

Shephali

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

Taher Fakhruddin Saheb Alias Taherbhai K ...Plaintiff
Qutbuddin Alias Taher Bhai Qutubuddin
Versus
Mufaddal Burhanuddin Saifuddin ...Defendant

Mr Anand Desai, Advocate, with Chirag Mody, Nausher Kohli, Samit Shukla, Saloni Shah & Shivani Khanwilkar, i/b DSK Legal, for the Plaintiff.

Mr Iqbal Chagla, Senior Advocate, with FE DeVitre, Senior Advocate, with Mr Pankaj Savant, Senior Advocate, along with Firdosh Pooniwalla, Azmin Irani, Abeezer Faizullahoy, Shahen Pradhan, Murtaza Kachwalla, Ammar Faizullahoy, Juzer Shakir & Jaisha Sabavala, i/b Argus Partners, for the Defendant.

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CORAM: G.S. PATEL, J
DATED: 17th-19th October 2022

PC:-

1. A portion of the evidence in this suit was taken before a Commissioner, Mr Salil Shah, Advocate. While recording the further examination-in-chief and cross-examination of several witnesses led by the Defendant, Mr Shah also noted objections raised. These are objections to the evidence in chief (both on affidavit and further examination-in-chief as oral testimony), during

the cross-examination and then again during re-examination. For at least one witness, there was more cross-examination after the re-examination.

2. Preparatory to the final hearing (scheduled to begin shortly), I must consider these objections and rule on them. This order takes up the objections in turn, proceeding from one witness before the Commissioner to the next.

RE: EVIDENCE OF DW4:

3. Paragraph 3 of DW4's affidavit in lieu of examination-in-chief is said by Mr Desai to be required to be excluded as being hearsay. I do not believe that the objection is well taken. The witness deposed to what he was told by his mother, relating what she in turn was told. A witness can always depose to what he heard, i.e., what he was told. That only establishes that he was told a certain thing. It does not establish the correctness of what he was told. What evidentiary value is to be attached to this is a matter to be decided at trial.

4. The second objection is to the question put to DW4 in re-examination. In Q24, a case was put to the witness that the significance of certain diary entries was only in relation to the 52nd Dai and the witness's family members going on a Hajj pilgrimage that year. The witness agreed. In re-examination on this question, an impermissibly leading question was put to the witness that the significance was also in reference to a Nass conferred on the Defendant. The question in re-examination was impermissible. It is

disallowed. It will not be taken into consideration at the final hearing.

RE: EVIDENCE OF DW5:

5. An objection taken in cross-examination to Q14 is not pressed.

6. Similarly, objections by the Defendant in Q51, Q52, Q81 and Q142 are withdrawn.

7. Q108 has two objections by the Defendant to a question placed by the Plaintiff in cross-examination regarding Exhibit 36 to an Affidavit in Reply in a Notice of Motion. The question was whether the ‘purport’ of the document as set out in the first three lines of page 354 of the Defendant’s Affidavit in Reply reflect the contents of document number 58 [Exh. D560]. The first objection was that the document would speak for itself, being part of the Court record. The second objection was that the entire document and not only the portion shown to DW5 ought to be exhibited. The original text was introduced in evidence [Exh. D560] but without the ‘purport’ which is part of an exhibit to an Affidavit in Reply.

8. I do not propose to spend more time considering these objections because of the nature of the question. The Affidavit in Reply is a part of the Court record. When — and if — necessary, it will be read at the time of final arguments. All this in Q108 appears to be much ado about nothing. The Exhibit in question has a caption. The document introduced in evidence does not. That was

the focus of this question about ‘purport’. We are not interpreting statutes here, where the interpretative value of headings and captions is to be considered. The question is disallowed. The objection is sustained.

9. Defendant objected to Q116. DW5 was asked whether, in his experience, his grandfather would have taken the 52nd Dai’s signature, and if the 52nd Dai would have signed a document shown to have errors. The objection was that the question was hypothetical. That is incorrect. The question was about a practice or a procedure with which the witness was supposedly familiar. The objection is overruled.

10. The objection by the Defendant to Q141 is not pressed.

11. Q155 was in general terms. The witness was asked if he agreed that only by *looking* at handwriting one could not conclusively identify the person whose handwriting was being shown. The answer from DW5 was to agree that a mere look at a handwriting could not conclusively identify the writer’s identity. The question itself was quite unnecessary. The witness had earlier identified the handwriting of his father and of his grandfather. This question was perhaps technical, possibly hypothetical, and, in my view, of no real assistance. I do not think it will matter much one way or the other — the witness was not a handwriting expert, and his theoretical opinion on a question such as this is entirely irrelevant. The objection is sustained. The question, its answer, and the document marked as Exh. P372 will be disregarded.

