Privy Council Appeal No. 79 *of* 1945

Hasanali and others - - - - - - - - *Appellants*

v.

Mansoorali and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1947

Present at the Hearing:

LORD PORTER
LORD UTHWATT
SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

This is an appeal by special leave from the judgment and decree of the Court of the Judicial Commissioner, Central Provinces and Berar, Nagpur, dated the 25th October, 1934, which reversed the judgment and decree of the Court of the Additional Subordinate Judge, Burhanpur, dated the 2nd January, 1931.

The question for determination is one which concerns the right to the use of certain Waqf property belonging to members of a Moslem community in India, known as Daudi Bohras, situate in the village of Shadra, near the town of Burhanpur in the Central Provinces, and, in particular, the question as to the right of the present respondents Nos. 1, 2 and 3 to interfere with the access to and use of such property.

A further question as to whether the appellants are entitled to sue in a representative capacity must also be considered.

The property consists of an enclosed area of land in which are situate the mausolea of three saints, two mosques, two jamatkhanas (dining hall), a dewankhana (congregation hall), and rest houses erected by or with funds subscribed by, or with offerings to the three saints made by, members of the said community and dedicated to God for the use of their devotees who are members of the said community.

Within the area there are also plots of land used as burial grounds, dedicated to God for the same use.

The Daudi Bohra community consists of Moslems of the Shia sect, holding in common with all members of that sect, the belief that there is one God; that Mohammad is His prophet, to whom He revealed the Holy Book (Koran); that Ali, the son-in-law of Mohammad, was the Wasi (executor) of the latter; and that Ali succeeded Mohammad by " Nas-e-Jali " which may perhaps for the moment be loosely translated as " declaration ".

In common with all members of the Shia sect, Daudi Bohras believe that Ali, the son-in-law of Mohammad, was succeeded by a line of Imams each of whom in turn was appointed by Nas-e-Jali by his immediate predecessor.

At a later date, the Shia sect itself became divided into two sects, known respectively as Ismailia and Isna Asharia. Daudi Bohras belonging to the former sect and in common with all other members of the Ismailia sect, believe that, owing to persecution, Imam Tyeb (the 21st Imam) went into seclusion; and that an Imam from his line will appear, it being their belief that an Imam always exists though at times he may be invisible to his believers while in seclusion; that owing to the impending seclusion of the 21st Imam (Imam Tyeb), his predecessor, the 20th Imam directed his Hujjat (a dignatory ranking next to an Imam), one Hurra-tul-Malaka, to appoint a Dai (missionary), a mazoon (a dignitary ranking next to a Dai) and a mukasir (a dignitary ranking next to a mazoon) to carry on the Dewat (mission) of the Imam so long as the Imam should remain in seclusion, and to take and receive from the faithful an oath of allegiance. The Dais were known as Dai-ul-Mutlaq.

On the death of the 26th Dai, however, a schism took place in the Ismailia sect.

One Suleman claimed that he had been appointed by the 26th Dai-ul-Mutlaq, and established a sect known as Sulemanis.

The members of the Ismailia sect who rejected the claim of Suleman held the belief that the 26th Dai appointed as his successor Daud-bin-Kutabshah, and thenceforth became known as Shia Ismailia Tyebia Daudi Bohras (the word Bohras being added by reason of the fact that the great majority of the sect are hereditary traders).

It is to this sect that the parties in the present appeal and those whom they represent belong.

It is common ground among the members of the community of Daudi Bohras that Nas-e-Jali is a declaration by which a Dai-ul-Mutlaq nominates his successor in office. The essential features of this declaration are considered later in this judgment.

The 46th Dai-ul-Mutlaq, Syedna Mohammad Budruddin, and each of his predecessors was admittedly validly appointed by Nas-e-Jali, but on his death a controversy arose between members of the Daudi Bohras community as to whether or not Budruddin appointed a successor by Nas-e-Jali, and it is by reason of that controversy that the dispute between the parties to the present appeal arose.

