooruddin, and grandson Abdulqadir Bhaisaheb Nooruddin, DW3. The conferral of the Nass was audio recorded by DW3.

450. DW3 describes how this came to pass. He and is father attended to the 52nd Dai during his stay at Cromwell Hospital. DW3 would arrive at the hospital at about 2.00 pm and leave at about 5.30 am the next day. The 52nd Dai's children who were in London visited him daily.

451. Between 6:30 and 7:00 pm on the evening of 4th June 2011, three of the 52nd Dai's sons (Idris, Qusai and Ammar) visited the 52nd Dai at the hospital. DW3's mother, the 52nd Dai's daughter, was present too, as were DW3 himself and his father. Shortly after the children and others met the 52nd Dai, he asked them to wait in the adjoining room. The sons asked if they could leave. The 52nd Dai bade them wait — the 52nd Dai said this to DW3 himself and to his

father. This, DW3 said, was somewhat unusual; normally, the 52nd Dai would not keep his children waiting. A little later, DW3 and his father asked the 52nd Dai if they should his sons to come back to the hospital room. The 52nd Dai said he would let them know. The 52nd Dai indicated to DW3 he wanted to be seated on a chair. DW3 and his father assisted the 52nd Dai. In the chair, the 52nd Dai read the Quran in silence. By this time, the attendant staff had made up his bed. The 52nd Dai wanted to return to it. He read more for a while and then gave DW3 his Quran to put away. Then he asked DW3 to help him back to his bed. They declined a hoist, and DW3, his father Dr Dungerwala helped the 52nd Dai to return to the bed. Asked if he wanted to rest — the sons and daughter were still outside, waiting — the 52nd Dai said no. He sat on the edge of the bed, his feet against the floor. Now the 52nd Dai asked for his three sons who were waiting in the adjoining room to be called in. DW3's father called them in. When they entered, the 52nd Dai was still on the bed, seated upright though with support from DW3 and his father. The 52nd Dai instructed for a sheet to be spread out on the floor before him. He he then gestured for them to sit before him. The sons sat on the sheet. The daughter, DW3's mother, stood beside them.

452. It had just past eight o'clock in the evening. The 52nd Dai spoke, his voice weak, yet clear, his style formal and declarative. He recited words. The manner of the recitation made DW3 believe something important was in the offing — especially given the events leading up to it. Evidently, DW3 was not the only one who sensed this. So did his father, and he motion to DW3 to start recording. DW3

pulled out his Apple iPhone 4 and began recording audio. It was 8:07 pm.[177]

453. DW3 has produced the audio recording.[178] There is a transcript. There is a translation of the transcript.[179] I will come to these immediately next.

454. DW3 emailed the audio recording to himself the next day, 5th June 2011, at about 12:29 pm UTC, from his yahoo account to his gmail account.[180]

455. On 13th June 2011, he forwarded the same email from his Gmail account to his Yahoo account and added some sentences to the body of the email, essentially mentioning that the recording was of the nass by the 52nd Dai on the Defendant in room no 208 of Cromwell Hospital. The subject line says, "nass ni zikr."[181]

456. The audio file emailed on 13th June 2011 is on record.[182] DW3 has confirmed it is identical to the audio recording file of 4th June 2011,[183] but with different metadata.

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177 In cross-examination, he was asked how he knew the time so precisely — the sort of question one should never ask unless one knows the answer or the answer does not matter. From the cellphone, replied DW3. Rightly so.

178 Ex D307.

179 Ex D443.

180 Again, the record is heavily seasoned with thoroughly irrelevant questions about these email records.

181 Ex D448 with its Section 65B Evidence Act certificate at Ex D449.

182 Ex D450.

183 Ex D307.

457. The story continues.

458. The 52nd Dai's sons got to their feet. DW3 stopped recording. Those present recited a few verses by the 51st Dai. Then the 52nd Dai told his sons and daughter they could now leave. They did. DW3 and his father stayed back. The 52nd Dai asked DW3's father from sherbet — traditionally celebratory — but there appear to have been *some* rules in that hospital applicable even to the 52nd Dai. There was no sherbet to be had. At least not then. After a while, the 52nd Dai asked if everyone had been told. DW3's father asked if they should tell everyone. The 52nd Dai nodded. Then the 52nd Dai gave them permission to leave too. Shaikh Ismail Shajapurwala (the 52nd Dai's personal assistant) and Dr Dungerwala stayed back at the hospital.

