OD-27

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

CS/229/2005

IA NO: GA/4/2008(Old No: GA/541/2008),

GA/6/2009(Old No: GA/67/2009),

GA/7/2009(Old No: GA/341/2009),

GA/10/2017(Old No: GA/622/2017)

SETH JWALA PRASAD BHATIA CHARITABLE TRUST & ANR.

VS

ARVIND BHARTIA & ORS.

BEFORE:

The Hon'ble JUSTICE SUGATO MAJUMDAR

Date: 19th December, 2023

Appearance:

Mr. Swarnendu Ghosh, Adv.
Mr. Debdut Mukherjee, Adv.
Mr. Aditya Kanodia, Adv.

...for the Plaintiffs

Mr. Suman Dutt, Adv.
Mr. Mohit Gupta, Adv.
Mr. A. P. Agarwal, Adv.

...for the Defendant

The Court: This is an originating summons Suit filed by one of the trustees of Seth Jwala Prasad Bhartia Charitable Trust seeking for opinion of this Court.

Sum and substance of the case, as emanates from the affidavit accompanying the originating summons, is that in the year 1928, Seth Jwala Prasad Bhartia constructed a hospital at Fatehpur in Rajasthan spending rupees three lacs. At the same time, he set apart another sum of rupees ten lacs for upkeeping and maintenance of the hospital. The said sum was invested in debentures, government promissory notes, treasury bills and other investments. A trust was created by a registered instrument on 29/08/1940 declaring that all these investments and income should be part of the trust fund. Under the said registered instrument Seth Jwala Prasad Bhartia Charitable Trust came into being. There are various provisions in the trust deed regarding administration and management of the trust. The present property in question, being a five storied building at premises no.42, Shibtala Street, Kolkata – 700006 was constructed out of trust fund in order to augment income. The Plaintiff No.2 and the Defendant No.2 are trustees of the said trust. The father of the Defendant No.1 was one of the trustees. On his death, the Defendant No.1 became one of the trustees. It is alleged in the plaint that the Defendant No.1 continued to look after and manage the affairs of the Trust including trust fund, use to realise rents from the tenants of the trust property. Allegations against the Defendant No.1 are that he retained all the trust related papers and documents; in spite of repeated insistence refused to hand over the same to the trustees; retained deposit receipts, books of accounts without power and authority. The Defendant No.1 inducted a tenant in the trust property at meagre rent on receiving a hefty amount of money for his own benefit. This was done without consulting the other trustees and without their consents. The Defendant No.1 is also negligent in rendering true accounts of the trust to the trustees. In nutshell it is alleged in the affidavit that Defendant No. 1 is responsible for mismanagement and maladministration of the trust, guilty of misappropriation of trust fund and is acting in a manner detrimental to the Trust. In this backdrop, questions framed for opinion of the Court are:

a) Whether the Defendant No.1 the said Sri Arvind Bhartia should be removed from his office as one of the trustees of the said Trust with immediate effect?

b) If not, whether the Defendant No.1 should be restrained from interfering with matters relating to control and management of the affairs of the trust?

c) Whether the monthly tenants under the said trust at the said premises no.42, Shivtalla Street, Kolkata – 700006, can be asked by the Defendant No.1 to stop making payment of the monthly rent to the Plaintiff the said trust?

d) If not, whether this Hon'ble Court would be pleased to direct the monthly tenants at the said premises to make regular payment of their respective rents to the said trust?

e) If and so deemed fit by this Hon'ble Court, whether suitable directions be given compelling the Defendant No.1 to reimburse to the said trust such entire sum of money that has been received by him from various tenants while inducting them as monthly tenants at the said premises?

f) If and so deemed fit by this Hon'ble court, whether suitable directions be given compelling the Defendant No.1 to make over all the records of the said trust to the Board of Trustees?

g) If and so deemed fit by this Hon'ble court, whether suitable directions be given compelling the Defendant No.1 to refrain from interfering with the affairs of the said trust specially relating to the said premises at 42, Shivtalla Street, Kolkata – 700006?