12. DW5 was re-examined quite extensively. Q163 is a re-examination related to Q&A 104 in cross-examination. In Q104, the witness was asked if the author was identified as Shaikh Ibrahim Yamani. He said yes, and then said that the author was his grandfather. In re-examination the witness was asked to identify *where* in the document his grandfather was so identified. The witness answered that this identification was on the second page of the document. I believe the question is entirely permissible and legitimate in re-examination. The objection is overruled.

13. Q164 in re-examination related to Q&A 59. Here, a case was put to the witness that other than being asked to identify the handwriting of his father and grandfather, DW5 had “not contributed to drafting the contents of” his Evidence Affidavit or in deciding which documents would be referred to in that Affidavit. The witness agreed with the suggestion. In re-examination, in Q164, the witness was asked *who* contributed to drafting the contents of the remaining part of his Evidence Affidavit. The Plaintiff objected to the question. I do not think the objection is well taken. If the answer in cross-examination was that the witness was responsible only for a part of the document, then it was perfectly legitimate to ask who contributed the rest. Indeed, I should have thought that this would have been the next logical question for completeness in the cross-examination itself. The objection is overruled.

14. Q165 in re-examination related to Q/A 100, which reads:

Q.10 Is it correct in your Affidavit of Evidence, you
0 have not produced any document alleged to be written in the handwriting of your grandfather and dated prior to 22 Moharrum 1398 (around 1978), where Yamani is written with an alif?”

Ans. Yes, that is correct.

15. In re-examination, an attempt was made to show the witness five additional documents not on record and, from Q165, a series of documents was sought to be put to DW5. Mr Desai for the Plaintiff objected. Mr DeVitre for the Defendant submits that had this been in Court, the Defendant would have sought a recall of the witness to introduce these documents by way of further examination-in-chief. He seems to proceed on the footing that this application, had he made it, would have been allowed for the asking. I have no hesitation in disabusing Mr DeVitre of this notion. He had more than enough time to prepare his witness's Evidence Affidavit, and I would have been most reluctant, barring a true exceptional circumstance, to permit a further examination-in-chief after a cross-examination. The objection is correctly taken and is sustained. Consequently, Q165 to Q174 will all be ignored. This has further impact because there is a further cross-examination from Q177 to Q183 and Q188 up to Q193. These will also be ignored. I note that as a result of this ruling Exhibit “D579” will have to be disregarded in the evidence. Mr DeVitre informs me that the same set of documents has been introduced through another witness as Exhibit “D615”.

16. Q175 in re-examination relates to Q&A 156 in cross-examination. There, the witness was asked to state the basis on

which he said that the original letters were written to a person named Yahya Bhaisaheb Mohiyuddin. He gave his answer and, in that answer, said that the letters were not in his grandfather's handwriting. The question in re-examination at Q175 was to ask the witness to identify the handwriting. He corrected himself now and said that these letters were indeed in the handwriting of his grandfather. In fairness to the witness this would have to be retained. The objection is overruled.

17. Q194 in further re-examination was in relation to Q178. That in turn was in a cross-examination following the first round of re-examination. I have already ruled that Q178 will be among the questions excluded. I understand that the same documents referred to there have been introduced in evidence as Exhibit "D-615" through another witness. Q194 is about the handwriting of the dates mentioned in what is effectively Exhibit "D-615". Q194 to Q196 can be read in that context. This does not require the retention of any part of the earlier re-examination that I have already excluded.

18. The additional documents introduced by the Plaintiff in the cross-examination following the re-examination will also be disregarded except Exhibit "P373", since this was used in the cross-examination of DW9.

RE: EVIDENCE OF DW6:

19. The first objection relates to the same documents that were shown to DW5 during his re-examination. Q&A 7 of the further

examination-in-chief references these documents. The reference is to be read as being to Exhibit “D-615” and not to Exhibit “D-579”. The objections to this during the further examination-in-chief of DW6 cannot be sustained. The objections are overruled.

20. There are objections to certain portions of the Affidavit in lieu of examination-in-chief. Paragraph 79 relates to a letter from one Shaikh Ishaq Aurangabadwala to the Defendant. It is dated 14th October 1989. The objection is inter alia on the basis that it is not produced from proper custody. DW6 identified Aurangabadwala’s handwriting and said that the document was produced from the Khizana, the official archives. He also produced a translation said to have been done by the Jamea Team. The translation has been separately proved through another witness. The objection to this by the Plaintiff is that DW6 is not the author and there is no explanation as to how this document came from the Khizana. In fact, in the cross-examination there appears to be an explanation because the witness answered in Q&A 64 that since the Defendant was now the Dai, his papers were with the Khizana. The objection is over-ruled.