459. En route to Bonham House, DW3's father called Shahzada Qaidjoher Bhaisaheb and requested him to meet them at Bonham House, saying that the 52nd Dai had conferred Nass on the Defendant at Bupa Cromwell Hospital and had instructed it to be made public. He also said that with the 52nd Dai's permission they were on the way to inform the Defendant first, before telling anyone else.

460. The party reached the Defendant's home. It was sunset. The Defendant was doing his ablution to prepare for namaz, his wife said. The other decided to return to the Defendant's after their own namaz. When they returned, the Defendant's wife and his son Jafarussadiq Bhaisaheb were present, as were others. Then Qaidjoher Bhaisaheb told the Defendant that 52nd Dai had conferred nass on

him. The Defendant got up from the sofa and sat on the floor. He seemed to be in grief. He wept. He expressed concern about his father's health. DW3 heard the Defendant say that death should take him, but spare his father. The Defendant then prayed for the Imam of the age should reveal himself from seclusion during the lifetime of the 52nd Dai.

461. At this point, with DW3 present, Qaidjoher told the Defendant of a previous nass he had conferred on the Defendant, and which the 52nd Dai had directed be kept in secret until he passed away. But now the 52nd Dai had directed the disclosure and announcement. Qaidjoher then narrated the events and nass of November 2005, and mentioned the 1969 nass, of which he (Qaidjoher) had been informed. DW3 heard all this.[184] DW3 is corroborated by DW9, Malekulashter.

462. It would prove to a busy June night in London. For, says DW3, the Defendant said they should go to the 52nd Dai. They got there by 10:30 pm. I suppose this was momentous enough to warrant disturbing the 52nd Dai at this late hour (never mind hospital rules). As it happened, the 52nd Dai was awake, reclining in bed.

463. And now come the videos. The 52nd Dai raised his hand to acknowledge the Defendant. DW3 started recording on his phone.

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184 Incidentally, if this was the only proof of the November 2005 or 1969 nussoos the evidence would have been inadmissible as hearsay. But both those have been separately and independently proved. This testimony is, therefore, corroborative of a fact in issue.

464. DW3 made six video recordings of this time.[185] The A transliteration and a transcript of the video along with time markers are on record.[186] I am dealing with the audio recording and the video recordings below.

465. All but the Defendant left the room and went to the adjoining room. A while later, the Defendant asked DW3 to come back in. Then, in DW3's earshot, the 52nd Dai said to the Defendant that he should take all matters in hand. The Defendant left; DW3 stayed on. The 52nd Dai wanted to know if the people had been told of the nass. DW3 went to the room next door to check. He Qaidjoher and others making calls and telling people.

466. DW9 was scheduled to preside over the majlis for the urs of Syedna Noor Mohammed Nooruddin (the 37th Dai) at the masjid in Houston, USA on the evening of 4 June 2011. A few hours after Qaidjoher's call, DW9 did preside at that majlis. There, he publicly announced the nass of a few hours earlier in London by the 52nd Dai on the Defendant. He also mentioned the earlier nass to which he and Qaidjoher had been witnesses. A video is, inevitably, available, with its equally inevitable transcription and translation.[187]

467. The plaint references an audio recording of Qaidjoher informing his family of the nass conferred by 52nd Dai on the Defendant on 4 June 2011. The plaintiff says the timing is discrepant.

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185 Exs D311A to D311F.

186 Ex D451.

187 Ex. D628; Exs D629A and D629B.

Never mind that; the Plaintiff's transcription identifies a source — the Original Plaintiff's own daughter, the present Plaintiff's sister. She was the daughter-in-law of Qaidjoher.

(4) The audio recording

468. About this piece of evidence, and the video recordings, I have to make this clear. I have heard and seen them myself. No amount of argumentation without evidence that the audio is 'fabricated' is going to work. No insistence on 'unintelligibility' will work.