h) That this Court be pleased to give directions accordingly and the following directions namely:

   i. That the Defendant No.1 be restrained by an order of injunction from interfering with the affairs of the said Seth Jwala Prasad Bhartia Charitable Trust;

   ii. That the Defendant, his men and agents be restrained by an order of injunction from obstructing in the matter of payment of monthly rent by the tenants at the premises no.42, Shivtalla Street, Kolkata – 700006;

   iii. That the tenants at the said premises no.42, Shivtalla Street, Kolkata – 700006 be directed by a mandatory order to make payment of the monthly rent to the said trust regularly, punctually with further direction to make payment of all arrears of such rent which have been withheld by the said tenants in terms of the notice issued by the advocate for the Defendant Sri Arvind Bhartia;

The Defendant No.1 filed written statement denying all the allegations. It is one of the pleas in the written statement that the suit is not maintainable. It is further stated that at no point of time the answering Defendant No.1 retained any trust related document or trust fund related document. The answering Defendant No.1 was never authorized to operate bank accounts of the trust; he never took any document of the trust. Bank accounts are operated by the Plaintiff No.2 and the Defendant No.2. It is Defendant No.2 who inducted the alleged tenant at meagre rent depriving the trust fund from legitimate and proper income. The Plaintiff No.2 and the Defendant No.2 stopped preparation of trust accounts which caused attachment of bank account by the income tax authorities. The Plaintiff No.2 and the Defendant No.2 closed operation of the hospital, ran by trust fund, at Fatehpur, Rajasthan. The Plaintiff No.2 and the Defendant No.2 are not discharging their duties as trustee properly for which they are liable to be removed from the trust.

In terms of an Order dated 17/08/2011 Co-ordinate Bench passed direction that the originating summons should be treated as a suit ready to be heard. The matter was renumbered. At that time the Bench had determination to hear suits and not interlocutory applications. This was noted in the Order dated 08/11/2017 another Co-ordinate Bench.

In this context the present application namely G.A. 622 of 2017 was filed praying for rejection/dismissal of the suit along with other prayers. Grounds for such prayers are the suit is outside the scope of Chapter XIII of the Original Side Rules; one of the trust properties is situated at Fatehpur, Rajasthan, outside the jurisdiction of this Court for which leave under Clause 12 of the Letters Patent should be taken; relief prayed for cannot be granted in summery manner as contemplated in Chapter

XIII of the Original Side Rules; an originating summons though is treated as a suit, should be heard by a Judge with determination to hear interlocutory matters.

Affidavit-in-Opposition, filed on behalf of the Plaintiff No.2 contains refutation of all the points. Sum and substance of the contention of the affidavit-in-opposition is that both the parties proceeded on the basis of the originating summons suit on understanding that the same should be heard as ordinary suit. Accordingly, necessary steps were taken by the parties. At this belated stage the Defendant No. 1 cannot raise any objection on jurisdiction. Such objection is not tenable, according to the Plaintiff No. 2. It is also contended that leave under Clause 12 of the Letters Patent need not be taken considering the nature of the present proceeding. According to the Plaintiff No. 2, the application is liable to be rejected.

Both the parties filed written notes of argument.

Mr. Dutta, the Learned Counsel appearing for the Defendant No.1 argued that power of the Defendant No.1 was terminated by a resolution dated 01/09/1999. Had the suit been filed for the same, the same would be barred by limitation. To circumvent the operation of law of limitation, the instant suit is filed in the form of originating summons. It is further argued that prayers, if allowed, would be in the nature of a decree taking the matter outside the ambit of Clauses (a) to (g) of Rule 1 of Chapter XIII of the Original Side Rules. Originating summons is a special procedure for seeking opinion of the Court. This cannot be equated with a suit. Referring to Rule 18 of Chapter XIII, it is submitted that disputes involved herein cannot be disposed of in a summery manner. Therefore, this Court has no scope to adjudicate upon the present disputes. Referring to the Order dated 17/08/2011 it is submitted that the Bench had no jurisdiction to pass such order and the Order is void *ab initio*. AIR 1969

SC 823 is relied upon. Mr. Dutta also referred to AIR 1990 Cal 224 to sinuate his submission.

