SHEPHALI

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1290 OF 2016
IN
SUIT NO. 337 OF 2014

Khuzemabhai Syedna Taher Saifuddin Sahab alias Khuzembhai STS Qutubuddin alias Khuzaima Qutubuddin
aged 73 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 (*deceased*)

~ VERSUS ~

Mufaddal Burhanuddin Saifuddin
aged 67 years, Indian Inhabitant residing at Burhani Manzil, 2nd floor, Saify Mahal, Malabar Hill, AG Bell Road, Mumbai 400 006. … Defendant

~ AND ~

Taher Fakhruddin Saheb alias Taherbhai K Qutubuddin alias Taherbhai Qutubuddin
aged 47 years, Indian Inhabitant residing at Fourth floor, Flat 1, Al-Azar, 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 … Applicant

APPEARANCES

FOR THE APPLICANT **Mr RM Kadam, Senior Advocate**, *with Mr Anand Desai, Mr Chirag Mody, Mr Samit Shukla & Mr Sausher Kohli, i/b DSK Legal.*

FOR THE DEFENDANT **Mr JD Dwarkadas, Senior Advocate**, *with Mr Pankaj Sawant, Senior Advocate, Mr Firdosh Pooniwalla, Mr Juzer Shakir, Ms Azmin Irani, Mr Abeezar Fazullabhoy, Mr Murtuza Kachwalla & Mr Shehen Pradhan, i/b HSA Advocates*

CORAM: G.S. PATEL, J
DATED: 7th March 2017

ORAL JUDGMENT:

1. The original Plaintiff ("**Khuzemabhai**") brought suit for a declaration that he was properly appointed as the 53rd Dai Al-Mutlaq (spiritual leader and head) of the Dawoodi Bohra Community by the 52nd Dai Al-Mutlaq, Syedna Mohammad Burhanuddin, whom he (the original Plaintiff) was entitled to succeed. The remaining prayers are for orders regarding various estates and properties that vest in the Dai Al-Mutlaq by virtue of that appointment.

2. The Defendant, for his part, claims to have been validly appointed by the 52nd Dai, Syedna Mohammad Burhanuddin, as his successor. He assumed office after the 52nd Dai died on 17th January 2014. Khuzemabhai challenged the Defendant's claim to that office in this suit.

3. From the beginning, the Defendant resisted the suit most strenuously. When the original Plaintiff's Motion came before me, I indicated that this was not a matter that lent itself to arguments on Affidavit or interim relief, and that the Suit itself would have to be heard at an early date. A quite extraordinary amount of time was spent in filing a Written Statements, framing issues, disclosures, marking documents and so on, but by our glacial standards, the matter went to trial with uncommon despatch. The original Plaintiff filed a substantial Affidavit in lieu of examination-in-chief. Cross-examination commenced on 27th April 2015, just a little over a year after the Suit was filed. Khuzembhai was being cross-examined. While this was under way, the matter, which obviously could not proceed on a day-to-day basis, was adjourned by consent. Before the next hearings could be scheduled, Khuzemabhai died in American on 30th March 2016.

4. Now his eldest son, Taher Fakhruddin, the present Applicant, seeks to continue his father's suit, saying that his father, the original Plaintiff, in turn properly appointed him as the 54th Dai Al-Mutlaq.

5. The question before me today in this Chamber Summons is whether the suit Khuzemabhai filed was for a declaration of a personal status and rights entirely personal to him; if so, whether this suit abated on his death; if not, whether Taher Fakhruddin can

continue the suit in his own name, amending it for a suitable declaration in his own favour. Clearly, Taher Fakhruddin would have to prove the validity of his father's appointment as the 53rd Dai, and then his own as the 54th.

6. There is at least one amendment that Taher Fakhruddin seeks that is on his own showing an addition to what was originally sought. I will consider that separately.

