

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (FOR ORDERS) NO. 5650 of 2016

in

In SPECIAL CIVIL APPLICATION NO. 10656 of 2014

With

CIVIL APPLICATION NO. 5651 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5478 of 2014

With

CIVIL APPLICATION NO. 5652 of 2016

In

CIVIL APPLICATION NO. 5661 of 2016

With

CIVIL APPLICATION NO. 5653 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5480 of 2014

With

CIVIL APPLICATION NO. 5654 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5481 of 2014

With

CIVIL APPLICATION NO. 5656 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5482 of 2014

With

CIVIL APPLICATION NO. 5658 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5483 of 2014

With

CIVIL APPLICATION NO. 5659 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5484 of 2014

With

CIVIL APPLICATION NO. 5660 of 2016

In

SPECIAL CIVIL APPLICATION NO. 5485 of 2014

With

CIVIL APPLICATION NO. 5661 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7289 of 2014
With
CIVIL APPLICATION NO. 5662 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7290 of 2014
With
CIVIL APPLICATION NO. 5663 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7291 of 2014
With
CIVIL APPLICATION NO. 5664 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7292 of 2014
With
CIVIL APPLICATION NO. 5665 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7293 of 2014
With
CIVIL APPLICATION NO. 5666 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7294 of 2014
With
CIVIL APPLICATION NO. 5668 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7295 of 2014
With
CIVIL APPLICATION NO. 5669 of 2016
In
SPECIAL CIVIL APPLICATION NO. 7296 of 2014
With
CIVIL APPLICATION NO. 4339 of 2016
In
SPECIAL CIVIL APPLICATION NO. 10656 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE RAJESH H.SHUKLA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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TAHER FAKHRUDDIN SAHEB ALIAS TAHERBHAI K QUTBUDDIN ALIAS
TAHERBHAI QUTUBUDDIN....Applicant(s)

Versus

STATE OF GUJARAT & 11....Respondent(s)

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Appearance:

MR MIHIR THAKORE, SR. ADVOCATE, with MR SALIL M THAKORE,
ADVOCATE for the Applicant(s) No. 1

ADVANCE COPY SERVED TO GP/PP for the Respondent(s) No. 1 - 10

MR MIHIR JOSHI, SR. ADVOCATE, with MR. PERCY KAVINA, SR.
ADVOCATE, with MR SP MAJMUDAR, ADVOCATE for the Respondent(s) No.
11 - 12

**CIVIL APPLICATION NO. 4339 of 2016 In SPECIAL CIVIL APPLICATION
NO. 10656 of 2014**

MR MIHIR JOSHI, SR. ADVOCATE, with MR. PERCY KAVINA, SR.
ADVOCATE, with MR SP MAJMUDAR, ADVOCATE for the Applicant(s) No. 1
MR MIHIR THAKORE, SR. ADVOCATE, with MR SALIL M THAKORE,
ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE RAJESH H.SHUKLA**

Date : 10 /11/2016

ORAL JUDGMENT

The present group of Civil Applications are filed by the applicant for impleading as a petitioner in this group of original petitions filed by His Holiness Syedna Khuzaima Qutbuddin Saheb, Dai al-Mutlaq, of the Dawoodi Bohra community (religious head). The original petitioner has claimed that he has been appointed as 53rd Dai, after 52nd Dai, whereas it has been claimed that His Holiness Syedna Mohammed Burhanuddin Saheb has been appointed as 54th Dai of the community for which Suit No. 337 of 2014 for declaration is pending before the Hon'ble Bombay High Court.

2. Syedna Khuzaima Qutbuddin Saheb has filed the original petition for the prayers for issuance of writ of certiorari or any other appropriate writ, order or direction calling for the record and proceedings of the respective Change Reports and quashing and setting aside the order passed by the Charity Commissioner or Asst. Charity Commissioner in different offices on the grounds stated in the memo of petition.