Mr. Ghosh, the Learned Counsel for the Plaintiff No.2 argued that as on date there is no existence of any originating summons suit. There was no existence of originating summons suit at the time of filling the instant application. The Hon'ble Court, at the time of passing the Order dated 17/08/2011 was pleased to appreciate that the nature of the dispute involved in the instant proceeding is such that it cannot be disposed of in a summery manner. Accordingly, this Court passed necessary order in terms of Chapter XIII Rule 18 of the Original Side Rules on 17/08/2011 passing direction that the originating summons should be treated as suit and the same should be ready to be heard. The Defendant No.1, from time to time, sought various directions of this Court all of which amount to implied acceptance of the said Order dated 17/08/2011. Thus there is no scope to assail the Order as of now. It is further submitted by Mr. Ghosh that allocation of determination is administrative function of the High Court. Even if an order is passed without determination, that order does not become bereft of jurisdiction. There was no inherent lack of jurisdiction of the Bench rendering the aforesaid Order null and void. (1998)3 SCC 72, (2005) 7 SCC 791, 1978 SCC Online Cal 73 were relied upon. The next limb of argument of Mr. Ghosh is that even if it is assumed that the Defendant No.1 had a statutory right to challenge the Order dated 17/08/2011, the same have been waived by the Defendant No.1 by continuous compliance. (2002) 4 SCC 316, (2004) 8 SCC 229 were relied upon. The Defendant No.1 cannot turn around at this belated stage and circuitously seek a declaration to the effect that the aforesaid Order dated 17/08/2011 is null and void. (1994) 4 SCC 149 was relied upon.

I have heard rival submissions.

Chapter XIII of the Original Side Rules provides for a special procedure by way of originating summons. Rule 1 explains the scope of the proceeding.

> "The executors or administrators of a deceased person or any of them and the trustees under any instrument or any of them and any person claiming to be interested in the relief sought as creditor, legatee, heir or legal representative or as beneficiary under the trusts of any instrument, or as claiming by transfer, or otherwise, under any such creditor or other parson as aforesaid, may take out, as of course, an originating summons, returnable before the Judge sitting in Chambers, for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require (that is to say), the determination without any administration of the estate or trust of any of the following question or matters:—
>
> (a) any person affecting the rights or interest of the person claiming to be creditor, legatee, heir, or legal representative or beneficiary;
>
> (b) the ascertainment of any class of creditors, legatees, legal representatives or others;
>
> (c) the furnishing of any particular accounts by the executors, administrators, or trustees, and the vouching (where 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.

Explaining the scope of the Chapter, the learned author E.C. Ormond explained that there is no doubt that originating summons proceedings are suits, but they are suit of a peculiar nature. For instance, questions may be answered by the High Court which have the effect of declaration without making it necessary for the parties to ask or the Court to grant further relief. The procedure is much the same as the procedure in England under the Rules of the Supreme Court. In each case the Court will consider whether a) the questions asked or the relief sought are such that the Court can, under the Rules, deal with on the originating summons and b) they are such as the court can conveniently deal with on originating summons. If either of a) or b) are decided in the negative sense, the Court will relegate the parties to an ordinary suit. Scope of the originating summons suits is further explained by the Division Bench of this Court in **State Bank of India vs Mohuragang & Gulam Tea Estate & Anr. [(1988) 2 CHN 78]** in the following words:

> "3. Chapter XIII of the Original Side Rules of this Court provide a special procedure by way of an originating summons which had its origin in English Rules of Supreme Court. This is undoubtedly a suit

> in the Original Side, but cannot be equated with it, since under the rules questions are framed for the purpose of being answered by this Court and the Court in its turn considers as to whether the questions are within the ambit of the rules of the Original Side and can be conveniently dealt with by way of an originating summons. In the event, however, the Court upon such consideration finds it otherwise, the Court will relegate the party applying to an ordinary suit."

In this context Rule 17 of the Chapter may be looked into. Rule 17 of Chapter XIII provides for taking evidence:

> "**17. When O.S may be supported by evidence**. On the hearing of summons, where the parties thereto do not agree to the correctness of the facts set forth in the affidavit, the Judge may order the summons to be supported by such evidence as he may think necessary; and may give such directions as he may think just for the trial of any questions arising thereout. The Judge may take amendment in affidavit and summons as may seem to him to be necessary to make them accord with the existing state of facts, so as properly to raise the questions in issue between the parties."

The aforesaid Rule provides for taking evidence by the Court for limited purpose for ascertaining correctness of facts. There is no provision for taking evidence like a civil suit to adjudicate upon disputes or for establishment or proof of facts. That is not within the scope of the originating summons.