The appellants and certain members of the community believe that Budruddin made no valid appointment of a successor to himself as Dai-ul-Mutlaq. They assert that he died suddenly on the night of the 29th Jamadil Akhar, 1256 H. (1840) from poison, without making any such appointment, but that the learned men of the community of that time, in their anxiety to avoid the disintegration of the community and to prevent its members from becoming members of the rival sect of Sulemanis, gave a Fatwa (ruling) in favour of one Najmuddin, to the effect that he was a fit person to succeed Badruddin, and further purported to elect him as Dai-ul-Mutlaq in succession to Badruddin, concealing from the general body of the community the fact that such appointment had not been conferred on him by Badruddin.

The respondents do not accept this assertion. They state that Najmuddin was validly appointed, that he was held to have been duly declared the successor of Budruddin by " Nas " by four learned men to whom the question was referred about the time of the appointment and that Najmuddin and his successors have been accepted as such by a large body of the sect.

For the purpose of the present judgment the 47th occupant of the position of headship of the Daudi Bohra community and his successors will be described as Dais as a neutral term not necessarily implying a valid appointment by Nas-e-Jali, and the phrase Dai-ul-Mutlaq will be confined to the case of a Dai validly appointed by Nas-e-Jali and thereby acquiring not only civil powers as head of the sect and as trustee of the property, but also ecclesiastical powers as religious leader of the community.

The order of succession of the Dais from 1837 onwards appears from the following table:—

BADRUDDIN	46th Dai	...	1837—1840
NAJMUDDIN ... ... (Son of the 45th Dai)	47th Dai	...	1840—1885
HUSAMUDDIN ... ... (Brother of NAJMUDDIN)	48th Dai	...	1885—1891
BURHANUDDIN ... ... (Son of NAJMUDDIN)	49th Dai	...	1891—1906
BADRUDDIN ... ... (Son of HUSAMUDDIN)	50th Dai	...	1906—1915
SAIFUDDIN ... ... (Son of BUHRANUDDIN), 2nd respondent.	51st Dai	...	1915—

As to all these there is no dispute that due appointment by Nas-e-Jali was made. save only in the case of Najmuddin, but it is said and accepted that, if his appointment is invalid, he cannot transmit what he never possessed and consequently his successors were never Dais-ul-Mutlaq.

During this period though there was no doubt a body of the adherents to the sect which did not accept Najmuddin and his successors as validly appointed, yet no very serious clash occurred until the present Dai occupied the position.

Some dispute, it is true, seems to have broken out in the time of his immediate predecessor, but no attempt was made by the second Badruddin to exclude his opponents from the Waqf property or to excommunicate them. Upon the succession of Saifuddin, however, and during the years following it the controversy between the two parties within the sect came to a head, with the result that the present suit was filed on the 26th October, 1925. Since that date there has been more than one change in the defendants but substantially the present Dai and two of his servants, who are charged with the care of the premises in question, have been represented. The plaintiffs have, however, undergone a kaleidoscopic change.

The original plaintiffs were Mahomedbhai and Taibali, suing for themselves and in a representative capacity. The former died before the hearing with the result that at the trial Taibali was the only plaintiff. In the appeal he, as the victorious party, became the only respondent, but his sympathy with the appellants was suspected and Hosen Ali and later Tahirbhai applied to be added as respondents and were so added, both individually and in a representative capacity.

When they lost the appeal before the Additional Judicial Commissioner, Hosen Ali and Tahirbhai again applied individually and in their representative capacity for leave to appeal to the Privy Council, joining Taibali as 4th respondent also individually and in his representative capacity.

Whilst that appeal was pending, Taibali died in 1941 and Hosen Ali in 1944. Consequently when the hearing before their Lordships began, the only appellant was Tahirbhai. As his position differed somewhat from that of some of those whose interests he sought to represent, their Lordships thought fit to grant the petition of another supporter of the appellants one Hosen Ali Jaffarji as a second appellant with the intimation that they might or might not be able to treat these two persons as appearing in a representative as well as an individual capacity, but that even if they were unable to do so, at least the main matters of dispute could be decided. It was a term of his joinder that no obligation to pay costs should be imposed on this gentleman.