469. On the audio recording, the voice of the 52nd Dai can be heard in Lisan ud Dawat saying:

> '*Dawat na rutba ma Mufaddal bhai ne qaa'im kariye che*'
>
> [Translated as 'We appoint Mufaddal bhai in the rank of Dai al-Mutlaq']
>
> '*tame saglaa ne khabar aapjo*'
>
> [Translated as 'Inform everyone.']
>
> '*tame sagla ye sunu…?*'
>
> [Translated as 'Did everyone hear…?']

470. The words are discernible; and the language poses little difficulty given its proximity to Gujarati.

471. The Plaintiff says this is fabricated and the digital file has been tampered. He produced no independent evidence of either. Asked in cross-examination why he said this,[188] PW2 said that the voice did not

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188 PW2, X/E, Q&A. 1317.

"seem to him" to be that of the 52nd Dai. That is not independent evidence. He said he had heard the 52nd Dai before and this time his voice sounded different. But he was *ill*; I should have been rather more suspicious if the voice had *not* been different. Then he maintained that the hospital records showed 'it could not have been the voice of the 52nd Dai' — and I will come to those in just a bit — because, according to him, these show that the 52nd Dai was 'unable to speak' (*at all*) and in no condition to speak intelligibly. Lastly, he said this audio recording was revealed only after the 52nd Dai passed away.

472. PW2's impressions are not evidence. He is no expert. As we shall see, the medical records do not say what PW2 claims they say. And there is no evidence led of fabrication or tampering. There is no voice print analysis.

473. Plus, I have heard the evidence myself. Every one of those words are discernible.

474. And then PW2 tripped.

475. 51. PW2 was, in question 1328, specifically questioned as follows:

1328.Q. Is it your case that the speech of the 52nd Dai in the video recording that was broadcast is different from his speech in the audio recording of 4th June 2011?

Ans. (*It is clarified to the witness that the reference is to the voice quality and not to the contents of what was said.*)

> According to me, there is a difference. **The 52nd Dai's quality of speech in the video recording is poorer and less intelligible than the voice in the audio recording of 4th June 2011**.
>
> (*Emphasis added*)

476. Therefore, in the audio recording the words of the 52nd Dai were *not* unintelligible and he *could* speak.

477. To be plain, the speech is laboured, slow, the breathing is laboured, there are pauses. The audio runs for about six minutes. The nass sentence itself runs for just under two minutes. It contains a dua or benediction.

478. The submissions by the Plaintiff are born of desperation, clutching at any and every straw ("he was made to read something"), with not a shred of evidence.

(5) The six video recordings

479. There is a babble of voices on these recordings. But the two phrases that are spoken by the 52nd Dai are :

> — you have really worked hard
>
> — Would the news be known everywhere? News will [still] not have reached. Give the news [indiscernible]

480. The first may be ambiguous; the second is consistent with the direction to spread the word about the nass — for their was simply no other 'news' to be made known 'everywhere'. There are also

indications that though weak and affected — he had suffered a pontine effect after all — the 52nd Dai was not robbed of his cognition as the Plaintiff claims.

(6) The medical records

481. At the very considerable risk of annoying all the lawyers, I propose to give this evidence the shortest possible shrift. We took the evidence of Dr Omar Malik (DW1) and Dr John Costello (DW2) online during Covid — neither could then travel to India. The medical records are in evidence.

482. The cross-examination was, in my view, entirely ineffective. To this day, I do not know and cannot make out what was sought to be achieved. The Plaintiff led no medical evidence to indicate that the professional opinions of DW1 and DW2, who treated the 52nd Dai in London in June 2011, were in any way unreliable. Of course had suffered a pontine event. Of course he had difficulty swallowing. Of course the intelligibility of his speech was affected and he slurred. Nobody denies that. One can *hear* it on the audio and video recordings. He was 97 years old at the time.

483. But none of this goes the necessary distance. The burden of proof was not on the Defendant but was on the Plaintiff for it was the Plaintiff's affirmative case that in June 2011 and especially on 4th June 2011, the 52nd Dai's cognition and speech were totally compromised — that he was *totally* incapable of thought and speech. Not a thing is established in this regard — and yet there are pages and pages of submissions from each side. Mr Desai would have me believe

not my own eyes and ears but to deny what I can see and hear because some Speech and Language Therapist made a note of 0-5% intelligibility on 2nd June 2011, and apparently there was no improvement, but a 'severe reduction' in the movement and strength of the lips and tongue. Then there is this submission:

> The hospital records, as well as the oral evidence of DW1 and DW2, do not show that there was sufficient improvement in the physical or mental condition of the 52nd Dai on 4th June 2011 for the 52nd Dai to confer Nass. There is no report, or any evidence given by the Doctors or medical staff that the 52nd Dai spoke intelligibly or was orientated on 4th June 2011 around 8 pm.