Rule 18 of Chapter XIII is the relevant provision in this regard. Rule 18 provides:

> "**18. What may be done on hearing originating summons.** The Judge hearing an originating summons may, where he thinks fit, adjourn the same into Court for hearing argument, and where it appears to him that the matters in respect of which relief is sought cannot be disposed of in a summary manner, may refuse to pass any order on the summons, may dismiss the same and refer the parties to a suit in the ordinary course; and in such case may make such order as to costs already incurred as may seem just."

In **State Bank of India vs Mohuragang & Gulam Tea Estate & Anr** (supra), it was elaborately explained:

> **"36.** In my view, it would neither be proper nor expedient to decide the questions, as raised in this proceeding, only on affidavit evidence by way of an originating summons. Originating summons is available to proceedings which are not of an involved nature and on which there would hardly be any scope for any oral evidence. Having regard to the issues raised and the questions posed for consideration, one cannot dispense with the oral evidence. While it is true that the Court has power to have even oral evidence, but in my view, the same ought not to be extended to any suit under Chapter XIII of the Rules of this Court, otherwise the Code of Civil Procedure would have to be given a complete go by. Needless

to say however that the Code of Civil Procedure prescribes certain forms of decree which is not available to an originating summons. The intent of the rule makers could never be to give a go by to the procedural aspect under the Code of Civil Procedure. For the purpose of due administration of justice and in a manner peculiar to the Original Side of this Court, these rules have been framed. Even on a plain reading of Rule 6 of Chapter XIII of the Original Side Rules, it is to be presumed that interpretation and construction of deeds and documents only ought to be taken note of and not each and every suit for mortgage for sale foreclosure or redemption. That obviously was the intent of the rule makers. Otherwise, Rule 10 would not have been engrafted in the Rules which provides that the court or Judge shall not be bound to determine any such question of construction where in his opinion it ought not to be determined on originating summons. Had the intent of the rule makers been otherwise Rule 10 would not have found place in the rules under Chapter XIII of the Original Side Rules of this Court. It is in regard to the question of construction that Chapter XIII has been engrafted into the rules of the Original Side but not a substantial question which would finally determine the issue. Assuming everything in favour of the plaintiff-respondent's contention, convenience and expediency prompts this Court to hold that

> originating summons is very restrictive in its application and cannot be taken recourse to any and every matter even under Rule 6 of Chapter XIII of the Original Side Rules Apart therefrom the correspondence itself suggests trade usage and Banker's right to charge interest for delayed payment—these are not pure questions of law but of fact which ought not to be raised, agitated and dealt with under an originating summons. On the state of facts, I am of opinion that originating summons under Chapter XIII of the rules of this Court was not the proper mode. In the present case the dispute cannot be adjudicated only upon interpretation by way of and construction of the deed of mortgage or the deed of guarantee."

Ratio of the above mentioned case, unequivocally explained that any complicated questions of facts or mixed questions of law and fact, inviting appreciation of evidence for proper adjudication those issues cannot be decided in a summary manner. The affidavit accompanying the originating summons in the instant case alleges mismanagement, maladministration, withholding documents of Trust and such acts and deed of Defendant no. 1 which constituted if proved the breach of Trust. On the contrary, the Defendant no. 1 raises some allegations against Defendant no. 2 and Plaintiff no.2. Pleading of the parties are rife with allegations and counter allegations. Answering framed questions demands ascertainment of truth of rival allegations and finding of facts on evidence, because pleading of the parties are mutually destructive and it is necessary to ascertain and establish what is the truth. That exercise demands fact findings on elaborate evidences. It is not merely interpretation of deed or direction for management and administration of the trust properties. The questions framed cannot be answered in a summary manner. This is admitted in the written notes of arguments by the Learned Counsel for the Plaintiff. Therefore, the usual course would be to follow the procedure laid down in Rule 18 of Chapter XIII.

In terms of the Order dated 17/08/2011 the Single Judge converted the suit into a contentious and contested one. There is no provision in Chapter XIII to do that. Provisions of Chapter XIII makes it clear that originating summons proceeding is meant for summary hearing. If the matters cannot be disposed of in summary manner, the suit shall be dismissed. Express provision of the statute bars hearing of a contentious cause; bars converting a originating summons suit to a regular suit.

