IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:
The Hon'ble Justice Sugato Majumdar

CS/394/1999
(ORIGINATING SUMMONS SUITS)
PRADYUT KUMAR SAHA
VS
SOUMEN SHAW & ORS

For the Plaintiff	:	Mr. Utpal Bose, Sr. Adv. Ms. Suparna Mukherjee, Adv. Mr. Arup Nath Bhattcharya, Adv. Ms. Sayani Das, Adv. Ms. Sreetama Biswas, Adv.
For the Defendant	:	Mr. Malay Kr. Ghosh, Sr. Adv. Mr. Aniruddha Mitra, Adv. Mr. Anirban Ghosh, Adv.
Hearing concluded on	:	16/05/2024
Judgment on	**:**	**27/06/2024**

Sugato Majumdar, J.:

Two suits were taken up together for hearing. The first one is CS 394 of 1999 and the other one is Extra Ordinary Suit 12 of 2003. CS 394 of 1999 was renumbered as C.S.O.S 394 of 1999 which is basically an application under Chapter XIII of the Rules of the High at Calcutta (Original Side) 1914. In terms of the Order dated 12th

July, 2003 this Court directed that the Originating Summons Suit, namely, C.S.O.S/394/1999 (CS/394/1999) should be heard prior to of E.O.S./12/2003, since outcome of the former will have a direct bearing on the letter. Accordingly, CS/394/1999 was heard and reserved for judgment.

CS 394 of 1999 was filed under Chapter XIII of the Rules of the High Court at Calcutta (Original Side) 1914 (in short 'Original Side Rules').

Sum and substance of the case of the Plaintiff is:

a) One Gopeswar Shaw had three sons, Karuna Mohan Shaw, Sailendra Mohan Shaw and Judhistir Mohan Shaw. The Plaintiff as well as the Defendant No. 2 to 6 are sons and daughters of Karuna Mohan Shaw. Sailendra Mohan Shaw was a bachelor. The Defendant No. 1 is the son of Judhistir Mohan Shaw. Until 19th September, 1955, Karuna Mohan Shaw was the sole and absolute owner of the premises no. 135A and 135B, Vivekananda Road, Calcutta. By an indenture dated 20th September, 1955, Karuna Mohan Shaw, since deceased, settled the said property on trust primarily for his own benefit and for the benefit of his two brothers, namely, Sailendra Mohan Shaw and Judhistir Mohan Shaw. The trust deed contained various terms and conditions and made provisions for administration and management of the said property.

b) The grandfather of the Plaintiff Gopeswar Mohan Shaw died on 7th January, 1960. On 8th June, 1971, Judhistir Mohan Shaw expired living behind him is only surviving son, the Defendant

No. 1 herein. Thereafter, on 24th November, 1979, the father of the Plaintiff expired as widower living behind the Plaintiff and the Defendant No. 2 to 6 as legal heirs and representatives. Thereafter, Sailendra Mohan Shaw died bachelor on 31st July, 1982 living a will become all his properties to the son of the Plaintiff Saugato Shaw. Since death of Sailendra Mohan Shaw the present Plaintiff became sole trustee of the trust being so appointed on the same day of death of Sailendra Mohan Shaw, namely, 31st July, 1982, in accordance with the deed of trust.

c) In terms of Clause 23 of the deed of trust, the trust is irrevocable. Trust properties are partly tenanted. A sum of Rs.534.50 p. per month was realized from the trust property by way of rent. Because of objection raised by the Defendant No. 1 tenants are not paying rent. Meagre income from the trust property made it very difficult to manage and administer the same and to pay the outgoing.

d) The Defendant No. 1 had filed a suit in the City Civil Court at Calcutta, which was registered as Title Suit No. 2937 of 1997 claiming a portion of the trust property. There are conflicting claims in respect of the trust property. Clause 19 of the deed of trust provides that beneficial interest of the trust property shall be in perpetual succession only to the male successors. It is contended that the trust was not validly constituted being hit by the rule against perpetuity and is, therefore, void. It is contended that Karuna Mohan Shaw, since deceased, the father of the Plaintiff was the sole and absolute owner of the trust property. On death of the said Karuna Mohan Shaw, since deceased, the Plaintiff no. 1 and 2 to 6 the succeeded to the trust property and are the present owner. It is stated that the Defendant No. 1 is not even the beneficiary of the trust.