484. I fail to understand what is meant by "improvement in physical or mental condition … to confer nass". There is no doctrine that a Dai must have Richard Burton diction to pronounce nass.

485. Not to put too fine a point on it, PW1 had a speech impediment. He came to court with it. He was barely intelligible. We needed a translator and his son present to assist as well. We video recorded each day's cross-examination of PW1, sometimes referring to the video to check the court transcripts. This, apparently, is sufficient linguistic ability for PW1 to have conferred nass on PW2 — but not for the 52nd Dai.

(7) Conclusion

486. The Plaintiff hangs his case on several distinct pegs here. There is the unproven allegation of the video recording being fabricated or doctored. There is the assault on mental capacity that

varies from 'could not speak at all' to 'could barely speak' to 'there was no improvement' and 'was scarcely intelligible'.

487. The Plaintiff offers no proof but demands conjecture: the 52nd Dai *must have been* of *insufficient capacity and speech* to confer a nass.

488. The nass of 4th June 2011 is proved.

VI The nass of 20th June 2011

489. There was a majlis in Mumbai on 20th June 2011 after the 52nd Dai was brought back by air ambulance from London. This was at the Raudat Tahera to mark the urs or death anniversary of the 51st Dai. This was video recorded. The video is on record.[189] The Plaintiff had an abridged version. There is a copious transcript. Mr Dwarkadas took me through a line by line explanation of the transcript. I saw the relevant portions of the video.

490. The Plaintiff says this:

(a) The Defendant and his 'coterie' stage managed the event of 20 June 2011.

(b) The suggestion is that the 52nd Dai was literally carted to Raudat Tahera and paraded there.

(c) The 52nd Dai was incoherent. A microphone was pushed in from of him. Dr Moiz Nooruddin, the 52nd Dai's personal doctor and attendant, claimed to

189 Ex D310.

understand what the 52nd Dai was saying and repeated words as if spoken by the 52nd Dai.

(d) If a nass had already been pronounced on 4th June 2011, another one on 20th June 2011 was unnecessary.

(e) The 52nd Dai lived for about two and a half years after this event but never regained his health or his ability to speak coherently.

491. DW3 gave evidence of the events of the evening before and of the morning of 20th June 2011. There were four video feeds and two recordings that were merged. A digital archivist gave evidence (DW8).

492. Again, there is nothing from the Plaintiff to show that the video is doctored or a fake.

493. A tabulation of the transcript was given to me. I need only to take the key elements from it, where the 52nd Dai himself can be both heard and seen (I am leaving aside physical gestures for there are many). Several times the 52nd Dai is heard to say this:[190]

> We adorn you with the crown of Shaikh Mohammed.

And then

> Mufaddalbhai I adorn with the crown of nass

And words to that effect.

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190 Time markers 1.09.15, 1.09.18, 1.09.21, 1.09.39, 1.09.42, 1.09.47, 1.09.49 etc.

494. Kauserali Yamani, DW5, gave evidence on the events of 20th June 2011. He was present. He and his father sat to the left of the 52nd Dai's stage seating. He said that he heard the 52nd Dai say "Mufaddal bhai ne nass nu taj". He understood the 52nd Dai to be conferring a nass of succession on the Defendant.

495. Something odd happened in his cross-examination. A portion of the video was played to him. He was shown a transcript and a translation prepared by or on behalf of the Plaintiff and produced by the Plaintiff. He was asked to confirm the accuracy of the Plaintiff's transcript and translation. It went like this.

> *Witness is shown the video recording at Exhibit D-310, time marker 1:26:51 to 1:27:30 and a Statement tendered by the Advocates for the Plaintiff showing the transcript and translation of the above portion of the video.*
>
> Q.51. Do you agree that this is an accurate transcript and translation of this portion?
>
> Ans. According to me, in the transcript and in translation tendered by the Advocates for the Plaintiff and shown to me, only the words at Sr. No. 5 are correct and understandable to me. The rest of the words are not understandable to me from the transcript and translation.