These being the parties, it is necessary briefly to set out the history of the dispute giving rise to the present litigation. It began, as has been said, in 1915 immediately after the accession of the present Dai but the events which led up to it must be stated.

In the year 1902 a primary school for the children of members of the Daudi Bohra community was established at Burhanpur under the name

of the Hakimia School, which, in the year 1911, became a high school and was then named the Hakimia Coronation High School.

The management of this school had given rise to some disagreement between the then Dai and its managers but this dispute was temporarily adjusted by the present Dai, the 2nd respondent after his accession in 1915. In the same year, however, the Amil of that respondent at Khamgaru in Berar excommunicated from the community Hosen Ali, who was then editing a weekly periodical called " Gulzar " which dealt with matters believed to be of interest to that community and in which appeared from time to time criticisms of the 2nd respondent and his Amils.

In 1916, after Hosen Ali had been excommunicated, Taibali invited him to dinner, and as a result the 2nd respondent's Amil at Burhanpur inflicted a fine of Rs.251 upon him under threat of excommunication.

These two gentlemen afterwards became parties to these proceedings but have since died.

Later, on the application of certain members of the Daudi Bohra community resident in Bombay, the Advocate-General of Bombay, in the year 1917, filed a suit under the provisions of section 92 of the Civil Procedure Code against respondent No. 2 and others who claimed to be his managers or agents for the establishment of certain charities (*Advocate-General of Bombay* v. *Yusufali Ebrahimji and Others* (24 Bom. L.R. 1060)). In that action the 2nd respondent was declared to be the trustee of a waqf in respect of the properties then in suit and in the present appeal the respondents, following that decision, do not rely on any assertion of personal ownership by the second respondent of any of the suit properties.

In the month of August, 1917, certain members of the Daudi Bohra community, at a meeting convened at the residence of the Amil at Burhanpur of respondent No. 2, signed a document dated the 10th August, 1917, which they delivered to the Amil, requesting him to excommunicate five members of the community (including Taiyabali) therein named and the Amil, in compliance with such request, purported by oral public proclamation made in the town of Burhanpur, to excommunicate those five persons, but the validity of this excommunication was afterwards disputed.

In the year 1920, Hosen Ali Jaffarji, now made a party to the appeal, was headmaster of the Hakimia High School and presumably owing to a revival of the former disagreement between the Dai and the managers, some attempt seems to have been made to persuade him to sever his connection with the school but without success.

Undoubtedly he was one of those who denied the validity of the appointment of the 47th Dai and consequently did not acknowledge the spiritual authority of the present Dai.

At a later date in the same year, his excommunication was intimated to him by the solicitors of the 2nd respondent in a letter dated the 17th July, 1920, in the following terms:—

" Sir,

We are instructed by our client His Holiness Sirdar Syedna Taher Saifuddin Saheb the Mullaji Saheb of the Daudi Bohra Community to address you as follows: —

Our client is informed that you have been working against him and consorting with former members of the community to the detriment of the interests of our client and the Daudi Bohra Community generally and therefore our client has severed his connection with you as you have thereby failed to comply with the tenets and traditions of the Daudi Bohra Community.

Lately our client is informed that you have received certain monies which you were not entitled to receive but which were payable to our client or his duly appointed *Amil* and our client regards such action on your part as most unbecoming and detrimental to his interests.

We are further instructed that you have been warned to desist from the continuance of all these actions but you have failed to comply with the warnings given to you.

Under the above circumstances, His Holiness Sirdar Syenda Taher Saifuddin Saheb instructs us to inform you that he hereby severs his connection with you and that you are no longer a member of the Daudi Bohra community.

We are lastly to express our client's hope that you will see the error of your ways and that you will recant and thus secure readmission in the community.

Yours truly,
Sd/- Little and Company."

From that date he was prevented from entering the premises in suit.