7. Did this suit abate on Khuzemabhai's death? Did the cause of action end on Khuzemabhai's demise? Does the right to sue survive? To answer these, we must first look at the prayers in the suit. I have broadly indicated the frame of prayer (a) earlier. Prayers (a) to (j) are the final prayers in the Suit and this is how they read:

> "(a) that this Hon'ble Court be pleased to declare the Plaintiff was appointed as the 53rd Dai al-Mutlaq of the Dawoodi Bohra Community and that he is entitled to succeed as the 53rd Dai al-Mutlaq of the Dawoodi Bohra Community;
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> (b) this Hon'ble Court be pleased to further order and declare that Plaintiff being the 53rd 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;
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> (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 form in any manner preventing or obstructing the Plaintiff from carrying out his duties as the 53rd 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 400 006, 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 "TTT" 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 database of all the Dawoodi Bohra Community members (e-jamaat 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;"

8. It seems to me evident that prayers (b) to (j) all depend on the Plaintiff's succeeding in obtaining a declaration in terms of prayer clause (a). The question however is whether this is a declaration as to a personal status and whether this declaration is one that would not survive the Plaintiff.

9. I have heard Mr Kadam and Mr Desai for the Plaintiff and Mr Dwarkadas for the Defendant at some length. Mr Dwarkadas submits that while it is open to Taher Fakhruddin to file his own Suit, he cannot possibly continue his father's. The right to sue does not survive to him. The suit as originally filed is not in a 'representative capacity'; it was for a declaration of status personal to Khuzemabhai.

10. Mr Kadam and Mr Desai on the other hand have been at some pains to urge that the declaration sought was of a status conferred on Khuzemabhai in accordance with the law that governs the Dawoodi Bohra Community. Taher Fakhruddin was appointed

by Khuzemabhai. He is, therefore, entitled to continue his father's suit and to establish, if he can, that not only was his father the correctly appointed 53rd Dai, but that he is the correctly appointed successor, the 54th.

11. On an overall balance, and for several distinct reasons, it seems to me I should allow this Chamber Summons and the amendment. Mr Dwarkadas readily concedes that a separate suit by Taher Fakhruddin is possible. But if this is so, then surely the continuance of the present suit is equally possible, and possibly desirable in the interests of saving judicial time, money and, not least, vast amounts of paper.

12. There is, Mr Desai says, more than sufficient authority to say the right to sue survives where the question is whether the plaintiff has been validly appointed as the occupant or the incumbent of a particular office. The right sought to be established in such cases is not entirely personal; it survives the death of the claimant plaintiff.

13. I turn first to the relevant provisions of Order 22 of the Code of Civil Procedure, 1908 ("**CPC**"):

> **O. XXII: DEATH, MARRIAGE AND INSOLVENCY OF PARTIES**
>
> **1. NO ABATEMENT BY PARTY'S DEATH IF RIGHT TO SUE SURVIVES**
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> The death of a plaintiff or defendant, shall not cause the suit to abate **if the right to sue survives**.

2. PROCEDURE WHERE ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS DIES AND RIGHT TO SUE SURVIVES.

Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. PROCEDURE IN CASE OF DEATH OF ONE OF SEVERAL PLAINTIFFS OR OF SOLE PLAINTIFF

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

9. EFFECT OF ABATEMENT OR DISMISSAL

(1) **Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877) , shall apply to applications under sub-rule (2).

Explanation.—Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

10. PROCEDURE IN CASE OF ASSIGNMENT BEFORE FINAL ORDER IN SUIT

(1) **In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.**

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an

> interest entitling the person who procured such attachment to the benefit of sub-rule (1).
>
> (*Emphasis added*)

14. Mr Desai puts his case like this: If the right to sue survives, the suit will not abate. If it does abate, and that can only be if the right to sue does *not* survive, then a fresh suit on the 'same cause of action' would be barred. Taher Fakhruddin's claim is, of necessity, derivative or inherited — he has no stand-alone claim or right he can assert independent of his late father's claim. This means, as a logical inevitability, that if his father's suit is held to have abated, then no fresh suit by Taher Fakhruddin is possible; Taher Fakhruddin cannot seek that which died with his father; and without seeking that, he cannot maintain his own claim. We thus pass through the filters of O.22 Rules 1, 2 and 9 and arrive at O.22 R.10. This is not a case of assignment of any interest. It is also not, strictly speaking, a case of a 'creation' of an interest. It is a case of devolution of an interest, and that devolution is traced in this suit back to the 52nd Dai. His interest in any estate of the Dawoodi Bohra community was one he held *qua* the Dai, in that capacity and no other. Khuzemabhai claimed to have succeeded to that interest by virtue of no other 'right' other than that which attached to his appointment or nomination as the successor (53rd) Dai by the 52nd Dai. Again, there was no personal interest involved in the sense of there being an interest that inhered in Khuzemabhai as an individual *de hors* his appointment as the 53rd Dai. Taher Fakhruddin's claim is drawn from his father's. Syedna Mohammad Burhanuddin's 'interest' *qua* the undisputed 52nd Dai is the wellspring of all rights, privileges and entitlements. Thus, Taher Fakhruddin's claim is one under a process of devolution (as was his father's), and the suit must

be allowed to continue, in either view of the matter, viz., that the right to sue survived Khuzemabhai within the meaning of O. 22 Rule 1, or on account of devolution under O.22 Rule 10.