21. The same objection is raised to the documents referred to in paragraphs 80, 81 and 82 of the Affidavit of Evidence. Those objections are similarly overruled.

22. Paragraphs 86 to 100 of DW6’s Evidence Affidavit deal with slightly different documents. All these are more than 30 years old. They have been produced from the Khizana. The translations are

separately proved through another witness. The objections are overruled. The relevance at this stage appears to be the use in these documents of certain terms of respect such as 'Maula' for several people holding different stations in the community.

23. Q54 in the cross-examination related to certain documents shown in a video clip. The question put to the witness was to seek his confirmation that those documents were not from the Khizana. Mr DeVitre objected, saying that the question was argumentative, hypothetical and called for a conclusion from the witness. I do not see why a plausible hypothesis cannot be put to a witness deposing to a certain state of affairs. The Evidence Act tells us that an opinion is indeed a fact and can be the subject of a deposition. This does not necessary confine itself to an expert witness. But the objection seems to have been that the question was premised on certain assumptions, namely, that the documents shown in the video were all in fact Khizana originals, a fact not proved. The answer from Mr Desai was that the video was already in evidence and that since DW6 was the curator of the Khizana and had been working with it since 2007 he ought to be able to answer the question. I must agree with Mr DeVitre that the suggestion put in Q54 was at the very least misleading and is apt to be misunderstood at any later stage. We cannot simply assume that the documents in the video are all originals merely because they were being handled by the Defendant, whatever position he may have held at the relevant time. The objection is sustained.

24. There is an objection noted below Q&A 59. In that question, the witness was asked to mark portions of the translation shown to him about which he was unsure. We need to go back to Q57. The witness was shown a part of a video, Exhibit “P-341”, from certain time markers. He was also shown a transliteration and a translation. He accepted that the transliteration was accurate but, equally, was unsure about the accuracy of the translation. It was then that he was asked to mark the portions of the translation to which he said he could not attest. He said he would do his best although he did not understand many translated portions. Then with the blue ball point pen, the witness circled the many translated portions that he could not understand. The Commissioner duly noted this. The witness initialled the sheet and dated it. At this point, Mr Desai for the Plaintiff submitted that the transliteration and the *un-circled* portion of the sheet initialled and dated by the witness should be marked in evidence. Mr DeVitre countered by saying that the entirety of the translation should be excluded from the evidence because the witness had clearly deposed that he was unsure of it.

25. I do not know how I can possibly take on record bits and pieces of a translation like this. If I do, I do not know what I will ever be able to make of it. The transliteration is accepted by the witness and can be received in evidence. The video is already marked in evidence. From the beginning, the witness has said that he does not confirm the translation and his circling of certain portions only indicates that those were the portions that he really did not

understand at all. It is unclear from this testimony — or even from the question — whether the rest of the document makes any sense at all with the portions circled by the witness excluded. I believe the objection is correctly taken and the translation should not be accepted on record.

26. The objections to Qns.76, 93 and 157 are similar to the one taken to Q59 regarding the accuracy of a translation, the witness describing blue circles on a translation shown to him while confirming the accuracy of a transcript or a transliteration. The same result must follow for questions 76, 93 and 157.

27. Q77 in cross-examination was about documents referenced by the Defendant in video clips marked Exhibit “P-377A”. He was asked whether these documents were delivered to the Khizana. Mr DeVitre objected that the question was vague about the time of delivery. It did not relate to any particular event. It was a general question about documents without any particular one being specified. Two clips were shown to the witness. The first referred to a letter but the second made no reference to any specific documents. Mr Desai responded by saying that the Khizana was the repository of manuscripts and historical documents. He said that it was not possible to reference a specific time-period because the video itself did not provide such a time context. Then Mr DeVitre objected that the document was not in fact shown to be an original but was very possibly a photocopy. The objection is sustained, and the question is disallowed.

28. Q94 was in relation to an audio recording of the 51st Dai's sermon on 28th June 1960. DW6 was asked whether he agreed with what the 51st Dai said about needing to closely scrutinize documents since portions of documents have been known to have been fabricated and their authorship misattributed. Mr DeVitre objected, and, in my view, quite correctly. The question was entirely irrelevant because whether the curator of the Khizana agreed with the 51st Dai is a surely matter of utter irrelevance to any issue in the suit. It seems to me also unfair to expect that the curator of the Khizana would have ventured to disagree with the 51st Dai — or with any other Dai for that matter. The objection is sustained. The question is disallowed.

18th October 2022:

RE: EVIDENCE OF DW7:

29. The Plaintiff does not press the objections to documents in list CC-11 (admissions and denials) and list CC-12 (objections).