In the month of November, 1922, an educational conference of the Daudi Bohra community was convened to be held at Buhranpur. Thereupon respondent No. 2, through his solicitors, published a notice, dated the 9th November, 1922, to all members of the community stating that the conference had been convened without his consent; that it had no authority to pass any resolution in the name of the community; that it had been convened by persons with some of whom he had been compelled to sever his connection; and that it was his wish that none of his followers should attend. Notwithstanding this notice, the conference was held and was attended by members of the community from different parts of India.

In consequence, some persons who attended the conference, including the 1st respondent in the High Court, were obstructed by the original defendants Nos. 2 and 3 in the present suit when they sought access to the property in suit.

About the same period certain members of the community who were said to have been excluded from it by some form of excommunication and in consequence had been prevented from exercising a right of burial in the property in suit obtained from a magistrate's Court orders under section 144 of the Criminal Procedure code prohibiting those in charge of the burial ground from offering obstruction to them.

As a result of such incidents as these the present suit was brought and, as has been said, those who then were plaintiffs sued in a representative as well as in their private capacity. The class, however, which they purported, and were given leave, to represent were all those who worshipped the three saints referred to above and throughout the proceedings no change, in the body said to be represented, has been made, though it has been recognized that the substantial dispute is between those who accept the second respondent as Dai-ul-Mutlaq and those who accept him as Dai only and not as Dai-ul-Mutlaq.

A difficulty, however, arises whether there is any body of persons (represented by the present appellants or by any of the parties to the action who preceded them) sufficiently definite for their Lordships to recognise as participants in the suit.

Obviously a body composed of all those who worship the three saints is too large: it would include all the members of both parties to the dispute and a number of those who are not Daudi Bohras at all, since it is agreed that there are worshippers of the three saints who are not members of that body.

On the other hand all those who believe that the Dais from the accession of Najmuddin were not validly appointed is too narrow a class since the second respondent claims that all those who dispute his absolute authority and all those who associate with them have ipso facto excluded themselves from the community.

Nor in their Lordships' view was any other body put forward by either side as a class which could satisfactorily form a basis for representation. Indeed their Lordships have been unable to envisage any such body. On the contrary each case must depend upon and be judged in the light of its own relevant facts.

In these circumstances their Lordships do not think it right to treat the present appellants as acting in a representative capacity. As however they

believe that the matter in dispute can be substantially resolved by a consideration of the cases of the two individuals whom they have now admitted as appellants, they proceed to deal with those claims.

The complaint of each of them is that he has been obstructed in and prevented from entering the property in suit for the purposes of worship, burial, and resting in the rest houses. Oddly enough the original plaint asserts that the then plaintiffs worshipped the three saints, but nowhere alleges that they are Daudi Bohras.

In their Lordships' opinion it is essential that those claiming should be or at least have been members of that community as a basis of any right in respect of the property in question.

In his written statement, however, the second respondent not only denied that the claimants were Daudi Bohras but maintained:

(i) that it is the implicit faith of all true Daudi Bohras that he is Dai-ul-Mutlaq and as such has an unrestricted power of excommunication;

(ii) that certain members of that sect, including Taibali, denied his absolute power and authority and accordingly were excommunicated;

(iii) that all persons who associate with or support persons so excommunicated become excommunicated from the community by the fact of such association or assistance;

(iv) that irrespective of any act of positive excommunication every Daudi Bohra on raising any question as to his absolute authority is guilty of a breach of the "misak" or vow taken by him to the religious head of the community at the age of about 15 and becomes excommunicated accordingly;

(v) that excommunicated persons cease to have any right to the use of the properties in suit.

In their reply the plaintiffs did claim to be Daudi Bohras, stated that as a matter of religious belief they and their party do not believe that Najmuddin was validly appointed, but maintained that such belief or want of belief is immaterial for the decision of the dispute between the parties.

The relevant facts with regard to the two appellants now before the Board are as follows:

(1) Hasanali Jaffarji: The facts have been set out above save that he said in evidence: "I do not regard the defendant as truly appointed Dai-ul-Mutlaq, but I regard him as a Sardar or Nazim" (i.e. as an acting head) "and that in the interests of the community though personally I do not think he is even fit for that."