15. In *Shri Krishna Singh v Mathura Ahir & Ors,*[1] the Supreme Court in paragraphs 78 to 81 said:

> "78. It is argued that the original Plaintiff, Mathura Ahir, having filed the suit primarily to establish his personal right to the office of mahant which entitled him to possession of the property in suit, the suit abated on his death. The cause of action on which the suit was instituted, it is urged, was personal to the Plaintiff, and in order to establish that he had been duly and properly initiated as a sanyasi and installed as a mahant, he had to plead and establish all the necessary facts regarding his capacity to become a sanyasi, his nomination by his Guru. and his ultimate election or nomination by the 'Sant Mat' Sampradaya. **The submission is that these were facts special to the original Plaintiff, and he having died, Respondent No. 1, Harshankaranand cannot claim any relief unless and until he also establishes all these facts in regard to his claim to mahantship. The original cause of action, it is said, has vanished with the death of the Plaintiff and the Respondent No. 1, Harshankaranand had necessarily to plead and establish a new set of facts. In substance, he could not prosecute the cause of action as originally framed and he could not succeed without materially altering the pleadings and substituting another cause of action, which could very well form the subject matter of a separate suit.**
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> 79-80. **It is argued that the nomination of a person as a mahant invests him with a 'status' and, therefore,**

1 (1981) 3 SCC 689.

capacity to succeed to the office of mahant is an incident of that status. It is said that the claim to mahantship is, therefore, a personal right which does not survive the Plaintiff; any suit claiming such a status must abate on the death of the Plaintiff. Alternatively, the submission is that if the Court came to the conclusion that the Plaintiff had sued in his capacity as a *de facto* mahant, it is obvious that the cause of action would be personal to him and would certainly not survive the Plaintiff. In that event, the suit must of necessity abate as a right claimed on the basis of de facto ownership cannot survive the Plaintiff.

81. **The question whether a suit abates in its entirety or not upon the death of the Plaintiff must necessarily depend on the nature of the suit. This is not a class of case to which the maxim, *actio personalis moritur cum persona applies*. The suit that the Plaintiff Harsewanand brought was for possession of the suit house which belonged to Garwaghat Math, in his capacity as the mahant.** On denial of his title, he pleaded that he was initiated as a chela by his Guru Swami Atmavivekanand, the then mahant, in 1937 and nominated to be his successor and accordingly upon his demise on August 23, 1949, had been duly installed as Mahant of the Math by the 'Sant Mat' Sampradaya, i.e., by the Mahants and Sanyasis of the Bhesh and given chadar Mahanti according to the tenets of fraternity. It was alleged that according to the tenets of this particular sect, anyone, including a Sudra, could be a sanyasi, and further that succession to the office of mahant was from guru to chela according to the custom or usage prevailing in the sect. One of the issues on which the parties went on trial was whether there was in existence a math at Garwaghat, and if so, whether the house in suit was an accretion thereto."

(*Emphasis added*)

16. It is true that the case before the Supreme Court began as a claim for possession, but that should not I think affect the overall approach. As the emphasized portions show, the claim for possession was as an incident of a particular status:

> **The suit that the Plaintiff Harsewanand brought was for possession of the suit house which belonged to Garwaghat Math, in his capacity as the mahant.**

This is not materially different from the claim before me in this suit. The sequencing of the prayers is largely immaterial; evidently, Khuzemabhai had to establish his status as the properly appointed 53rd Dai, and having got that, needed the prayers regarding properties, assets, estates, wakfs and so on. Conversely, he could not have obtained orders regarding those assets, properties and estates *without* a preceding declaration of his status. The arguments before the Supreme Court in paragraphs 78 to 80 are precisely the ones Mr Dwarkadas makes before me today.