30. The Defendant's objection in cross-examination to Q&A 16 is also not pressed.

31. What remains are objections to re-examination in Q&A 35 and 36.

32. Q&A 35 and 36 arise from Q&A 23 to 25. The witness was asked who, according to him, comprised the Jamea team. He first

said that he only knew the lawyers working with him in the case. When the question was rephrased, he said that the team he worked with was part of the Jamea Team. Then in Q25 he was asked to name the person or persons who, according to him, were part of this Jamea team. He mentioned three names: i) Al-Azhar Bhaisaheb, ii) Saifuddin Bhaisaheb and iii) Qusai Bhaisaheb. An exceedingly peculiar re-examination followed. The witness was then asked whether the persons he named as Al-Azhar Bhaisaheb and Saifuddin Bhaisaheb were present at the commission's session hearing that day. He said they were. Then he was asked, again in re-examination, to point out these persons said to be present at the commission's session. He said he could. He pointed to two individuals and, in addition, he indicated a person who, according to him, was the third person he had named, Qusai Bhaisaheb. At this point Mr DeVitre interjected and said that the person the witness had identified as Al-Azar Bhaisaheb was Mr Alaqmar Bhaisaheb Dawood; the one he said was Saifuddin Bhaisaheb was Moiz Bhaisaheb Fakhruddin and the person he said was Qusai Bhaisaheb was Adnan Bhaisaheb Husain. This is not a matter of identification of the individuals. That is entirely immaterial and I do not propose to allow any argument on a wrong identification, nor to turn any part of this trial into a masquerade ball. The questions in re-examination are disallowed. The objections are sustained.

RE: EVIDENCE OF DW8:

33. Mr Desai for the Plaintiff does not press his objections to the documents in list CC-15 (admissions and denials).

34. Mr Desai's objection to the further evidence in chief of DW8 in regard to the question of Exhibit "D-622", Exhibit "D-623", Exhibit "D-624" and Exhibit "D-625" are all not pressed. The witness has been questioned on all of these.

35. Mr Desai also does not press the objection to Q&A 16 in further examination-in-chief.

36. The Defendant had an objection to Q&A 43. This is not pressed.

37. The next objection is to something the witness volunteered after Q&A 156 in the cross-examination. The context of this is Qns.101 to 104. These four questions pertained to a certain audio recording. The witness was played the relevant audio recording from specified time markers and given a transcript and a transliteration. He was then questioned on the ending words of an extract, said in cross-examination — and this was what was put to him — to be "*nass kare chhe*". In answer to Q102, he said he could not hear the sentence correctly. He was asked what he could hear as the last sentence after the transliterated portion that he was given. He said he could hear the words "*kare chhe*" but could not confirm this. Then in Q104 a case was put to him that these words were not found in the corresponding portion of the recording sent by the Defendant's lawyers and which they said was a recording of the entire sermon. Exhibit "D-624" shown to the witness was said to be an extract of that entire sermon. The witness was therefore asked in Q104 whether he had added the words "*kare chhe*" that he said he

had just heard in the extract Exhibit “D-624”. He said he had not added any portion to any extracts of the sermon. Apparently, he then added, although this is not noted as a volunteered statement that he wanted to see both files before he replied. Both sides agree that the reference here is to the audio files and not to printed documents.

38. The cross-examination continued and after Q156 which was on a different Exhibit, Mr DeVitre for the Defendant pointed out the witness’s answer to Q104. He said that there has been no follow-up although the witness had said that he wanted to reply after having seen both files. It was his suggestion that the witness be permitted to depose to the reply. This might have been legitimate in re-examination but, he claimed, should properly also be allowed during the cross-examination. Mr Desai contended that the first part of the answer to Q104 was enough for his purposes, namely, that the witness had not added any portion to any extracts of the sermon. He argued that the witness was having second thoughts and, therefore, there was no question of any follow-up. Both audio files in question had been played for the witness during cross-examination. Indeed, they were played more than once. Mr Desai said that it would be improper for the witness to add or improve on the answer. Ultimately, before the Commissioner, Mr Desai submitted that even if the witness was permitted an explanation this should be taken as a volunteered statement and not in reply to any question. There then followed a long explanation from the witness at internal pages 55 and 56. The witness, a digital archivist, was at some pains to explain how he went about his work and what he did with these two digital audio

files. He explained that there was indeed an error and a portion had inadvertently got transposed or translocated.

39. At this stage, I am not assessing the veracity, correctness, evidentiary value or relevance of this evidence. The only question before me is whether this entire evidence volunteered by the witness ought to be struck out or should be retained. I believe it would be entirely unfair to the witness to direct the elision of the statement that he volunteered. After all, it is he who did the work of extracting portions from an audio file or audio files. If, during the course of that work, he made an error, which he is prepared to admit, then surely that explanation must be retained. If it is not, there is every likelihood that the veracity and the credibility of the witness will be assailed. That would be entirely unfair to the witness. The objection by Mr Desai is thus overruled. The portion volunteered by the witness will be read in evidence.