3. The eldest son of Syedna Mohammed Burhanuddin Saheb was appointed as 53rd Dai as head of the community and the applicant, who is the son of the original petitioner-Syedna Khuzaima Qutbuddin Saheb, claims to be the Dai after the death of Syedna Khuzaima Qutbuddin Saheb as 'nass' was conferred upon him. Thus, it is claimed by the applicant that as he has been conferred 'nass' by the 53rd Dai late Syedna Khuzaima Qutbuddin Saheb, as the 53rd Dai, he would be succeeding him as the religious head and would be entitled to continue the proceedings including the suit before the Hon'ble Bombay High Court as well as the proceedings in different offices of the Charity Commissioner. Respondent No. 3 also proclaimed himself as the 53rd Dai, religious head

of the community. It is in this background the present civil applications have been filed by Taher Fakhruddin Saheb, son of late Syedna Khuzaima Qutbuddin Saheb, making a claim as the religious head after the deceased Syedna Khuzaima Qutbuddin Saheb on the basis of 'nass' conferred upon him as per the religious practice and not as the son or heir of late Syedna Khuzaima Qutbuddin Saheb.

4. Learned Sr. Counsel Shri Mihir Thakore appearing with learned advocate Shri Salil M. Thakore for the applicant referred to the papers at length and submitted that the anointment of mansoos is guided by Allah (God) by divine inspirations and as successor in the office of Dai has devolved upon the applicant by virtue of conferment of nass conferred upon him by the petitioner. It is contended that the applicant is, therefore, obliged to perform his duties as 54th Dai and the right as a Dai al-Mutlaq is not a personal right of the original petitioner alone as by rights the office to which the original petitioner Syedna Khuzaima Qutbuddin Saheb was appointed and in turn now the applicant has been appointed. Learned Sr. Counsel Shri Thakore submitted that the title of Dai al-Mutlaq is conferred by each Dai al-Mutlaq on his successor by conferment of nass. He submitted that 52nd Dai conferred nass on the original petitioner as stated in detail in the plaint and the original petitioner being the 53rd Dai conferred nass on the applicant and thus the title has devolved upon the applicant and therefore he may be permitted to be joined as the petitioner in the original proceedings and may also allow to continue with the proceedings before the Charity Commissioner and the petition filed by late Syedna Khuzaima Qutbuddin Saheb would not stand abated as sought to be canvassed. Learned Sr. Counsel Shri Thakore submitted that the applicant is entitled to pursue such proceedings filed by the original petitioner as the interest in the subject-matter of the petition as well as the proceedings before the Charity Commissioner having been devolved upon the applicant on conferment of

nass. He, therefore, submitted that the present civil applications may be granted. Learned Sr. Counsel Shri Thakore also made the position clear that the applicant is claiming to be joined as a party to continue the proceedings i.e. original Special Civil Application Nos. 10656 of 2016 and other matters as well as the proceedings before different offices of the Charity Commissioner regarding the Change Reports and also the suit pending before the Hon'ble Bombay High Court. He submitted that in view of the passing away of the original petitioner on 13.3.2016 the Bombay High Court, vide order dated 6.4.2016, cancelled the fixed date for further cross-examination of the deceased plaintiff original petitioner and the claim made by the other side that now the Bombay High Court has dismissed the suit in view of the Change Report is misconceived.

5. Learned Sr. Counsel Shri Thakore referred to the papers and strenuously submitted that the suit is not dismissed but it was postponed and in fact the application moved before the Hon'ble Bombay High Court has not been served upon the advocate of the original petitioner or to the applicant. Therefore, as the applicant came to know about it when he served the copy of the civil application and therefore the present application may be allowed. He also referred to the different Change Reports or proceedings before different offices of the Charity Commissioner. Learned Sr. Counsel Shri Thakore submitted that the proceedings would not abate. He has referred to and relied upon the judgment of the Hon'ble Apex Court reported in AIR 1998 SC 1624 in the case of *Saiyad Mohammad Bakar El-Edross (dead) by LRs v. Abdulhabib Hasan Arab and ors.* and emphasised the observations made in para 6 onwards. He emphasised that if the petitioner has succeeded and anointed as the Dai (religious head of the community) his claim has to be considered and determined. He also referred to the judgment of the High Court of Gujarat reported in 1961 (1) GLR 564 in the case of *Kuberbhai Shivdas and anr. v. Mahant Purshottamdas Kalyandas and*

