

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL NO. 86 OF 2015****IN****ORIGINATING SUMMONS NO. 774 OF 2014**

Thakkar Kanji Morarjee Bhatia Niwas
& Thakkar Vassanji Morarjee Chawl
Trust & Anr.

.. Appellants

versus

The Charity Commissioner & Ors.

.. Respondents

Dr. Birendra Saraf with Mr. R. Carvalho i/b. Mr. Bipin Joshi for Appellants.

Mr. R. Dada – Senior Advocate with Mr. Naushad Engineer, Mr. M. S. Federal, Mr. P. Parekh i/b. M/s. Federal & Rashmikanth for Respondent No. 3.

**CORAM: DR. MANJULA CHELLUR, C. J. AND
M. S. SONAK, J.**

DATE : 01 SEPTEMBER 2016

P.C.:

1] Heard learned counsel for the parties and perused the record.

2] The issue involved in the present appeal is whether the disputes between the parties could have been adjudicated in the originating summons instituted by the appellants. The learned Single Judge, upon appreciating the contentions of the parties has held that it would not be appropriate to adjudicate the disputes as raised in summary proceedings by the originating summons procedure. Hence, the present appeal.

3] Dr. Saraf, learned counsel for the appellants submits that the only issue involved relates to the interpretation of document of conveyance executed by the appellant trust in favour of the respondents. Since complex issues of fact are not involved, in such interpretation, the same were required to be adjudicated in the originating summons procedure.

4] On the other hand, Mr. Dada, the learned Senior Advocate for respondent no. 3 submitted that this is not the just matter of interpretation of the document of conveyance but the questions which the appellants have posed by taking out the originating summons relate to the very validity of the deed of conveyance.

5] Rule 238 of the Bombay High Court (Original Side) Rules 1980 provides for who may apply for the issue of originating summons and in respect of what matters. Rule 238 read thus :

“238. Who may apply for the issue of originating summons and in respect of what matters. - The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative, or as beneficiary under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for such relief of the nature or kind following as may by summons be specified and circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following

questions or matters. :-

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or legal representative or beneficiary ;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, legal representatives, beneficiaries or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees and the vouching (when necessary) of such accounts;

(d) the payment into Court of any moneys in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees;

(f) the approval of any sale, purchase, compromise or other transaction;

(g) the determination of any question arising in the administration of the estate or trust."

6] In ***Lyla Darius Jehangir vs. Bakhtawar Lentin & Ors.***¹ , the Division Bench of this Court (Coram : R. M. Lodha and S. A. Bobde, JJ.) (as they then were) has held that the whole object of the originating summons procedure is to make available to the parties the procedure which is inexpensive but at the same time, in substance for determination of disputes as to construction of the written instruments referred to in Rule 238. However, it is also held that the originating summons is not a proper procedure to be adopted where disputed facts are of such complexity as to involve a considerable amount of oral evidence. This procedure should be confined to matters being

¹ 2007 (1) Mh. L.J. 545

capable of decision in a summary way. The Division Bench, by reference to the decision of the learned Single Judge of this Court in case of ***Rama Aziz Parpia & Ors. vs. Balkrishna K. Mehta & Ors.***² has held that originating summons is neither the process for declaration of the rights of the properties, nor is it a *lis*, as popularly understood. By this, the court is not adjudicating the rights and liabilities of the parties. Rather, this procedure is a means for getting over unexpected, un contemplated difficulties which crop up during the administration of the estate by the executors of the trust.

7] In the impugned order dated 4 December 2014, the learned Single Judge has referred to the questions which the appellants want the court to answer by applying the summary procedure of originating summons. The same read as follows :

“(a) Whether the sanction to sale the trust property dated 13th November, 1979 issued by the Charity Commissioner stands complied.

(b) Whether the execution of the conveyance without the simultaneous execution of the lease deed would amount to breach of the condition of sanction dated 13th November, 1979.

(c) Whether such execution is valid and lawful.

(d) Whether the breach of the order dated 13th November, 1979 can be remedied and rectified by execution of appropriate lease deed.

*(e) Whether or not the execution of the lease deed will invalidate conveyance,
and*

(f) Whether the trustees are required to take legal proceedings to recover possession of the trust property from defendant Nos. 2 and 3.”

8] According to the appellants, in terms of the sanction dated 13 November 1979 issued by the Charity Commissioner and the document of conveyance, certain portion of the conveyed property was

² (1992) 0 Supreme (Mah) 148

required to be leased back to the appellants, which condition according to them, has not been complied with. On the other hand, it is the case of the respondents that though they stand by the terms of sanction and conveyance, the appellants demand is much in excess of the terms of the sanction and document of conveyance. The issues raised, pertain not just to interpretation of the documents but also to validity of the execution, performance and so on. The respondents have also raised the issue of bar of limitation.

9] In the aforesaid circumstances, taking into consideration the limited scope of enquiry in the originating summons procedure, we are unable to fault the reasoning in the impugned order. The issues raised, are substantive issues which might require evidence and detailed investigation into facts. Such complex issues of law and fact cannot be appropriately adjudicated in the summary procedure as contemplated in originating summons under Rule 238. The impugned order has not shut out the rights of any parties and therefore, it is always open to the parties to institute substantive proceedings for adjudication of their alleged rights or claims. We therefore, see no reason to interfere with the impugned order.

10] Before we part we must however express that since the property is belonging to the public charitable trust, it would be in the interests of the parties that the disputes between them are sorted out amicably by negotiations or by seeking intervention of some suitable mediator. Such resolution of disputes will be in the interests of the parties, including more particularly the appellant which is public charitable trust.

11] We make it clear that all contentions of all parties with regard to their disputes are kept open.

14] With the aforesaid observations, this appeal is disposed of.

CHIEF JUSTICE

(M. S. SONAK, J.)

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