40. In addition, the witness tendered a document. This was a printout of a screenshot of two wave-forms. This was apparently done shortly before he volunteered this piece of evidence. The screenshot in question is one the witness himself took and it is used to explain, clarify or illustrate the portion of evidence that he volunteered. Again, that document will have to be read in evidence. The objection to that is also overruled and the document is allowed.

41. Mr Desai has an objection to question 197 in re-examination put by Mr DeVitre. Q180 in cross-examination was a suggestion to the witness that 4th February 2012 was the Prophet's birthday. This

is the date mentioned in the witness's own Evidence Affidavit in paragraph 20(ii) at page 22. In re-examination the witness was shown his answer to Q180 but then was also shown photographs which are Document 76 of the Defendant's Compilation of Not Admitted Documents. But these photographs are in fact what the witness referenced in paragraph 20(ii) at page 22 of his Evidence Affidavit. In re-examination the witness was asked what the occasion shown in these photographs was. In cross-examination, he had been shown this very paragraph of his Evidence Affidavit. The question in re-examination is perfectly legitimate. The objection is overruled. The answer will be read in evidence.

RE: EVIDENCE OF DW9:

42. Mr DeVitre objected to Qns.29 to 32 in cross-examination. This was in the context of a generalised question earlier at Q28, when he was asked if a transcript, transliteration and translation shown to him were accurate. He replied saying that the transcription was accurate. As far as the transliteration and translation were concerned, he said he could not answer one way or the other. Following this, Mr Desai seems to have put to him four questions on individual portions and, specifically, certain words that were in the transcription and were translated by the Plaintiff's brother. The objection from Mr DeVitre was that the witness had already "answered the question in his answer to the previous question" meaning the answer to Q28. The objection is overruled. All four questions put to the witness were about the meaning of specific phrases or words in Arabic. His answers were clearly relevant.

43. In Qns.90 to 94, DW9 was asked whether he was familiar with certain texts. In Q.95, Mr Desai asked whether it would be correct to say that whatever the witness has read in these various texts, there was no mention of a specific number of witnesses required for a valid Nass of succession. The question is directly relevant to one of the issues framed for trial. The objection from Mr DeVitre was that the witness had already said that he did not remember the contents of the books referred to earlier. But Q.95 by Mr Desai was not about the content of any particular book or contents of all the books taken together but was more correctly about the witness's understanding of what he had read in relation to a very specific situation or condition, i.e., whether a particular number of witnesses was required for there to be a valid Nass of succession. The question was entirely legitimate. DW9 is the Defendant's brother. He is the Rector of the Jamea and holds one of the higher degrees recognised in the community. Mr Desai's response, that such a question is permissible, is correct. He is also correct that the question was relevant. The objection is overruled.

44. Mr DeVitre does not press the objection before Q&A 126 to the audio recording referred to in the third paragraph at page 39 of the transcript.

45. Q.130 related to a proceeding before the Privy Council. DW9 was shown an apostilled extract dated 4th December 2017 from a book titled 'Privy Council cases'. The relevant extract is of the year 1947. Pages 1116 and 1117 were shown to the witness. These pages are part of the record of proceedings printed and prepared for Privy

Council Appeal No. 79 of 1945. They are part of the collection of the British Library. The case in question before the Privy Council was in the Burhanpur Dargah Case, Suit No. 32 of 1925, apparently instituted before the Court of the Additional Sub-Judge First Class Burhanpur. The 51st Dai was the 4th defendant to that suit. He had engaged a pleader. As part of the record and proceedings, the 51st Dai's pleader said, in essence, that according to the 51st Dai there were very few instances of a nass of succession being in writing. The 51st Dai's pleader said that despite diligent search the 51st Dai was not in possession of any original *Nass-Nama*. The pleader then went on to note, evidently on instructions, that the 48th Dai had appointed the 49th Dai by a written document. Every other Dai from the time of the 46th Dai onward had only made oral appointments. The 51st Dai had the *Nass Nama* of the 48th Dai with him but this and other documents were lost while he was on his way to Indore some eight years earlier. He could not, therefore, produce a single original *Nass Nama*.