ors. and submitted that the application or the proceedings before different offices of the Charity Commissioner will not abate and therefore the applicant is required to be impleaded and substituted as a petitioner in the original petition filed by late Syedna Khuzaima Qutbuddin Saheb.

6. Learned Sr. Counsel Shri Thakore also referred to the judgment reported in 2003 (1) BomCR 447 in the case of *Madanrao S/o Nanasaheb Chavan v. State of Maharashtra and ors.* and 1980 MhLJ 372 in the case of *Jagatnarayansingh Swarupsingh Chithere and ors. v. Swarupsingh Education Society and anr.* He submitted that this right is claimed not as the son of late Syedna Khuzaima Qutbuddin Saheb, but on the basis of nass conferred by Syedna Khuzaima Qutbuddin Saheb as the Dai (religious head of the community). He therefore submitted that even though the issue is sought to be joined with regard to anointment of Syedna Khuzaima Qutbuddin Saheb which is a matter to be considered by the Bombay High Court, the applicant is entitled to pursue such remedy. Learned Sr. Counsel Shri Thakore therefore strenuously submitted that he cannot be shut out at this stage on the ground of death of late Syedna Khuzaima Qutbuddin Saheb inasmuch as it will be dependent upon the proceedings before the Hon'ble Bombay High Court and therefore the proceedings will not abate as sought to be canvassed. He also referred to the papers and contended that as stated in the pursis he does not make any claim but he must have the right to pursue the proceedings. If he is not allowed to pursue the proceedings it will be shutting him out though he was conferred nass by late Syedna Khuzaima Qutbuddin Saheb for anointment as the next Dai. He therefore submitted that it is dependent upon the proceedings before the Hon'ble Bombay High Court but till then the Charity Commissioner cannot make any change for which he may also be permitted to pursue the proceedings in different offices of the Charity Commissioner also.

7. Learned Sr. Counsel Shri Mihir Joshi appearing with learned advocate Shri Majmudar appearing for respondents Nos. 11-12 submitted that the Dai is a spiritual head of the community and by scriptures and religious beliefs the anointment of Dai is made who is given nass and therefore he is considered to be the head. He submitted that the succession to such office of Dai does not come by inheritance. He submitted that there is no appointment of such a trustee as a Dai and being the sole trustee and the spiritual head the Dai has all the discretion and upon conferment of nass by the religious head the anointment of next Dai is made. Learned Sr. Counsel Shri Joshi submitted that it is well a settled principle that when there are disputed questions of fact like who could be said to be Dai and whether Syedna Khuzaima Qutbuddin Saheb was validly anointed as Dai, is a matter for consideration by the Civil Court and therefore the proceedings are pending before the Bombay High Court. He submitted that the applicant who claims that nass has been conferred by Syedna Khuzaima Qutbuddin Saheb as 53rd Dai itself is pending in litigation and therefore he cannot proclaim himself to be a Dai or religious head. Learned Sr. Counsel Shri Joshi submitted that the anointment or the claim of the applicant as Dai or religious head on the basis of the so-called nass conferred by the late Syedna Khuzaima Qutbuddin Saheb will depend on whether late Syedna Khuzaima Qutbuddin Saheb's appointment or anointment as the religious head is established and approved by the court. He therefore submitted that unless the Civil Court in a civil suit pending before the Bombay High Court has decided in favour of late Syedna Khuzaima Qutbuddin Saheb, the applicant has no right to claim any such position and therefore he does not have any locus. However, the applicant is trying to make a claim indirectly though he does not have any such right. He submitted that as is provided in O. 22 R. 4 the legal representative is required to be brought