e) It is alternatively pleaded that on the footing that trust was validly created the same did not come to an end on death of Sailendra Mohan Shaw in the year 1982 and is still valid and subsisting. It is also pleaded that neither the three beneficiaries named in Clause 1 of the deed of trust nor their sons had or has any beneficial interests beyond the right of residence in the said premises during their life time. It is pleaded further that in view of the provisions contained in Clause 19 of the deed of trust beneficial interests should be perpetual in succession only to the male successors of the beneficiaries; the entire beneficial interests cannot be said to belong to the present set of the beneficiaries entirely, each having at the most right of residence during respective life time. In absence of consensus among the beneficiaries, enjoying the entire beneficial interest in the trust between them, the question of putting an end to the trust cannot and does not arise. Next point pleaded is that on the footing that the trust is subsisting by the reason of the fact that the Plaintiff was appointed as the sole trustee on 31st July, 1982, the Plaintiff is alone entitled to continue the administration of the trust in accordance with the terms of indenture. Alternatively, in the event it is contended that the trust has come to an end on death of Sailendra Mohan Shaw, the trust property should devolve upon the legal heirs and successors of the settler, namely, Karuna Mohan Shaw the father of the Plaintiff. In view of that the following questions are framed for consideration and opinion of this Court:

> *"1(a) Whether the Trust created by the Indenture dated 20th September, 1955 is bad and non-est being hit by the Rule against property by reason of the previous contained in clause 19 of the Indenture to the effect that the beneficial interest shall be perpetual in succession only to the male successors;*
>
> *(b) If so, should the alleged trust property remained and continue to form a part of the estate of the alleged settler?*
>
> *2.(a) In the event his Hon'ble Court is of the opinion that the trust was validly created by the said indenture, did the same come to an end on the death of Sailendra Mohan Shaw, the last named beneficiary in Clause 2 of the said Indenture in 1982?*
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> *(b) If so, should the trust property revert to the estate of the alleged settler Karuna Mohan Shaw on resulting trust?*

3. Having regard to the fact that none of the named beneficiaries in the said Indenture, nor the sons of the said beneficiaries having any interest beyond the right of residence in and most of the said property during his life time, can he claim absolute interest in the said property or is otherwise competent to dispose of his alleged interest in the said property by will or otherwise?

4. Can any other person lay any claim to act as trustee without the consent of the plaintiff, he being appointed as the sole trustee?"

Defendant No. 1 filed written statement. Contentions of the written statement may be summarized as follow:

i) Gopeswar Shaw, since deceased, the grandfather of the parties herein had a business of the name and style of M/s Countries Spirit Shop at 24A, R.G.Kar Road, Calcutta. The said business was and still is a flourishing one. In the year 1943, out of the profit of the said family business premises no. 134A and 134B, Vivekananda Road, Calcutta was purchased in thename of Karuna Mohan Shaw. At that material point of time Karuna Mohan Shaw was merely a salesman of the family business and other two sons were of tender age and they used to help Karuna Mohan Shaw and his father in running the business. Subsequently, Gopeswar Shaw, since deceased, had settled the said premises no. 134A and 134B, Vivekananda Road, Calcutta for the benefit of his three sons for providing residential accommodation. During the life time of Gopeswar Shaw the property was used as family residence of the three sons of Gopeswar Shaw and all of them treated the property as a joint property.

ii) On death of Gopeswar Shaw, his three sons and their families where and still are in occupation of the same as family residence and treated the said premises as their own.

iii) It is contended in the written statement that the sons of Gopeswar Shaw, since deceased, had acted as a trustee and treated the property as a family trust for their benefit. Till the year 1995, the Plaintiff had treated the property as a trust and acted as a trustee and performed all obligations as directed in the trustee. The Plaintiff is, therefore, estopped from denying the fact that the trust property is not a family trust.

iv) Another point canvassed in the written statement is that the father of the Defendant No. 1, namely, Judhistir Mohan Shaw, since deceased, had contributed a substantial amount of funds from his own business for building two more stories on the joint property, namely, premises no. 134A and 134B, Vivekananda Road, Calcutta.