(2) Tahirbhai stated in evidence that his firm belief on that day was that Najmuddin was not appointed by "Nas" and that when attending the Education Conference at the Hakimia Coronation School he was obstructed from going inside the premises in suit by the then custodian, an act admittedly taken on the instructions of the second respondent. He was never excommunicated in terms either before or after being excluded from this Waqf property.

These being the facts the questions for their Lordships' decision were conveniently tabulated by Counsel for the appellants as follows:—

(1) Is the respondent No. 2 Dai-ul-Mutlaq?

(2) If yes: has he power to excommunicate?

(3) (*a*) If yes: Is such power absolute and arbitrary so that it cannot be questioned or must it be exercised in accordance with natural justice?

(*b*) Can the respondent effect excommunication by implication on the ground that his authority is questioned by any person or on the ground that any person has consorted with or supported an excommunicated person?

(4) What is the effect of excommunication on property rights?

(5) What if any difference does it make that an oath of allegiance has been taken?

These five questions all go to the determination of the position and power of the second respondent and must first be considered but before concluding the consideration of the appeal their Lordships must further determine the validity of the pleas that the matter is res judicata and that the plaintiffs' claims are time barred. Their Lordships will deal with these matters in due course. Meanwhile they will decide as to the powers of the second respondent.

(1) Firstly his claim to be Dai-ul-Mutlaq must be determined.

Undoubtedly he and his four predecessors have acted as Dais and been accepted as Sardar or Nazim, i.e., as acting head of the community. Moreover by a large number of the sect they have been and are recognized as Dai-ul-Mutlaq, though from the first there has been a number which has refused to acknowledge them as such.

As has been pointed out the validity of his claim depends upon whether Najmuddin was validly appointed by Badruddin before his death in 1840.

The period which has since elapsed is over 100 years to-day and was about 80 years distant at the initiation of the suit. It cannot, therefore, be expected that any very exact evidence could be obtained.

For the respondents it is pointed out that during all that time the successive Dais have been acknowledged and accepted as the heads of the community, though no doubt there has been opposition and a contrary view in some quarters, that the question of the validity of the appointment was put to four wise men or experts immediately after Najmuddin's accession and was approved by them and that one of the tenets of the sect is that no Dai can die without appointing a successor since if he did die without appointing he would break the chain between God and man which passes from the one to the other through the Iman and the Dai. Both sides agree that a valid appointment can only be made by " Nas " and " Nas ", say the appellants, is defined in a translation accepted by both parties from the respondents' book " Kitabul Wasia ":

" What is that thing by which ' Nas ' is proved? " it asks, and replies: " As to those who are present and see, to them ' Nas ' is proved by pointing out to them and informing them of the successor, and to those who are absent ' Nas ' is proved by information communicated to them by such persons who will be considered as authority."

Naturally, as their Lordships think, the acceptance of these Dais as heads of the community and their acceptance by the wise men made at about the time of Najmuddin's accession cast a heavy burden upon the appellants to displace the validity of his appointment. This they seek to do by a consideration of documents, the authenticity of which the oral evidence establishes. Obviously the early documents are those of most importance; the others which are written later at a time when controversy had become acute tend rather to show the attitude and arguments of each side than afford any safe ground on which to form an opinion.

There is ample evidence that Najmuddin was held in high esteem by his father the 45th Dai and by Badruddin his cousin the 46th Dai and was the most likely person and indeed the only person whom Badruddin proposed to appoint as his successor. It is clear that he intended to make the formal announcement on the day succeeding his death, but died before doing so. The only question, therefore, is whether he made a sufficiently explicit declaration before he died.

There is evidence in the books written shortly after the death of Badruddin that (the quotation is from " An-Najmus Saqib " written by one Syedi Walibhai as the mouthpiece of the Dai):

" On which day it was the intention of Syedna " (i.e. Badruddin) " to appoint the persons whom he had chosen for the posts of dignitaries, and to confirm what had previously been said about me " (i e. Najmuddin) before a public meeting, but God did not will it to defer his departure to that time and death overtook him hurriedly."