17. *Shri Rikhu Dev v Som Dass*[2] came up before the Supreme Court from a decree of the Punjab & Haryana High Court. The appellant was the plaintiff. He said there was one Shiromani Nirankari Dera at Patiala, and it had two branches, one at Landeke in Moga Tehsil and the other at Nanga Kheri in the erstwhile state of Patiala. As the mahant-in-charge of the Shiromani Dera branch in Patiala, he had the right to manage the properties attached to the other branch at Landeke. He sought recovery of possession of the Landeke Dera and the properties attached to it. The defendant said the Landeke Dera was independent and that he was in possession of it and its properties as the lawfully appointed mahant. The trial

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2 (1976) 1 SCC 103

court decreed the suit. The defendant appealed. The appeal court reversed. The plaintiff appealed to the High Court. Pending that appeal, the defendant died. No application was made within the time prescribed to implead his heirs. About three and a half months after the defendant died, the plaintiff sought to implead the defendant's chela. The defendant's date of death being in dispute, the High Court referred the question to the trial court for enquiry. The trial court took evidence on the question of the date of the defendant's death — about a month and half before the date asserted by the plaintiff. At this, the plaintiff asked the High Court to treat his application as one for setting aside the abatement, claiming he did not know of the defendant's death immediately it happened. The High Court found no substance in the plaintiff's plea that he had no knowledge of the defendant's death. It held the appeal had abated and there was no ground to set aside that abatement. Before the High Court, the plaintiff also urged that such an appeal could not abate since the defendant claimed to represent the Dera as its duly elected chela and in no other capacity. The High Court rejected this contention too, and said the plaintiff was bound to 'bring on record the legal representatives of the deceased within the time prescribed by law'. This is what the Supreme Court said:

> 6. **We do not think that the view of the High Court was correct. The suit was filed on the basis that the appellant as the lawfully appointed mahant was entitled to manage the properties of the Dera at Landeke, that the defendant was unlawfully claiming to be the mahant of the Dera and entitled to manage the properties of the Dera and that the appellant was entitled to be in possession of the properties.** As already stated the **contention of the defendant was that though the properties belonged to the Dera, he was its lawfully**

appointed mahant and that the appellant had no right to recover possession of the property of the Dera. When Som Dass died, the interest which was the subject-matter of the suit, devolved upon Shiam Dass as he was elected to be the mahant of the Dera **and the appeal could be continued under Order 22 Rule 10 of the Civil Procedure Code against the person upon whom the interest had devolved.**

7. [Order 22 Rule 10 is set out]

8. **This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court.** When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, **the rule that has to be applied is Order 22 Rule 10 and not Rule 3 or 4,** whether the devolution takes place as a consequence of death or for any other reason. **Order 22 Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office.** In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule. **The word "interest" which is mentioned in this rule means interest in the property i.e. the subject-matter of the suit and the interest is the interest of the person who was the party to the suit.**

9. It was, however, contended on behalf of the respondent that there was no devolution of the interest in the subject-matter of the suit on the death of Som Dass, since there was no certainty as to the person who would be elected as mahant to succeed him. The argument was that it

was uncertain on the death of Som Dass as to who would become the mahant by election, that it was only when a person succeeded to the mahantship on the death of a previous mahant by virtue of law or custom that there would be devolution of interest in the subject-matter of the suit and, therefore, Order 22 Rule 10, would not be attracted. We see no force in this argument. **We are of the view that devolution of the interest in the subject-matter of the suit took place when Shiam Dass was elected as mahant of the Dera after the death of Som Dass.**

10. **Som Dass was sued in his capacity as a person who claimed (though illegally according to the appellant) as mahant of the Dera. Som Dass contended that he was lawfully appointed as mahant of the Dera. He never set up any claim which was adverse to the Dera or its properties. The suit against Som Dass was not in his personal capacity but in his capacity as *de facto* mahant. In other words, the suit was for possession and management of the Dera and the properties appertaining to it by the appellant purporting to be the *de jure* mahant against Som Dass as *de facto* mahant.** The fact that it was after Som Dass died that Shiam Dass was elected to be the mahant of the Dera can make no difference when we are dealing with the question whether the interest in the subject-matter of the suit devolved upon him. **The subject-matter of the suit was the interest of Som Dass in the Dera and its properties and it devolved upon Shiam Dass by virtue of his election as mahant subsequent to the death of Som Dass.** And, as it was in a representative capacity that Som Dass was sued and as it was in the same representative capacity that the appeal was sought to be continued against Shiam Dass, Order 22 Rule 10 will apply. [See *Ratnam Pillai v Nataraja Desikar*, AIR 1924 Mad 615 (1) : 84 IC 200] In *Thirumalai v. Arunachella* [AIR 1926 Mad 540 : 92 IC 520] the Court held that a succeeding trustee of a trustee who filed a suit and