496. The words in the entry at Serial No.5 are exactly the words DW4 says he heard the 52nd Dai say. The transcript and translation were marked for identification. They were never proved. Entry/Serial No 5 entered the record.[191] The entry is "the crown of nass on Mufaddal bhai." Thus, the *Plaintiff* put the case to DW4 — by seeking confirmation of the transcript and translation — that the

191 Ex P360.

52nd Dai *did* speak these words; and *the Plaintiff* got into evidence this portion (and only this portion) of the transcript and translation.

497. But the plaint says—

> "…the Defendant and his coterie repeatedly put the microphone in front of the 52nd Dai and although the 52nd Dai was incoherent because of the stroke suffered by him, yet Dr Moiz bhai Nooruddin, being the 52nd Dai's personal doctor and attendant, claimed to understand what the 52nd Dai was saying and acted as if he was repeating the words of the 52nd Dai so everyone could understand. **The video recording of the event establishes that the 52nd Dai was incoherent and it was impossible for anyone to understand what he was saying…**"
>
> (*Emphasis added*)

498. There is no question of the Plaintiff maintaining the line about microphones being thrust before the 52nd Dai or of the 52nd Dai being incoherent and incapable of being understood by anyone. The Plaintiff understood him perfectly clearly.

499. DW3 also deposed to on the events of 20th June 2011 — his cross-examination reveals nothing to support the Plaintiff's case. He was shown selective time-markers to bolster the case of the mental infirmity and the event being stage-managed. But this is not how any evidence is to be viewed, taken a bit from here and a bit from there. We must look at the piece of evidence in its entirety — the full video.

500. The allegation of it being stage-managed is an allegation of fraud. This is what I meant by the pleading being more in the nature

of an affidavit at an interim stage, meant to cause prejudice, rather than a proper pleading. If this is fraud, and it cannot be a plea of anything but fraud, it had been pleaded with particulars and proved to have been a fraud. The gathering was a public one. The burden on the Plaintiff is that much higher.

501. Importantly, DW1, Dr Omar Malik, gave evidence of his opinion on seeing the videos of the 52nd Dai on the evening before and on 20th June 2011. He deposed to the functional ability of the 52nd Dai. There was no cross-examination at all.

502. The Plaintiff has failed to show that the 52nd Dai was not mentally competent to pronounce nass or that he did not in fact pronounce nass on 20th June 2011. The Defendant has proved that he did.

VII Other corroborative material: the Risalah Zaat al-Noor

503. The Plaintiff's case collapses in view of two or three subsequent events. (I propose to ignore the references to the Deed of Affirmation dated 2nd March 2012 and the Power of Attorney dated 18th March 2013). But the *Risalah Zaat al-Noor* is important because the Plaintiff knew about it even before the suit was filed and because of the way he addressed it in the plaint.

504. The Risalah Zaat al-Noor is a publication prepared on the instructions of the 52nd Dai. It was said on behalf of the Defendant to have been finalised and approved by the 52nd Dai. That it was

presented to various dignitaries, *including the Original Plaintiff*, is undeniable. It contains a reference to the 1969 Nass.

505. DW3 deposed that he enjoyed the confidence of the 52nd Dai. He and the 52nd Dai's personal secretary, Shaikh Abdulhusain Yamani, were asked to assist the 52nd Dai him in fulfilling his desire to complete and publish the incomplete risalahs of his father, the 51st Dai. The 52nd Dai also involved the Defendant and Abdulhusain Yamani in completing, preparing and publishing his own risalahs. The 52nd Dai finalized and approved the risalahs. He personally read the text or had it read out to him — even after the stroke. Many incomplete drafts of the risalahs of the 51st and 52nd Dais were eventually completed and published in an ongoing process until the 52nd Dai's demise. Each risalah was formally released by the 52nd Dai during a sermon or at an important event.

506. The risalah Zaat Al-Noor,[192] was released in a ceremony at the Raudat Tahera on 19th August 2011. The Defendant and Qaidjoher presented the risalahs to the 52nd Dai. He officially gave permission for them to be distributed by placing his hand on the risalahs. The risalahs were presented and given to the dignitaries present — including the Original Plaintiff. The Original Plaintiff stood to accept the risalahs. There are photographs.