Similarly in the Munabbehatul Wasnan it is said: " He " (i.e. Badruddin) " did not pass away from this world without appointing him " (i.e. Najmuddin) " in his place and without making ' Nas ' in his favour—a Nas which is known to all learned persons." And the position is summed up in extracts from " Mosame Bahar " a history of the Dais written in 1884 in which the author speaks of " emphasizing " the fact of " Nas," and of " confirming " the fact of " Nas " and finally asks the question: " When the two virtuous brothers came to him to enquire about his health and asked him about succession after him and the reply he gave to them was it not in the nature and category of ' Nas ' and thereafter what he clearly stated to our most respected brother the pride of the Mazoons when he went to enquire about his health on the night of his death, is not that a clear and specific ' Nas '? "

Of the authors of these passages Walibhai is said to be one of the two virtuous men who came to Badruddin to enquire about the succession and he was also one of the four learned men to whom the validity of the appointment and the question whether it was or was not by " Nas " was put.

It was said on behalf of the appellants that the evidence showed only a future intention to appoint and that an intention though expressed did not amount to " Nas " and that these and many other passages showed doubt as to the validity of the appointment and at least an undercurrent of disbelief from the day of the accession onwards.

Naturally enough such doubts would exist where a day for formal notification of the appointment had been named and the appointer had died meanwhile. But the question is whether a sufficiently explicit notification of the appointment had not already been made.

There are certainly indications that enough had been done by Badruddin, in pointing out to the two virtuous brothers, to the Mazoon and indeed generally, to mark out Najmuddin as his successor and in their Lordships' view there is ample evidence upon which the fact of " Nas " can be inferred.

It is true that Walibhai does not himself state in terms that Badruddin had pointed out Najmuddin to him as his successor or mention his visit to the former, but after all he was an expert in the customs and beliefs of the Daudi Bohras and formed one of four who held the appointment to have been made with sufficient particularity. Their Lordships see no reason for differing from or criticizing that finding and therefore agree with the Appellate Court in thinking that the second respondent must be regarded as Dai-ul-Mutlaq.

This finding disposes of the necessity of determining whether the validity of Najmuddin's appointment is *res judicata* and their Lordships must not be taken to accede to the argument that it is. It is at least doubtful whether that question was ever a material issue in the case brought by the Advocate-General of Bombay, and reported in 24 Bombay 1060, which the respondents suggest decided the matter.

(2) The next question is whether the Dai-ul-Mutlaq has the power of excommunication. Their Lordships cannot doubt his having this power. It was undoubtedly exercised by Mohammed and the Imams. The grounds and effect of its exercise will later be considered. At the moment it is only necessary to say that there are instances of its exercise in the community from time to time by the Dais. No doubt these instances are rare but the power is not likely to be extensively employed and a few instances, if unchallenged, are sufficient to establish the right. Indeed the right of excommunication by a Dai-ul-Mutlaq was not so strenuously contested as were the limits within which it is confined. The

main contention was that the only method of depriving the adherents of the community of their rights as members was either by voluntary secession or an express act of expulsion—and the latter, it was said, must be consistent with justice, equity and good faith.

(3) (a) Though their Lordships hold that the power to excommunicate exists, it by no means follows that it is absolute, arbitrary and untrammeled. The power possessed by the prophet Mohammed or the Imams is a different matter, the question is what authority the Dais possessed.

There are no doubt a number of instances to be found in the written documents of cases where the power was exercised or the exercise of the power was threatened by them.

Except in the case of a member of the community who turned to the Sunni faith, the intended exercise of the power seems in almost all cases to have been preceded by a warning.

Perhaps the most instructive information is to be found in a homily addressed to the Dais and dignitaries of the sect composed about 1200 A.D. in the time of the 3rd Dai which contemplates the pronouncement of excommunication, it is true, but suggests that the steps to be taken are first rebuke of the offender and if he does not amend then a public reprimand and expulsion.