> thereafter died during its pendency was not a legal representative of the predecessor in office. **The Court said that where some of the trustees die or retire during the pendency of a suit and new persons are elected to fill their place, it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under Order 22 Rule 10** notwithstanding that the period of limitation for impleading them had expired.
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> (*Emphasis added*)

18. Again, I believe the present case is very close to *Shri Rikhu Dev* as well — the claim here again is by a *de jure* claimant against a *de facto* incumbent, and it seeks, *inter alia*, the right in that defined, specific capacity to exercise dominion over estates attached to that office. (I hasten to add that I should not, in saying this, be understood to accept either the *de jure* or the *de facto* capacities; I have only invoked the words of the Supreme Court as illustrative of their applicability to the case at hand.) I am not persuaded by Mr Dwarkadas's submission that 'interest' in Order 22 Rule 10(1) means interest in property and that can only mean a personal interest in property. The first part may be correct; the second is not, for there is nothing in Order 22 Rule 10(1) that speaks of the interest being personal. If it did, then the whole of that Rule was surely unnecessary. Where there is a right to property, this will survive the death of the plaintiff.[3] However, where the right claimed is a purely personal right, different considerations may apply.

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3 *Ambalika Padhi & Anr v Radhakrishna Padhi & Ors*, (1992) 1SCC 667.

19. In *Shri Rameshwar Manjhi v Management of Sangramgarh Colliery & Ors*[4], the Supreme Court had before it precisely such a case although in the context of the Industrial Disputes Act. The question was whether the death of a workman during pendency of proceedings resulted in abatement. The Supreme considered the case of a narrow species of personal rights — the right to sue for damages in defamation, for example and similar reliefs. The Supreme Court said this in paragraphs 12 and 13:

> "12. The maxim '*actio personalis moritur cum persona*' though part of English Common Law **has been subjected to criticism even in England. It has been dubbed as unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often caused grave injustice.** This Court in a different context, in considering the survival of a claim for rendition of accounts, after the death of the party against whom the claim was made, in *Girja Nandini Devi v Bijendra Narain Choudhary* observed as under:
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> > "The maxim *'actio personalis moritur cum persona'* a personal action dies with the person has a limited application. It operates in a limited class of actions *ex delicto* such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could

4 (1994) 1 SCC 292.

> not be enjoyed after death, or granting it would be nugatory."
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> 13. **It is thus obvious that the applicability of the maxim *'actio personalis moritur cum persona'* depends upon the 'relief claimed' and the facts of each case.** By and large the industrial disputes under Section 2-A of the Act relate to the termination of services of the concerned workman. In the event of the death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The Tribunals and Labour Courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the deceased workman. Even otherwise there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman."
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> (*Emphasis added*)

20. Mr Dwarkadas relies on the decision the Calcutta High Court in *Sarat Chandra Banerjee v Nani Mohan Banerjee*[5] to say that the Applicant must assert the same rights the Plaintiff did. If so, the right to sue survives, and the Court may then permit the legal representative to amend and proceed with the Suit under Order

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5 (1909) Cal. (Vol. 36) 799

XXII Rule 3. A legal representative is of course defined in Section 2(11) of the CPC:

> "A person who in law represents the estate of the deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the **person on whom the estate devolves** on the death of the party so suing or suit."
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> (*Emphasis added*)

21. The mere right to sue itself, Mr Dwarkadas says, is not transferable. That is correct, but it does not have any bearing on the present case.

22. Mr Dwarkadas says Order 22 Rule 10 this is a residuary provision[6] and it applies only in cases not covered by the preceding Rules of Order 22. Thus, according to him, it is only where during the pendency of the Suit the right to sue survives and the interest in the subject matter devolves on a person other than the legal representative that the suit can be continued.

23. The last submission based on *Vinayaka Dev, Idagunji v Shivaram & Ors*[7] is quickly despatched, for that was a claim based on a hereditary title. That right, the Supreme Court said, was a personal right and not to a public right in a public trust. If anything, as Mr Kadam says, that is a decision that assists the present Applicant's case rather than damaging it in any way.