on record. He submitted that after the death of Syedna Khuzaima Qutbuddin Saheb the right has extinguished to pursue any such claim or proceedings including the present petition and therefore it would stand abated. He has referred to Civil Application No. 4339 of 2016 in SCA No. 10656 of 2014 and submitted that as stated the main petition has become infructuous as the cause would not survive. Learned Sr. Counsel Shri Joshi submitted that the original petitioner was prosecuting the matter claiming his personal right in his favour regarding conferment of the title as Dai and on his death the proceedings cannot be continued and will stand abated. He therefore submitted that the applicant has no locus standi and his claim that he is the 54th Dai is not sustainable, nor any proceedings can be said to have been pending.

8. Learned Sr. Counsel Shri Joshi has referred to and relied upon the judgment reported in AIR 1957 Patna 79 in the case of *Mahindra Singh and ors. v. Chander Singh and ors.* and submitted that the personal right would not survive and therefore the right of Syedna Khuzaima Qutbuddin Saheb, assuming that he was anointed as the religious head, would come to an end. He submitted that a large number of the community have accepted respondent No. 3 as the religious head and when the applicant is claiming through Syedna Khuzaima Qutbuddin Saheb whose anointment itself has been pending in litigation before the Bombay High Court, the applicant cannot make any claim particularly after the death of the deceased Syedna Khuzaima Qutbuddin Saheb. Learned Sr. Counsel Shri Joshi has also referred to and relied upon the judgment of the Hon'ble Apex Court reported in AIR 2005 SC 3081 in the case of *Vinayaka Dev Idagunji and ors. v. Shivaram and ors.* He also referred to and relied upon the judgment reported in AIR 1975 Karnataka 202 in the case of *Eagle Star Insurance Co. Ltd. and anr. v. The Gwalior*

Transport (P) Ltd. and anr.

9. Learned Sr. Counsel Shri Joshi submitted that the application filed by the applicant is not *bona fide*. He again referred to the background and submitted that till the death of late Syedna Khuzaima Qutbuddin Saheb it has not been accepted that he was declared as religious head and it is still pending and therefore everything would have depended upon the proceedings before the Bombay High Court as the claim for Daiship is made on the basis of so-called nass conferred on late Syedna Khuzaima Qutbuddin Saheb.

10. Learned Sr. Counsel Shri Percy Kavina referred to the papers as well as the background of facts and submitted that the applicant is making a claim on the basis of nass for the anointment and respondent No.3 has been accepted as the 53rd Dai. He therefore submitted that it will be subject to the proceedings before the Bombay High Court and the applicant has no locus standi at this stage. He submitted that public announcement has been made regarding respondent No. 3 and therefore the submissions about conferment of rights on the basis of nass by late Syedna Khuzaima Qutbuddin Saheb is misconceived. He submitted that there is some confusion as to how and when the nass was conferred. He also submitted that late Syedna Khuzaima Qutbuddin Saheb has acknowledged that respondent No. 3 was anointed and after the passing away of 52nd Dai respondent No. 3 is the religious head. Learned Sr. Counsel Shri Kavina submitted that the claim made by late father Syedna Khuzaima Qutbuddin Saheb has not been finally decided and as he has expired the proceedings would abate. He submitted that therefore the applicant Taher Fakhruddin Saheb cannot make any claim to be the 54th Dai before the father Syedna Khuzaima Qutbuddin Saheb is declared and

accepted as 53rd Dai and only then further claim could be made by the applicant. Learned Sr. Counsel Shri Kavina submitted that before such event when Syedna Khuzaima Qutbuddin Saheb has died no claim could be made by the applicant and any such claim must fail.