46. What was put to DW9 was this material (another portion of this record at page 752 from Part II is at Exhibit "D-428"), paragraph 30 at page 11 of his Evidence Affidavit and also Exhibit "D-489". This Exhibit "D-489" is a document said to be in the handwriting of the 49th Dai with an endorsement in the handwriting of the 51st Dai. Apparently, the 49th Dai did appoint a successor by conferring a Nass. But he abrogated that Nass and then conferred Nass on the person who went on to become the 50th Dai. The 51st Dai's endorsement on Exhibit "D-489" is about these events. The question in cross-examination was whether DW9 agreed that in view of what was stated in the Privy Council records shown to the

witness the *handwriting* on Exhibit “D-489” was not (or could not be) that of the 51st Dai.

47. I do not think this was at all a legitimate question. It may have been permissible to put it to the witness that there was an apparent conflict between what was said on behalf of the 51st Dai by his pleader in the Privy Council case and what was supposedly endorsed by the 51st Dai in Exhibit “D-489”. Such a question might have been legitimate, provided of course, that the witness was a person capable in law of answering it. But the question of the document “Exhibit D489” *not being in the handwriting* of the 51st Dai did not and could not possibly arise as a logical corollary to the Privy Council record even if the two were in apparent conflict. Mr DeVitre objected on many grounds, of which two have sufficient appeal. The first is that the question lacked clarity. It does. The second was that the question was a rolled up one. That is also true. But it seems to me that a more fundamental problem with the question was that it poses a situation that simply did not and could not arise on the two documents when set one against the other. The objection is sustained. The question and its answer and documents marked as Exhibits P-414 and P-415 will be disregarded.

RE: EVIDENCE OF DW10:

48. The objections by the Plaintiff to Q&A6 in further examination-in-chief are not pressed. Mr. Desai objected to the entire documents being marked as submitted by Mr. DeVitre in Q&A 47 and Q&A 59. However, Mr. Desai withdraws his

objections. The entire documents are marked as Exhibits D969 and D970.

49. There was an objection by Defendant to Q&A 36. This is not pressed.

50. DW10, a philologist, was introduced as an expert witness. In question No. 64 he was asked if he agreed that if the Plaintiff and the Defendant were in accord on any translation from Arabic to English, then the witness's own translation to the extent that it differed from the agreed translation was "necessarily incorrect for the Dawoodi Bohra Community". This question ought never to have been put to this witness. It made no difference because if the only two parties to the Suit agreed on a particular translation of a particular document, no amount of expert evidence could dislodge that agreement. There was no need to introduce an ambiguity. The objection was that the question was argumentative, which indeed it was, and also that it invited a speculative conclusion. The second objection may not necessarily be correct. The opinion of the expert was being sought. At best, the question was imprudent. The objection is sustained.

51. The Plaintiff has no objection to any of the documents tendered.

RE: EVIDENCE OF DW11:

52. Mr. Desai withdraws his objections to Exhibit D1032 and D1033 being taken on record. Mr. Desai also does not press his response to Mr. DeVitre's objection to Q&A 109. Q&A 109 is disregarded.

53. There are several objections taken by Mr. DeVitre in cross-examination. The Plaintiff is pressing his responses to those objections.

54. As to Q&A 18, the witness was shown a few lines from page 576 of Volume-II of Muntaza, Jamea Edition. The entire page is received in evidence. That is appropriate for the purposes of the record. The objection of the Plaintiff was trivial. Exhibit "D1030", the entire page, will be used in evidence as necessary. Q23 is on an identical footing.

55. In Q.41, the witness was asked his opinion on a translation done by DW10, the previous witness. Almost predictably, Mr. DeVitre objected. He said that the previous witness had not been cross-examined on the document. He demanded that the exact portion be identified. The other objection was that the portion referred to in the question was not clear and ought to be specified by some marking on a copy. I do not think there is substance to the objection. DW11 was also an expert. He understood the portion shown to him sufficiently to provide a perfectly cogent answer. The objection is overruled.

56. For Q&A 57 and 58, Mr DeVitre does not press the objection, although he commends retention of his editorial comment as noted by the Commissioner. Since Mr DeVitre was not the witness, once the objection goes, so does his commentary.

57. The objections to Qns. 94, 95, 114 and 115 are of the same stripe as Q.41. The objections to these are over-ruled.

58. In Q.117, the witness was asked whether certain pages shown to him were from his own dissertation. He answered that they were. Mr. DeVitre objected saying that these pages had to be marked 'subject to proof of correctness of contents'. I disagree. They are part of the witness's own dissertation. It is open to the Defendant to argue from the material on record, including the witness's Evidence Affidavit, that those pages from the witness's dissertation are incorrect, or have been disowned, recanted, corrected or later said by the very same witness to have been inaccurate. The question was only whether the pages were or were not part of his dissertation and nothing further. The objection is over-ruled.