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6 *Dhurandhar Prasad Singh v Jai Prakash University & Ors*, (2001) 6 SCC 534.

7 (005) 6 SCC 641.

24. There is another dimension to this, too, one that Mr Kadam hints at. Order 22 Rule 1 does not limit itself to the death of a plaintiff. The survival of the 'right to sue' is a question that arises on the death of either the plaintiff or the defendant. I will confine myself to a situation of a sole plaintiff and sole defendant, because that is what I have before me. Let us suppose the situations were reversed, and the Defendant before me had passed away after appointing a successor. That successor would have assumed office. It surely cannot be suggested that Khuzemabhai's 'right to sue' would not survive the death of the original Defendant. If the title and right claimed by the Defendant is not personal to him and would survive him, then surely the challenge to that title and claim must also survive the original Plaintiff. This is, in my assessment, so compelling an argument that one need not look much further.

25. In this particular case, I do not see why the Chamber Summons ought not to be allowed. After all, the right sought by the original Plaintiff to hold a particular office was one that he himself, by virtue of his claim, could confer on another. If his own right failed, then that of the Applicant would consequently fail. If, on the other hand, the Plaintiff obtained a decree in terms that he first sought, then surely the Applicant would be entitled to a resultant decree in similar terms in his own favour. To view it from another perspective, even if Khuzemabhai had not filed the Suit, the present Applicant could well have brought the same Suit seeking first the same declaration of his late father being the properly appointed 53rd Dai and, in the next prayer, a similar declaration in his own favour as the 54th Dai.

26. To be clear: Taher Fakhruddin is not seeking to continue the suit in his father's name. He does not want to rest with a declaration of a title or status in or on his now deceased father. He seeks instead to continue the suit, but in his name, seeking a derived, or devolved, interest.

27. As to the question of whether the Suit in a representative character or not, this is again answered with a similar parallel. A complete outsider could have brought this Suit asking for a declaration in favour of Khuzemabhai or Taher Fakhruddin or both. If an outsider did this, and Mr Dwarkadas readily concedes that it could be done, the plaintiff would be suing in a representative character. It does not cease to be 'representative' only because a plaintiff seeks the same relief in his own name. That is not the test; one must look to the nature of the relief sought, and how the plaint is laid. A claim for damages in defamation is, for instance, purely personal — nothing in that kind of claim would survive the death of either a sole plaintiff or a sole defendant. Indeed, I would venture to suggest that a claim for a titular declaration — a nominal title alone — is entirely personal.

28. A Division Bench of the Patna High Court in *Ramswarup Das v Rameshwar Das*[8] took a diametrically opposite view. The Court said:

> In my opinion, the answer to the question raised on behalf of the appellant depends upon the nature of the suit. **If the plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive,**

8 AIR 1950 Pat 184 : (1949) ILR 28 Pat 989.

> **and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate.**
>
> (*Emphasis added*)

I mention this for two reasons. First, this is precisely the frame of Mr Dwarkadas's submissions before me as I understand them today. Second, this view was in terms disapproved by the Supreme Court in *Shri Krishna Singh* (*supra*) cited by Mr Desai:

> 86. The correctness of the decision in *Ramswarup Das v. Rameshwar Das* [(1949) ILR 28 Pat 989 : AIR 1950 Pat 184] is thus open to question. **It does not stand to reason that when a suit is brought for possession by a mahant of an asthal or math, or by a shebait of a debottar property, and the defendant is adjudged to be a trespasser, such a suit should abate with the death of the mahant or shebait. This would imply that after a long drawn litigation, as here, the new mahant or shebait has to be relegated to a separate suit.**
>
> (*Emphasis added*)

29. To say therefore that the amendment changes the character of the suit is also not correct.

30. There is a controversy about two portions of the proposed amendment. To understand the context, it necessary to reproduce paragraph 12 of the Affidavit in Support at page 10:

> "12. In the Schedule I have also made corrections at paragraph 51 of matters that had been corrected by the Original Plaintiff, added at paragraphs 15, 19, 60, 64 and 85 certain relevant matters which were to my personal knowledge, and at paragraph 5 added certain events that have transpired after the amendment to the Plaint on October 6, 2014. I have also added a submission that the Dawoodi Bohras belong to the Ismaili faith, and do not believe that *nass* can be revoked. By taking a defence in this suit that *nass* can be retracted or revoked or changed or superseded, the Defendant has gone against the very basis and foundation of the Ismaili faith viz. that *nass* is irrevocable. **Thus, the Defendant is no longer following the faith of the Dawoodi Bohra Community, and certainly cannot claim to be the Dai al-Mutlaq of the Community.**"
>
> (*Emphasis added*)