Funds generated from the family business were put into the use and development of the property. The father of the Defendant no.1 also injected money into the property from time to time, since, all family members of Gopeswar Shaw resided in the said property comfortably. At the time of purchase of the property in the year 1943, Karuna Mohan Shaw was the only major son of Gopeswar Shaw which prompted Gopeswar Shaw to purchase the property in his name. It is further contended that parents of the Defendant No. 1 had contributed a substantial amount of money for reconstruction, development and maintenance of the building.

v) It is further contended that though the suit property was settled by trust, yet the settler's father, brothers and all their heirs treated the property as a joint family property; rents, profits and benefits derived from the propertywere divided among the three sons of Gopeswar Shaw and such division was submitted before different authorities.

vi) Next, it is contended that the trust property was purchased out of the income of family business with sole intention to provide residential accommodation to the sons of heirs of Gopeswar Shaw, since deceased. From the deed of settlement, it is crystal clear that the Settlor had created the trust with sole object to provide residential accommodation to the three sons of Gopeswar Shaw so that their heirs might enjoy the suit property equally and equitably. At the time of settlement the Defendant No. 1 was alive and is entitled to get benefit of the undivided share of the property or benefits arising from the said property.

vii) The next contention of the Defendant No. 1 is that the Plaintiff used to collect the rents and profits of the property as trustee and the Defendant has reason to believe that the Plaintiff collected substantial amounts of money which was not properly utilized for maintenance of the building. It is rather the Defendant No. 1 who spends substantial amount of money for repairing and maintenance of the portion of building where the Defendant No. 1 resides. Each occupier used to repair and maintain their respective occupied portion of the building at their own costs.

viii) The answering Defendant denied all other allegations with a further denial that the deed of trust is hit by rule against perpetuity. It is further contended that the trust properties were purchased out of income generated from family business which belonged to Gopeswar Shaw and his three sons. As such, the trust property cannot be part of the estate of the Settlor. It is claimed that all the three sons of

Gopeswar Shaw were co-owners of the trust properties and on their demise the property devolved upon their respective heirs.

ix) It is denied by the Defendant No. 1 that the trust is hit by rule against perpetuity. All other allegations contained to the plaint were denied by the answering Defendant.

Mr. Bose, the Learned Senior Counsel representing the Plaintiff submitted that mere reading of the Deed of Trust dated 20th September, 1955 goes to show that the trust was created in perpetuity and the trust property is placedforever beyond the exercise of power of alienation. In other words, by the Deed of Trust dated 20th September, 1955, a disposition was made for which the trust property became inalienable for an indefinite period. Mr. Bose referred to Clause 2, 3, 4, 5, 8, 19 and 23 of the trust deed in support of his condition. In further elaboration of argument it is submitted that the trust was created for the benefit of the named beneficiaries. All of them expired, namely, Karuna Mohan Shaw, Sailendra Mohan Shaw and Judhistir Mohan Shaw. The said persons were only beneficiaries, last of whom passed away in the year 1982. By a conjoint reading of Clause 1 and 2, it is apparent that the trust provided beneficial interests of right of residence to Karuna Mohan Shaw, Sailendra Mohan Shaw and Judhistir Shaw as well as their father Gopeswar Shaw, as well as for their respective families for the purpose of personal occupation, as may be decided by Gopeswar Shaw. There is no devolution of such interests unto and infavor of heirs of the named beneficiaries in the trust deed. There having been no provision for devolution of property upon the death of the named beneficiaries, the deed of trust become void, empowering to trustee to hold the property in perpetuity without power of alienation. According to Mr. Bose, exactly this is the point which offend the rule against perpetuity as contained in Section 14 of the Transfer of Property Act. Mr. Bose refers to

- **Moulvi Ali Hossain Mian & Ors. Vs Raj Kumar Halder & Ors. (AIR1943 Cal 417);**
- **Kali Chand Mukherjee Vs Jatindra Mohan Banerjee (33 CWN 150):**
- **M.Kesava Gounder & Ors. Vs D.C. Rajasn & Ors. (1989 Law Reporter);**
- **Anath Nath Maitra vs Kumar Keshab Chandra Roy (14 CWN 601);**
- **R. Kempraj vs Barton Son & Co. [(1969) 2 SCC 594]**
- **Ajit Kumar Mitra vs Tarubala Dasee and (ILR (1936) 63 Cal 209)**.