11. Learned Sr. Counsel Shri Kavina has referred to the judgments including the judgments reported in 1912 SCC Online Calcutta 313 in the case of *Bhima Rout v. Dasarathi Dass*, AIR 1930 Lahore 703 in the case of *Jug Lal and ors. v. Jot Ram* (p. 703) and also referred to AIR 1931 Lahore 293 in the case of *Abdullah Shah and ors. v. Mt. Zainab Bibi and ors.* He submitted that if the observations have been made and if the answer is negative then the applicant cannot continue the proceedings and cannot be impleaded as a party or substitute as the petitioner. He also referred to and relied upon the judgment of the Hon'ble Apex Court reported in AIR 1958 SC 253 in the case of *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* and also (1973) 1 SCC 688 (p. 689) in the case of *Smt. Phool Rani and ors. v. Sh. Naubat Rai Ahluwalia* and submitted that what is relevant is the right to seek the relief and for that purpose it has to be considered whether any right has survived. He has also referred to and relied upon the judgment of the Hon'ble Apex Court reported in (1996) 2 SCC 205 in the case of *Puran Singh and ors. v. State of Punjab and ors.* and submitted that the principles would apply to the writ proceedings also and strictly the Civil Procedure Code may not apply, but the same principle or analogy would be applicable. He therefore submitted that the applicant may not be joined in the present proceedings and the proceedings would stand abated and the present application may be disposed of.

12. In view of these rival submissions which have been made at length

referring to the papers in detail by the learned counsels, the moot question is whether the applicant can be permitted to be impleaded as petitioner in the aforesaid main petitions on death of Syedna Khuzaima Qutbuddin Saheb. The submissions have been made that it is a personal office or even if it is not a personal right and the proceedings could be said to be abated, the issue is whether the applicant Taher Fakhruddin Saheb could be impleaded and what could be his right. It is not in dispute that the suit is pending before the Bombay High Court with regard to declaration as Dai claimed by Syedna Khuzaima Qutbuddin Saheb. Therefore, if the claim made by Syedna Khuzaima Qutbuddin Saheb succeeds then the applicant Taher Fakhruddin Saheb could lodge a claim for his appointment on the basis of nass conferred on him by 53rd Dai i.e. Syedna Khuzaima Qutbuddin Saheb. Therefore, the issues which are sought to be raised on the ground that when the person through whom the applicant claims has not been declared as Dai on conclusion of the proceedings like civil suit at Bombay High Court, the application made by the applicant is misconceived.

13. However, a close scrutiny would indicate that the proceedings before the Bombay High Court has not been terminated and it was only a postponement of the proceedings, meaning thereby it has not been finally adjudicated. Therefore, the moot question is whether the claim made by Syedna Khuzaima Qutbuddin Saheb which is subject to litigation and the declaration by the Bombay High Court would decide the claim or rather the claim made by the applicant to be the Dai on the basis of nass conferred by Syedna Khuzaima Qutbuddin Saheb, 53rd Dai have to be considered. Again, these are separate issues which may be considered by the Bombay High Court, but the crux of the matter is whether the applicant could be shut out at this stage that he may not be permitted even

to continue with any proceedings which would result in denying him even the right to pursue the remedy over which he is making a claim and it has been made clear by learned Sr. Counsel Shri Thakore that it is only in the event Syedna Khuzaima Qutbuddin Saheb is declared to be the 53rd Dai in the proceedings before the Bombay High Court the claim could be made by the applicant on the basis of nass conferred by him.

14. Therefore, at this stage, while considering the application for joining him as a party petitioner or substitute him, has to be considered in light of the statutory provisions of O. 22 of CPC. Apart from the issue with regard to anointment of late Syedna Khuzaima Qutbuddin Saheb, the court is required to consider whether the applicant can be allowed to pursue the remedy. If he is not permitted, then, the very basis of the claim made by Syedna Khuzaima Qutbuddin Saheb would stand terminated without any decision which in turn will affect the claim by the applicant and therefore he cannot be denied at the threshold. It is required to be stated that the claim is not made on the basis of succession as a son by late Syedna Khuzaima Qutbuddin Saheb. The claim is made on the basis of nass conferred upon the applicant and once it is conferred it is not called back and therefore these are issues which can be considered in the proceedings in the civil suit before the Bombay High Court.