This course appears to their Lordships that which the Dai is obliged to take if an effective decree of excommunication is to be pronounced and save in exceptional circumstances (such as occur when a member of the community abjures the faith altogether, e.g., by turning Sunni) the only course which will effectively deprive them of the rights which the appellants claim. It is noteworthy that in the case of Sir Adamji Peerbhoy the present Dai actually adopted this course by calling an assembly and affording an opportunity of making amends. Normally therefore the members can be expelled only at a meeting of the Jamat after being given due warning of the fault complained of and an opportunity of amendment and after a public statement of the grounds of expulsion.

(3) (b) Whatever power to excommunicate may be inherent in the Dai, however, the appellants maintain that it must be exercised in acordance with justice, equity and good conscience and that courts of law are the tribunal to decide whether this obligation has been carried out.

If the duty imposed by this form of words is that the alleged offence must be brought to the notice of the member, that he must be given a warning and opportunity of repentance, and if he fails to do so, should not be excommunicated save for reasons publicly stated in a meeting of the Jamat, their Lordships would agree, but subject to these safeguards the determination of what is an offence warranting expulsion must in their view be left to the religious sense of the head of the community acting in accordance with the usage of the sect and pronounced in public assembly. This ruling, as their Lordships think, is not in conflict with the authorities cited to them and leaves it open for the court to decide whether there is any evidence that the offence complained of has been committed and whether the requisite steps for valid excommunication have been taken.

Such a view obviously precludes the imposition of the penalty apart from the taking of the formal steps indicated and rules out the claim of the second respondent that those who question his authority or support or even consort with such persons are by that very act excommunicated without any further steps being taken.

The contention appears to be a new one and no instance is to be found in the books of the doctrine of excommunication by implication. In their Lordships' opinion excommunication to be effective must as they have indicated be express and pronounced only after the requisite formalities have been followed.

In the course of argument as to the existence of powers of excommunication in the sect some discussion took place as to the right of an Amil, whether with or without the direct authority of the Dai, to expel adherents. No doubt there are instances of purported excommunication by these functionaries, but most of the examples given remained in force for a short

period only and appear to have been more in the nature of a temporary exclusion than of a permanent shutting out from the religious or property rights of the community. As, however, neither of the appellants suffered at the hands of an Amil but were the one in terms by the Dai and the other by implication said to be permanently cast out of the membership of the sect their Lordships do not think fit to pronounce upon the subject. But it must not be taken that they accept such powers as necessarily passing to the Amil either by virtue of his office or by direct authority from the Dai.

(4) The appellants would limit the effect of excommunication, whatever steps might have been taken to bring it into being, to complete social ostracism. There is nothing, they say, to show that it excluded from rights of property or worship.

Their Lordships do not find themselves able to accept this limitation. The Dai is a religious leader as well as being trustee of the property of the community and in India exclusion from caste is well known. There is at least one case in which it is recorded that certain persons applied to the King to intercede with the 33rd Dai complaining that in consequence of excommunication they were kept from the mosques and places where true believers met, and no instance has been cited where excommunicated persons freely exercised their religious rights. Indeed the complaint in the cases brought to their Lordships' attention as regards which relief is claimed for the appellants or those whom they are said to represent is that they were wrongly excommunicated, not that if rightly excommunicated they were wrongly deprived of their religious rights.

Excommunication, in their Lordships' view, if justified, necessarily involves exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed.

(5) A further contention was urged in support of the Dais' claim. It was said that the misak or oath of allegiance which each member of the sect has to take at about the age of 15 is taken to the Dai direct and that to break it therefore ipso facto brings about excommunication. The appellants urged that this oath was not taken to the Dai but to him merely as representative of the Imam in seclusion.

Their Lordships see no necessity for deciding this question. Whichever be the true view, excommunication can still only be effected by the appropriate steps indicated above. The Dai is the religious ruler and trustee of the properties of the community but even if the oath be taken to him he must still act in a constitutional manner. An alleged breaking of the oath no more excommunicates than does any other alleged departure from the faith. Nor does it assist to say that an adherent may by his own confession of apostasy cut himself off from the community. The appropriate steps must still be taken to ascertain that he is an apostate.