59. Q.118 was similar to the last question put to the previous witness. The case put to the witness was that if there were certain doctrines and historical records on which the Plaintiff and the Defendant agreed, such as the contents of Exhibit P-1, a contrary view by the witness would necessarily be incorrect for the Dawoodi Bohra Community. To DW10, though in the context of a translation a virtually identical question was put. As with the previous witness,

the question was inappropriate and irrelevant. It carries the matter no further. The objection is sustained.

60. Q.119 in re-examination relates to Q&A 39 in cross-examination. In his answer when he was being questioned on the meaning of the word “*Inna*”, the witness referred to a dictionary by Hans Wehr. The witness had then said that Hans Wehr’s dictionary has the same word mentioned in the question, but he adds that it is usually not translated. In re-examination, the witness was asked whether he could produce the entry from the Hans Wehr dictionary. The objection was that the question was impermissible. I disagree. The objection is overruled. The question in re-examination was entirely legitimate and required for completeness. The witness produced the relevant entry. It would be read in evidence.

61. Q&A 120 in re-examination relates to Q&A 61 in the cross-examination. The witness’s answer was to speak about “the remaining Jaziras”. In re-examination, he was asked about these words “the remaining Jaziras” on the fourth line of Exhibit “D-461”. Mr Desai objected to the question saying that there was no ambiguity in Q. 61 or its answer, nor did it require clarification. I disagree and at least from my perspective I would urge Mr Desai to be somewhat more merciful. *I* require the clarification. The objection is overruled.

62. Q&A 106 in cross-examination referenced an underlined portion of a particular volume. That had a footnote No. 5 against the word ‘Nizar’. In cross-examination the footnote was omitted. In re-

examination, in Q.121, Mr DeVitre for the Defendant asked the witness to explain what footnote No. 5 said. The question is legitimate. It is necessary. The objection is overruled.

RE: EVIDENCE OF DW12:

63. There are no objections to be considered.

RE: EVIDENCE OF DW13:

64. The Plaintiff's objections to questions in further examination in chief being Q&A 2 and Q&A 14 are not pressed by the Plaintiff. Those questions and answers will be read in evidence.

65. The Defendant's objections to the Plaintiff's questions in cross-examination being questions Nos 56, 57, 58 and 59 are not pressed. Those questions and answers will be read in evidence.

66. The Plaintiff objects to Q9 of the further examination-in-chief. Mr Desai's objection was that the witness was merely the assistant of the Rector, and the Rector had himself deposed. The assistant could not answer such a question. I do not see why not. The assistant may well have a wider or narrower view than his immediate superior. The objection is overruled.

67. In Q&A 13, the witness was asked whether the pages in Exhibit D540 and its original were the same or were different (apart from their sequencing). The objection that the documents would

speak for themselves is overruled. The witness could certainly answer.

68. In Q&A 16, the witness was asked whether there were any witnesses to the two Nass to which he had deposed in the previous answer. The objection was that there was no mention in the evidence affidavit. But that is precisely the point of a further examination in chief. The objection is without substance and it is overruled.

69. In Q&A 18 (in further examination in chief), the witness was asked to produce the extracts from the notebook in which something to which the witness had deposed was recorded regarding a Nass of 1328 AH. The objection was on three grounds. *First*, that the extracts were inadmissible in evidence. *Second*, that the notebooks were not referenced by the Defendant before this question was asked. *Third*, that such evidence would be hearsay. Having regard to Q&A.17, I do not see why these extracts would be inadmissible in evidence. There is no question of them being hearsay. It may be true that they had never been referred to by the Defendant, but the reference is clear from the answer to question 17. There, the witness was asked, while still in examination in chief, about the basis on which he said that the 50th Dai conferred Nass on the 51st Dai in 1328 AH. The answer was that his knowledge was based on certain notebooks. Question 18 was, logically, the next question. The objection is overruled. The witness then produced documents. These will be read in evidence as well.

70. In Q&A 31, the witness was asked to produce extracts of the audio recording with transcripts and translations. These were ones to which he referred in his answer to Q30. The objection by Mr Desai to the production is overruled.

71. In Q&A 34, the witness was asked who the witnesses were to the second Nass referred to in certain identified paragraphs of his evidence Affidavit, and which were also mentioned in audio and video recordings (produced along with their transcripts and translations). There was an objection to this on the basis that it had not been disclosed earlier. The reference came from the witness's own answer. The objection is without substance. There is no question of leaving out legitimate material on which a witness wishes to rely.