Per contra, Mr. Ghosh, the Learned Senior Counsel appearing for the Defendant No. 1 submitted, firstly, that the suit is barred by law of limitation. As argued by him, the questions framed by the Plaintiff particularly the question no. 1(a), if answered in positive in favour of the Plaintiff, will amount to decree for declaration passed by this Court in view of Rule 20 of Chapter 13. To be precise it would be a decreeof declaration. The question no. 2(a) if answered in positive in favour of the Plaintiff will be a decree of declaration that the trust has come to an end. An Originating Summons supported by an affidavit is a suit within meaning of that term in Clause 12 of the Letters Patent. Mr. Ghosh refers to **Pravas Chandra Sinha vs Ashutosh Mukherji [ILR 1929 (56) Cal 979]** to lend support to his argument. In further elaboration of his argument Mr. Ghosh submitted that Article 58 of Schedule I of the Limitation Act, 1963 provides that the period of three years to obtain any declaration starts from the time when the right to sue the first accrues. Section 9 of the Limitation Act, 1963 further provides that once time has begun to run no subsequent disability or inability to institute a suit or make an application stops it. Provision of Section 10 of the Limitation Act, 1963 does not apply, as submitted, to the instant Originating Summons Suit filed by the Plaintiff as a trustee. The Plaintiff became trustee on 31st July, 1982 and became aware of the terms and conditions of the trust including Clause 19 thereof on the same day. According to Mr. Ghosh, the right to sue first accrued on that day. The instant suit, seeking declaration in the form of Originating Summons Suit, after lapse of sixteen years from the date when the right to sue first accrues, is barred by limitation. Mr. Ghosh refers to **Noharlal Verma Vs District Cooperative Central Bank Ltd. Jagdalpur [2008 (14) SCC 445]** to argue that in view of Section 3 of Limitation Act, 1963, Court has a duty to decide the issue of limitation.

The second point of argument of Mr. Ghosh is that two suits are pending between the Plaintiff and the Defendant No. 1. Therefore, this Court should not exercise jurisdiction under Chapter XIII of the Original Side Rules to answer any of the questions in favour of the Plaintiff. Referring to **Official Trustee, West Bengal and Ors. Vs. Sachindra Nath Chatterjee and Another (AIR 1969 SCC 823)**, it is submitted that since the jurisdiction of this Court acting under Chapter XIII of the Original Side Rules is summary in nature, this procedure should not be resorted to frustrate the pending regular suits. Mr. Ghosh also referred to two

Division Bench decisions of this Court, namely, **Shree Shree Iswar Shiv Thakur & Ors. vs Amar Nath Daw [1998 (1) Cal LT (HC) 58 (DB)]** and **Samitendra Narayan Dutta & Ors. Vs Purnendu Narayan Dutta & Ors. [(2001) 2 Cal LJ 1 (DB)].**

The third point argued by Mr. Ghosh is that the Plaintiff, as trustee, is not entitled to get any decree or order which in effect, would extinguish or revoke the trust constituted under theDeed of Trust dated 20th September, 1955. Section 34 of the Trust Act, 1882 allows a trustee to apply to a principal civil court of original jurisdiction for its opinion, advice or direction on any present questions in respect of the management or administration or the trust property and the said right of the trustee cannot be extended for getting a decree or order which, in effect, would hold that the present trust in bad in law. In furtherance of this contention, it is contended by Mr. Ghosh that Section 77 of the Trust Act, 1882 lays down the conditions for which trust can be extinguished. None of the conditions stated in Section 77 of the Trust Act, 1882 is fulfilled in the facts and circumstances of the present case. It is contended that trustee cannot act in violation of Clause 16 of the deed. Mr. Ghosh argued, even if it is held that the Clause 19 of the Deed of Trust, hit the rule against perpetuity, the trust should not be held bad-in-law. Clause 2 and Clause 19 of the deed should be re-harmoniously and that Clause 2 should prevail over Clause 19 of the Deed of Trust. Referring to the observation of the Supreme Court of India in **Radha Sundar Dutta vs Mohd. Jahadur Rahim & Ors. (AIR 1959 SCC 24)**, it is submitted that if there is a conflict between an earlier clause and a letter clause and it is not possible to give effect all of them, then the rule of construction is well-established that the earlier clause must overridethe letter clause and not the vice-versa.

Forth contention of Mr. Ghosh is that the Plaintiff assumed the office of the trustee on 31st July, 1982. He should not be allowed to contain that the entire trust deed or any clause is offensive to the rule against perpetuity under Section 14 of the Transfer of Property Act, 1882. The Plaintiff is, therefore, estopped from contending the same.