192 Ex D435, transcript and trans Ex D776.

507. Zaat al-Noor refers to the nussoos conferred by the 52nd Dai on the Defendant. It mentions the 2005 witnessed nass and references the earlier one.

508. DW3 was not cross-examined on the preparation of the risalah-al-noor.

509. This is where the Plaintiff trips up. I heard the submission in arguments that the Plaintiff learnt of this risalah from the Defendant's Affidavit in Reply to the Notice of Motion; and that the Plaintiff received this only with the Affidavit of Documents filed by the Defendant. In evidence, the PW2 only argued infirmity, but did not prove incapacity (inability to supervise the completion of the risalahs). Yet it was argued that the this risalah al noor was prepared by the Defendant and could not have been finalised or approved by the 52nd Dai given his health.

510. That too is an allegation of fraud, forgery or worse. That too had to be pleaded with particulars, and proved. It could not be an argument seeking conjecture.

511. There is no doubt that the Original Plaintiff received the risalah. Even had he said he had not read it, it would have made no difference. But the point is that the Plaintiff's acceptance of the risalah and his failure to lead any evidence to discredit it completely obliterates any argument of the 52nd Dai lacking capacity.

VIII The Plaintiff's conduct after June 2011

512. Mr Dwarkadas addressed me at length on the Plaintiff's conduct after June 2011. After considerable reflection, I have decided not to return any findings on these submission. I do so as a matter of prudence and circumspection, for the reasons set out at the head of this judgment: these are matters of faith and belief, and these parties are not ordinary commercial litigants. Comments on their character or veracity (as opposed to the weight of their evidence) may have serious unintended effects.

513. Further, the issue at hand is defined. The Defendant's case is not further proved by the Plaintiff's conduct, whatever it may.

(1) The majlis of 6th June 2011

514. There are two exceptions to this. The first is the majlis of 6th June 2011. The 52nd Dai was still in London; he had not yet returned to Mumbai. News of the 4th June 2011 nass had already been circulated. A majlis was held at Saifee Masjid in Mumbai on 6th June 2011. The audio of the announcement by Qaidjoher of the 52nd Dai's nass on the Defendant was played. The Defendant mentioned this in the Affidavits in Reply filed in March and May 2014 to the Plaintiff's Notice of Motion. The plaint was amended a few months later in July 2014. There is no mention of this majlis — although the Original Plaintiff presided at it. It was not until the AOE that the Original Plaintiff purported to address this majlis. He claimed it was for the long life of the 52nd Dai (of course it was that too), but said 'it was curiously announced' by SMS that the Qaidjoher audio recording

would be played. As Mazoon, the Plaintiff presided at the majlis. The Original Plaintiff said that he kept silent about the announcement of the nass on the Defendant as he believed it would be inappropriate to raise the issue in public. There is photographic evidence, including of the taking of sherbet, traditionally a celebratory act (and which the Plaintiff accepted in cross-examination). Interestingly, the Original Plaintiff accepted that he had been informed that a 'tape' received from Qaidjoher was to be played (which could have had nothing to do with the 52nd Dai's health or longevity); and, initially, the Mukasir was to preside at this majlis, but the Original Plaintiff decided to preside himself.

515. There is a long cross-examination of PW2 of the events of around this time and his own involvement. He was in Bakersfield, California, USA at the time. Not much turns on this for our present purposes.

516. What is, however, unexplained is the complete elision of the 6th June 2011 majlis and the Original Plaintiff's participation in it. The implications — including the ritual celebratory sherbet drinking — are clear (for if the majlis was only to pray about the 52nd Dai's health or long life, there was nothing to 'celebrate'). This is especially so because the Original Plaintiff was, at that time, *in the second highest rank*, that of the Mazoon.

517. This is not a matter of conjecture. It invites a clear inference from the unexplained conduct of the Original Plaintiff — that he was aware of the nass on the Defendant of 4th June 2011 just two days

later; this nass was made publicly known at a majlis; the Original Plaintiff himself presided at this majlis; and the Original Plaintiff participated in the ritual of celebration. This is a piece of evidence, not an argument or a supposition. It is a fact that is in itself relevant, but is also a fact connected with a fact in issue — the nass of 4th June 2011. Thus, the Original Plaintiff accepted at least once the conferment of a nass on the Defendant on 4th June 2011.