31. What Taher Fakhruddin now urges is that the process of appointment, i.e., the pronouncement of a *nass* once made is irrevocable. That is his case. He may or may not be correct. He will have to prove this. He says that once an irrevocable *nass* is pronounced, then no other may claim under a subsequently pronounced *nass*. The consequence of this submission, according to him, is that the retraction, revocation or supersession of a previous *nass* results in the claim to the subsequent *nass* going against the Ismaili faith. The specific averment that offends is that the Defendant, by making such a claim of revocation or supersession, is a deemed apostate or has forsworn the Ismaili faith. This assertion is

not to be found in the original Plaint. These assertions are in paragraphs 27 and 50D of the Schedule of Amendments at Exhibit "C" to the Affidavit in Support of the Chamber Summons.

32. The Dawoodi Bohras are a sect within the Ismaili branch of Shia Islam. It is also sometimes referred to as the Tayyabi Musta'li Isma'ili sect. The Ismailis split from the Ithna Ashari Shias over an issue of succession to Imam Jafar Al-Sadiq. The Ismailis took Isma'il bin Jafar to be their Imam, while the Ithna Ashari Shia (the so-called 'Twelvers') took Musa Kazim bin Jafar Al-Sadiq as theirs. The Ismailis split into Druze and mainstream Isma'ilis on another issue of succession. There followed another schism into the Nizari and Musta'ali branches. The Dawoodi Bohras trace their theological ancestry to the Musta'ali branch (which can ultimately be traced back to the Fatimid Caliphate), and the 21st Imam Al-Tayyeb, who went into occultation or hiding. His direct descendent is considered the current Imam and remains in seclusion. The spiritual leader of the Dawoodi Bohra community is called the Dai al-Mutlaq (Vicegerent). He serves as the representative of the hidden Imam, who according to Dawoodi Bohra tenets, lives on in seclusion or occultation. Queen Arwa bint Asma or Arwa al-Sulayhi (al-Hurra al-Malika) of Yemen — one of only two female monarchs in the Muslim Arab world to have had the khutba proclaimed in their name in the mosques as sovereigns — created the office of the Dai al-Mutlaq to administer the community in the Imam's absence.

33. The two amendments in question, raising this issue of apostasy and an abandonment of the Ismaili faith, are most serious and are entirely new. They formed no part of the cause of action

pleaded by Khuzemabhai. I propose to disallow these two amendments entirely.

34. I will, however, clarify that the Applicant will be entitled to lead evidence on the proper requirements and features of a valid *nass*, including whether or not it is revocable as a matter of doctrinal law or custom. This is necessary so that the Applicant is not latter confronted at the time of evidence by saying that there is no foundation in his pleading for that evidence.

35. The Chamber Summons is accordingly made absolute in terms of prayer clauses (a), (b) and (c), **except** paragraph 27 and paragraph 50D of the Schedule of Amendments at Exhibit "C" to the Affidavit in Support of the Chamber Summons (at pages 21 to 23 and page 37 respectively of the Motion paper book).

36. Mr Kadam tenders a handwritten amendment to the Schedule. This introduces prayer (a1). It is allowed. The draft is taken on record and marked "X" for identification with today's date. The amendment allowed will include this prayer. Mr Desai will arrange to have the same prayer in a typed form placed on record by tomorrow, 8th March 2017.

37. The amendments are to be carried out on or before 27th March 2017.

38. A copy of the amended Plaint, properly retyped is to be served on the Advocates for the Defendant on or before 3rd April 2017.

39. Additional Written Statement, if any, to be filed and served on or before 24th April 2017.

40. The amendment is without prejudice to the Defendant's rights and contentions, including as to the validity of the Applicant's appointment, but this obviously cannot extend to any question of whether the right to sue survives or of abatement.

41. Suit to be listed for directions and, if necessary, framing additional issues on 2nd May 2017.

42. Mr Dwarkadas is instructed to apply for a stay of this order. The application is rejected.

(G. S. PATEL, J.)