Fifth contention of Mr. Ghosh is that the questions posed and framed, are mixed questions of law and facts. The instant Originating Summons Suit involves complicated questions of fact as well as law which cannot be decided in this summary proceedings**.**

Lastly, it is contended that the instant suit doesn't fall within the scope of the Originating Summons vice-a-vice trust as contemplated in Chapter XIII Rule 1 (g) of the Original Side Rules which contemplates determination of any question arising in the administration of the estate or trust. The questions framed by the Plaintiff, as submitted, do not pertain to administration or management of the trust but rather to extinguish the trust. Therefore, the suit is not maintainable.

In reply, Mr. Bose submitted that the Learned Author Ormond, referred to the observations made by Ameer Ali, J in **Vedabala Debee vs Official Trustee of Bengal [1935 (ILR) 62 Cal 1062]** wherein scope of Originating Summons Suit was considered and it was held that under this proceeding a declaration can be sought without seeking for consequential reliefs. That is permissible in Originating Summons Suit. It is further argued that right to sue accrued when the Defendant filed a partition suit being Suit No. 2937 of 1997 (EOS NO. 12 of 2003) in the year 1997 ascertaining that trust has come to an end and property devolves upon the beneficiaries. The present suit was filed within three years from the date of filing of that suit being well within the period of limitation. It is further contended that provision laid down in Chapter XIII of the Original Side Rules clearly prescribes that in the event of determination of any question pertaining to administration of the trust or any question affecting the interests of the person claiming to be beneficiaries, the same can be adjudicated upon by this Court under the provisions of Chapter XIII of the Original Side Rules. In the instant proceedings, Plaintiff has sought for opinion of this Court to determine whether the provisions laid down in the Deed of Trust is hit by rule against perpetuity, and if so, what would be the fate of the trust property. According to Mr. Bose, this Court is vested with jurisdiction to maintain and determine these issues.

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 person 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."

Scope of Originating Summons Suit was well-explained by Amir Ali, J. in **Vedabala Debee Vs. Official Trustee of Bengal (I.L.R. 62 Cal 1062).** It was observed that the system under which this Court entertains proceedings on Originating Summons is contained in Chapter XIII of the Rules. As observed By Ameer Ali, J.,

> "Before I deal with the objection to jurisdiction, I will refer shortly to another preliminary matter which may in any proceedings on Originating Summons call for decision and which arises incidentally in this case. The system under which this Court entertains proceedings on Originating Summons is contained in Chapter 13 of the Rules. There is no doubt that such proceedings are suits, but they are suits of a peculiar nature. For instance, questions may be answered by this Court, which have the effect of declarations without making it necessary for the parties to ask, or the Court to grant, any further relief. Compare section 42, Specific Relief Act. 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 as the Court can under the rules deal with on 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."

In **Official Trustee, West Bengal & Ors. Vs. Sachindra Nath Chatterjee & Anr. (AIR 1969 SC 823),** Three Judges' Bench of the Supreme Court of India observed that jurisdiction of a Judge acting under Chapter XIII of the Original Side Rules is a summary jurisdiction. Rule 1 of the chapter empowers the Judge to entertain an application in respect of matters enumerated in Clauses (a) to (g) of the Rule. Observations made by Division Bench of this Court in **Samitendra Narayan Dutta & Ors. Vs. Purnendu Narayan Dutta & Ors. [(2001) 2 Cal LJ 1]**are also relevant. The Bench took note of the observation and finding of a Single Judge of this Court in **Mitchell Vs. McNeill [31 CWN 630]** that procedure by Originating Summons is not applicable to a contentious matter. Reference was also made in this judgment to **Official Trustee, West Bengal Vs. Sachindra Nath Chatterjee [A 1969 SC 823], State Bank of India Vs. Mohuragang & Gulam Tea Estate [1988 (2) CHN 78]** and **Shree Iswar Shir Thakur Vs. Amar Nath Daw [1988 (1) CLT 58]**, to indicate that intricate and mixed questions of fact and law could only be determined in a regular suit. In the last mentioned case, the Division Bench observed that from the chequered management of the debutter estate it was abundantly clear that controversy had to be determined not only independently construing the Deed of Trust rather the matter had to be gone into while appreciating all the deeds, be it either Deed of Trust or the deed of family settlement or even decree passed at one or the other stage in earlier suit. It was opined that when there are intricate and mixed questions of facts and laws involved those mattes can be decided only in a regular 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."