(2) The December 2011 public sermon in Ujjain

518. PW1's son, Abdeali Qutbuddin, gave a sermon around 1st December 2011 in Ujjain, during Moharram. In the course of this, Abdeali acknowledged and accepted that a nass had been conferred on the Defendant. In the written statement, the Defendant quotes Abdeali as saying—

> "Let me mention this as well: the great act of nass that Moulana Burhanuddin Aqa has performed. His son, whose name Syedna Taher Saifuddin has kept as Aali Qadr Mufaddal. His upbringing was at the hands of Syedna Mohammed Burhanuddin, and he gave him the title of Aqeeq al-Yemen. This Aali Qadr Syedi Mufaddal bhaisaheb Saifuddin, may Allah the Exalted extend his life in prosperity in the shade of Burhanuddin Aqa".

519. PW2 was cross-examined. He knew of the sermon. He agreed that his son 'took or used' the Defendant's name as the Mansoos. I asked if Abdeali referred to the Defendant as the Mansoos. Yes, said PW2.

520. I do not suggest that Abdeali's words are an admission by either PW1 or PW2. But this is yet another piece of *evidence*, a relevant fact, and also a fact related to a relevant fact and a fact in issue, about the manner in which the Plaintiff's family approached the 4th June 2011 nass on the Defendant — at least until December of that year.

IX Conclusion

521. One observation is unavoidable. Clearly, the Plaintiff applies different standards to the nass he claims was conferred on himself and the nussoos of the Defendant. It is all right, we are told, if the nass on the Original Plaintiff did not use the words nass, Mansoos, crown, or anything of the kind. It does not matter that it was without witnesses and in private, and never revealed or even alluded to. It is all right if there is some nebulous and unspecified 'indication' (some words, a ring). We are asked to extrapolate and from this infer a nass, inter alia on the account of MOHSL, not one of whom is brought forward to bear witness. But for the Defendant, audio, video, and the depositions of those actually present are all worthless. The court's own study and appreciation of the audio-visual material is worthless. All this can be jettisoned by literally demanding that — and there is no other way to put it — the nass on the Defendant *was not sufficiently clear*.

522. I return to the guidance of the Evidence Act: likelihood, probability, balance, preponderance, prudence. In 1965, the 52nd Dai was 51 years old. He lived for twice as long. He had just ascended to the office of Dai. He had not yet taken his pledge of allegiance. We are asked to believe that right there, right then, the first thought in the

52nd Dai's mind was not just about getting in place his second-in-command, the Mazoon, but also of immediately appointing his own successor. It is not impossible. But what is the likelihood of this as compared to a time five years later in 1969, with things firmly under control, and a spiritual leader's thoughts turn to the matter of succession? Or 2005, *forty* years later after he became in 1965, when surely this must have been a concern, and health issues already coming up? Or 2011, forty six years from the date of the Plaintiff's claimed nass? Of these, the Plaintiff's is the least likely, the most implausible scenario.

523. An overall assessment of the 52nd Dai in 2011 is not one of an comatose mind man trapped in a weakened body, to enfeebled to know that which he was doing. If there is one dead giveaway, it is at the Raudat Tahera majlis of 20th June 2011. One annual custom at the urs of the 51st Dai was for the 52nd Dai to announce a grant to the Burhani Qardan Hasana scheme through a dedicated trust. The principle objective of the Qardan Hasana Scheme is to provide interest-free loans for business, industry, housing, marriage, Haj and Ziyarat, and support for education, health, poverty relief and so forth. How much did the 52nd Dai announce on 20th June 2011? Rs 100 crores. This the Plaintiff does not see as an indication of infirmity or incapacity. The 52nd Dai was perfectly mentally and physically competent to make a huge donation — but he could not have named his successor and was unintelligible and too mentally impaired for that.

524. Likelihood, probability, balance, preponderance, prudence. The Plaintiff fails on all counts.

525. Issues Nos 5(a), 5(b), 5(c) and 5(d) are answered in the affirmative. The remaining will not survive.

L. FINAL ORDER

526. The suit is dismissed.

527. In the facts of the case, I will not make an order of costs. Each side has already borne unimaginable costs. I see no reason to add to those burdens.

(G.S. PATEL, J.)