The only other contention raised by the respondents as defeating the claim is that it is defeated by limitation.

Whether in a case where the plaintiff claims a declaration that he has a continuing right which the defendant denies, and the defendant on his part pleads that the right has been extinguished, it is ever possible for the defendant to rely upon the Limitation Act need not be considered. In the present case each of the parties was prevented from entering the premises in 1922 and the action was begun in 1925. No question of limitation in their cases can, therefore, arise.

It only remains to apply the effect of the principles enunciated to the two cases now before their Lordships.

Plainly Tahirbhai has never been excommunicated and is entitled to the declaration which he claims. Hosen Ali Jafferji has had a pronouncement of excommunication from the Dai direct and the grounds for it have been given. Moreover he has directly challenged the authority of the Dai and even said that he is unfit to be trustee of the property or acting head of the community. But he was not rebuked nor were the Jamat called together nor was his excommunication publicly proclaimed.

As their Lordships have said only exceptional circumstances warrant the cutting off of a member from the community without these steps having been taken.

In their Lordships view the circumstances recited above do not constitute an exceptional case and he was not validly expelled.

Their Lordships as their judgment shows substantially agree with the reasoning upon which the Additional Subordinate Judge decided the case. But the circumstance that their Lordships do not think it right to treat the present appellants as acting in a representative capacity, and the fact that there has been a change in parties require that the order made by him should be varied, and in particular that the direction given in head (ii) (a) of paragraph (1) of the decree should be reconsidered.

Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner be set aside, and that the decree of the Additional Subordinate Judge be re-instated with the following variations:—

(a) In the opening part of paragraph 1 *substitute*:—

"It is hereby declared that neither Tahirbhai nor Hosen Ali Jafferji has been validly excommunicated from the Daudi Bohra community and that they are entitled to enjoy all such rights as appertain to their position as members of that community and subject to the rules framed by the Trustee and Manager for the time being in force:—"

(b) *delete* paragraph (ii) (a) of paragraph (1).

(c) *Substitute for paragraph* (2) the following paragraph:—

"The Defendants their agents and servants be and are hereby permanently restrained from obstructing and interfering with Tahirbhai and Hosen Ali Jafferji from and in exercise of their rights aforesaid, but nothing in this injunction shall prevent the Defendant Mullaji Saheb from making and enforcing rules regarding proper management of the Dargah properties and the uses thereof provided that the rules are fair, reasonable and not aimed at oppressing either Tahirbhai or Hosen Ali Jafferji and not inconsistent with this decree or with any directions which may hereafter be given in these proceedings by the Court.

(d) In paragraph (3) *delete* all words except the words "ad interim injunction order dated 22nd November, 1926, is hereby vacated."

Their Lordships will further humbly advise His Majesty that the cause be remitted to the Additional Subordinate Judge with a view to his giving such further direction affecting Tahirbhai and Hosen Ali Jafferji as respects the matters dealt with in head (ii) (a) of paragraph (1) of the decree of the 2nd January 1931 or as respects other subjects related to the position of Tahirbhai and Hosen Ali Jafferji as members of the community as are expedient for the proper working out of the decree.

Under this decree the appellants have substantially succeeded and should have their costs of the proceedings before the Board. Tahirbhai is the only survivor of the appellants in the Court of the Judicial Commissioner and was successful in establishing his personal rights in the appeal to their Lordships. He was not however entirely successful in establishing the claims put forward before the Subordinate Judge and in the appeal in India and in these circumstances their Lordships think that the proper result is that the order making the respondents pay the costs incurred before the Judicial Commissioner should be vacated and he should be awarded half the costs incurred by him in that Court. The order of the Additional Subordinate Judge leaving each party to pay his own costs should be affirmed.

They will humbly advise His Majesty accordingly.

(12/47) (59393t) Wt. 2013—20 [illegible] 1/48 D.T. G. 333

In the Privy Council

HASANALI AND OTHERS

v.

MANSOORALI AND OTHERS

DELIVERED BY LORD PORTER

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1948