Reference may also be made to a Division Bench observation of the High Court of Bombay on relevant provision of that High Court Rule on Originating Summons Suit, which is *peri materia*. It was observed by D.Y. Chandrachud, J. (as

His Lordship then was) in **Charu K. Mehta & Ors. Vs. Lilavati Kirtilal Mehta Medical Trust &Ors. [2012 SCC OnLine Bom 1679],** speaking for the Division Bench, that a summary procedure is envisaged in an Originating Summons Suit, but the summons remains a species of original civil side jurisdiction suit commencing with a plaint and ending in pronouncement of a judgment and drawing up a decree. It was further observed that since the procedure envisaged is summary the judge retains control over the proceedings and has the discretion as to whether an Originating Summonsshould be entertained.

> "Essentially an Originating Summons has been regarded as appropriate remedy where a question of interpretation arises that does not depend for its resolution upon an appreciation of evidence or determination of disputed factual matter of some complexity."

The questions framed in the plaint are to be considered in the context of the whole plaint. The plaint and the questions framed are organic whole. Perusal of the plaint impress the mind with certain facts and pleadings. Firstly, it is averred that a civil suit is pending in the City Civil Court instituted by the Defendant where the Defendant's right, title and interest, as claimed, in the same trust property are subject matter of the suit. It is also in the pleading that Defendant No. 1 is not even the beneficiary of the trust; there are various conflicting claims made by the parties as to the character and status of the suit properties as well as the legal entitlement of the parties under the Deed of Trust. It is also averred in terms of Clause 19 of the Deed of Trust beneficial interest shall be perpetual in succession only to the male successors as contained in Clause 19 of the deed; as such, there is no valid constitution of the trust as the same is hit by the rule against perpetuity making the trust void. Then it is pleaded that the suit properties belonged to the father of the

Plaintiff and Defendant no. 2 to 6. Since, the Deed of Trust is void, as claimed, the property should revertto the legal heirs of the settler Karuna Mohan Shaw.

There is an alternative plea. In view of provisions of Clause 19 of the Deed of Trust the entire beneficial interest shall be in perpetual succession only to the male successors of the three named beneficiaries. The entire beneficial interest cannot be said to belong to the present set of beneficiaries entirely, each having right to residence during their life time.

There is another alternative plea that the trust comesto an end on death of Sailendra Mohan Shaw and the trust property rebutted to legal heirs of the settlers.

The contentions of Defendant No. 1 are manifold. There is a plea taken in the written statement that the suit properties were purchased out of the joint family fund generated from the family business so, it should be a joint property and, in fact, the Defendant No. 1 treated the property as their joint family property. Another defence of the Defendant no. 1 is that the property is a trust property till 1995. The Plaintiff acted as a trustee and performedall the obligations as directed in the trust deed since 1982. Therefore, the Plaintiff is estopped in denying the existence of the trust deed itself. It is further contended that father of the Defendant No. 1 contributed substantially in the property for its development.

The rival pleadings presented before this Court involve complex structure of facts and conflicting claims of right, title and interest in the suit property. Such array of facts entwined with complicated questions of law cannot be decided in a summary proceeding. Consideration and decision making of such facts on these questions of facts as well as law demands oral and documentary evidence, if any. It is not merely a case of interpretation of trust deed. The authorities quoted above are unanimous that complicated questions of a kind like this one cannot be decided in a summary proceeding of Originating Summons Suit. Rule 18 of Chapter XIII provides for discretion to the Court to refuse to pass any order on summons when the relief cannot be disposed of in a summary manner. In that eventuality the Court may dismiss the same and refer the parties to a suit in an ordinary course. The suit is already pending between the parties touching upon the trust properties and their respective right, title and interest as claimed and alleged.

This Court, in view of reasons stated above, is of opinion that the issues involved and the questions framed and reliefs sought for cannot be decided in a summary manner, in a summary proceeding, as contemplated in Chapter XIII of the Original Side Rules. This Court, therefore, refuses to pass order and dismiss the present suit, advising the parties to take resort to regular civil suit.

Since, it is held that the Originating Summons Suit is not maintainable, and is dismissed hereby, this Court refrain from commenting on or considering other issues agitated by the parties.

Accordingly, the instant CS OS No.394 of 1999 stand dismissed and disposed of with pending applications, if any.

Urgent certified copies, if applied, may be provided.

(Sugato Majumdar, J.)