72. The objection to Q&A 41 is similar to the ones taken by Mr Desai to Qns. 31 and 34. The objection is overruled.

73. The objection to Q.45 is similar to the ones in Qns. 31, 34 and 41. For the same reason the objection is overruled.

74. The objection to Q. 49 is similar to the objections to Qns. 31, 34, 41 and 45. The objection is overruled.

75. In Q53, the witness was asked what, according to him, was "the correct position" in regard to inadvertent errors made by Dai in oral communications (such as in sermons or in his writings). Mr Desai objected that the question was irrelevant, inadmissible and

without any foundation. It is most certainly without foundation. It is possibly irrelevant. But it is not inadmissible. The other objection by Mr. Desai is that the question is asked to a person who does not claim to be a Dai. This is no reason to disallow the question to a non-Dai. The answer is interesting. The Rector's assistant said that Dai had made inadvertent errors in historical references. These were errors in oral communications and, sometimes, also in their writings. He recalled an error by the 52nd Dai himself. He volunteered to produce an extract from that sermon, its transcript and translation to substantiate his answer. In the next question he confirmed that this sermon was already on record. He then produced a transcript and a translation. He went on to expand on his previous answer. The question of relevance is one that I will address at some later stage if the occasion arises. It seems to be unlikely that it will, but nonetheless. The objection is thus over-ruled, and the question is allowed.

19th October 2022

76. The objection by Mr. Chagla and Mr. DeVitre to Q75 is not pressed.

77.

78. The objections by the Plaintiff to the documents listed in List CC-28 are not pressed.

79. Mr Desai does not press his objections on the ground of hearsay to the Evidence Affidavit.

GENERAL:

80. All objections other than those addressed in this order are not pressed by whichever side took them. Similarly, all documents marked in evidence before the Commissioner, and which have not been dealt with in the foregoing order while addressing the objections of one side or the other will now be read in evidence. They will retain the exhibit numbers assigned at the sessions before the Commissioner. These markings will be treated as complete, i.e, without reservation.

81. Lastly, all other objections, other than those addressed in this order, stand withdrawn.

ISSUES:

82. Issues were framed; one was recast; and then additional issues were framed following an amendment to the plaint after the original Plaintiff passed. For convenience of all, the final issues are listed below. Both sides agree that no additional issue arises from the trial record.

ISSUES

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?
2. What are the requirements of a valid *Nass* as per the tenets of the faith?
3. ~~Whether the Plaintiff proves that a valid *Nass* was conferred/pronounced on him as stated in the Plaintiff?~~
- 3-A Whether the Plaintiff proves that a valid *Nass* was conferred/pronounced on the Original Plaintiff as stated in the Plaintiff?
- 3-B If Issue No.3-A above is answered in the affirmative, then whether the Plaintiff proves that a valid *Nass* was conferred/pronounced on him as stated in the Plaintiff?
- [Original Issue No.3 was substituted with Issues 3A and 3B by Order dated 3rd May 2017]
4. Whether a *Nass* once conferred cannot be retracted or revoked or changed or superseded?
5. ~~If the answer to Issue No. 3 is in the negative, then 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? If so, whether this amounted to or was a retraction or revocation or change or supersession of any *Nass* previously conferred by the 52nd Dai?~~

Recast as:

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?

6. What Judgment and Decree?

MISCELLANEOUS

83. The trial in the matter is now complete and it is ready for final hearing.

84. As currently advised, this final hearing will be before me in a special session only for this matter from 28th November to 23rd December 2022 on a day-to-day basis. No adjournments will be possible. It will also not be possible to extend the time for arguments. How the two sides propose to divide the time between them is a matter I leave to their counsel.

85. I had previously indicated that some recompilation of the record might be necessary. On reflection, I believe this would needlessly complicate matters. As long as there are identifiable exhibit and page numbers, a complete recompilation is not necessary. The record will however need to be scanned so that it is available in soft copy as well.

86. During the course of arguments, I anticipate that there will be a need to view certain videos and hear some audio material. Mr Goswami, CPC and Mr Bobade, Deputy Registrar, IT are requested to make the necessary arrangements and to ensure that there is sufficient audio and video clarity.

87. Both sides propose to hand in notes of arguments. At least for the Plaintiff, a copy in advance of the skeleton arguments should be tendered in hard and soft copy by 23rd November 2022.

88. Parties have agreed that Mr Desai for the Plaintiffs will begin final arguments. This means he will have the opportunity of Rejoinder.

COMMISSIONER

89. It remains for me to commend Mr Salil Shah, Advocate, appointed as the Commissioner for the outstanding quality of his work. The Commissioner's record is exemplary: meticulous, superbly organized, and thorough in every regard. It should serve as the standard for all commissions for recording evidence; and, in addition, I would recommend that its format and methodology be included in the curriculum for Judicial Officers at the Judicial Academy. I have no doubt at all that our Judicial Officers would greatly profit from an understanding of how the manner of recording evidence in this matter lends the utmost clarity. Mr Shah's work has undoubtedly lessened my own burden, and for that he has my gratitude.

(G. S. PATEL, J)