15. The test is not whether the presence of a party is necessary for resolving the dispute before the court but whether the order would affect him or his interest would be prejudiced. Further, a useful reference can be made to the observations made by the Hon'ble Apex Court in a judgment reported in **AIR 1958 SC 886** in case of **Razia Begum and ors. v. Sahebzadi Anwar Begum and ors.**, where the observations have

been made that where the subject matter of litigation is a declaration as regards the status or the legal character, the rule of the present or the direct interest may be relaxed in order to adjudicate upon the controversy effectively. A useful reference can also be made to the observations made in a judgment reported in **1963 (Patna) 390** in case of **Dukh Haran Tewary and others v. Dulhin Bihasa Kuer and another** where the similar issue with regard to the claim or the title has been considered.

16. Therefore, the moot question is how to maintain balance of the rival claims. If the change report as sought is to be permitted without affording any opportunity, the applicant would meet with the *fait accompli*. It is not the case of the applicant to declare himself as a Die but he has confined it to only permission to pursue the proceedings in which he has an interest. Therefore, though it has been claimed that a claim would be made on the basis of permission to continue the proceedings it is thoroughly misconceived inasmuch as even if the applicant is permitted to be impleaded in the main matter and also permitted on that basis to pursue the proceedings before the Charity Commissioner it would not cause prejudice to the rights of the respondents. The provisions of O. 22 which has been emphasised and referred to by learned Sr. Counsel Shri Thakore clearly suggest that if it is not permitted it would be deciding the controversy which is required to be decided in the suit pending before the Bombay High Court. Therefore, at this stage, the application made by the applicant in all these Civil Applications seeking permission to allow him to continue the proceedings can be considered independently on merits. Therefore, the prima facie case or balance is in favour of the applicant. It is made clear that merely because he is permitted to pursue the remedy would not confer any title till the proceedings of the suit pending before the Bombay High Court

are decided on its own merits where both the sides will have sufficient opportunity. In the meanwhile, if the applicant is not permitted in the main matter to be impleaded, the respective change reports or proceedings in the Charity Commissioner would make the situation irreversible. Therefore, at that stage, if permission as prayed for is granted, no harm will be caused to the other side and it is well settled that proceedings before the Charity Commissioner with regard to the claim would not stand abated as the next person can always pursue the proceedings on behalf of the trust or such body.

Thus, mere permitting the party like the Applicant to pursue the remedy, does not confer any title, and the suit pending before the Hon'ble Bombay High Court could be considered on the basis of its own merits.

17. Therefore, the present applications seeking the applicant to be impleaded as a party petitioner deserve to be granted. The Civil Applications accordingly stand allowed.

18. In light of this order, Civil Application No. 4339 of 2016 in SCA No. 10656 of 2014 filed by the applicants-original respondents, that direction may be issued to the concerned offices of the Charity Commissioner to proceed with the Change Reports cannot be accepted and as a necessary corollary Civil Application No. 4339 of 2016 in SCA No. 10656 of 2014 deserves to be dismissed and accordingly stands dismissed.

(RAJESH H.SHUKLA, J.)

Further Order:

After the order was pronounced, learned Senior Counsel Shri Mihir Joshi appearing with learned Advocate Shri S.P.Majmudar for the Applicant in Civil Application No. 4339 of 2016 in Special Civil Application No. 10656 of 2014 has requested for stay of the operation of the order to enable the client to approach the higher forum.

Therefore, the order passed in the Civil Applications permitting the impleadment of the parties in all the Civil Applications shall remain stayed up to 5.12.2016.

It goes without saying that as Civil Application No. 4339 of 2016 is dismissed, no order is required to be passed.

(RAJESH H.SHUKLA, J.)

(hn / jnw)

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