The Learned Counsel for the Plaintiff strenuously argued that compliance of the Defendant no. 1 as well as proceeding with the instant suit pursuant to the Order dated 17/08/2011 is tantamount to waiver of objections to buttress the argument. Relied upon three Judges' Bench decisions of the Supreme Court of India in **Commissioner of Customs, Mumbai Vs. Virgo Steels, Bombay and Another [(2002) 4 SCC 316]** where the Supreme Court India observed that requirement provided by a statute for the benefit of an individual can be waived by that individual. The Learned Counsel also refers to **Krishna Bahadur Vs. Purna Theatre and Ors. [(2004) 8 SCC 229]**. On the strength of which it is submitted that a right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Both these cases were decided on their own facts and circumstances. Confirming statutory benefit is one thing and authority of the Court to decide a list is a different thing altogether. In case a Court passes any order without authority of jurisdiction no amount of compliance would sanctify that order.

Three Judges' Bench of the Supreme Court India in **Nusli Neville Wadia Vs. Ivory Properties and Ors. [(2020) 6 SCC 557]** examined the meaning of the word "jurisdiction. Jurisdiction is the power to decide and not merely the power to decide correctly. Jurisdiction is the authority of law to act officially. It is an authority of law to act officially in a particular matter in hand. It is the power to take cognizance and decide the cases. It is the power to decide rightly or wrongly. It is the power to hear and determine. Same is the foundation of judicial proceedings. The Bench further elaborated that the word "jurisdiction" is derived from Latin words "juris" and "dico", meaning "I speak by the law" and does not relate to rights of parties as between each other but to the power of the court. Jurisdiction relates to a class of cases to which a particular case belongs. Jurisdiction is the authority by which a judicial officer takes cognizance and decides the cases. It only presupposes the existence of a duly constituted court having control over subject-matter which comes within classification limits of the law under which court has been established. It should have control over the parties' litigant, control over the parties' territory, it may also relate to pecuniary as well as the nature of the class of cases. Jurisdiction is generally understood as the authority to decide, render a judgment, inquire into the facts, to apply the law, and to pronounce a judgment. When there is the want of general power to act, the court has no jurisdiction. When the court has the power to inquire into the facts, apply the law, render binding judgment, and enforce it, the court has jurisdiction. Judgment within a jurisdiction has to be immune from collateral attack on the ground of nullity. It has co-relation with the constitutional and statutory power of tribunal or court to hear and determine. It means the power or capacity fundamentally to entertain, hear, and determine. It is further explained in Para 32 of the judgment that Court has jurisdiction to entertain as a suit when it has jurisdiction to receive it for consideration. If, at a threshold, the Court cannot consider it, it can be said that the Court has no jurisdiction to entertain the case. Three Judges' Bench in **Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (Dead) Through LRS. and Others [(2004) 8 SCCC 706]** expressed that where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est* and void *ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

Express provision of Rule 18 imposes embargo on this Court to entertain a suit which cannot be disposed of in a summary manner and enjoins upon the Court to dismiss the same. When a specific provision is made in the statute a Court cannot go beyond or infringing the provision; a Court cannot exercise power which is not vested by it by the statute and specifically barred by express provision. In that case the Court has no jurisdiction in the sense authority to pass any order irrespective of whether it had determination or not. No amount of compliance can sanctify or confer upon the Court any jurisdiction which is barred by the statute. There can be no waiver or estoppel against statute.

The instant suit cannot be disposed of in a summary manner in view of complicated questions involved therein which demands appreciation of evidence, Continuation of the proceeding is not maintainable under the Original Side Rules. This Court cannot sustain a suit infringing any express provision of law, assuming and exercising jurisdiction not vested upon it by law. Order of the Co-ordinate Bench cannot supplant such authority. Therefore, these originating summons proceeding is liable to be dismissed in accordance with Rule 18 of Chapter XIII of the Original Side Rules.

In nutshell the instant Petition is allowed. The suit is dismissed as being not maintainable. It is needless to state that this Court expressed no opinion on merit of the rival contentions.

The Receiver/Special Officer appointed, shall stand discharged. Receiver/Special Officer shall hand over documents related to the trust in his custody to the Office Bearer of the Trust within fifteen days from the date of this order.

The instant suit stands disposed of along with all pending applications.

(SUGATO MAJUMDAR, J.)