
(2004) 02 BOM CK 0105

In the Bombay High Court

Case No : Originating Summons No. 71 of 1997

Dinar Rashid Wadia and Another

APPELLANT

Vs

Kersy Eruch Lalkala and Others

RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 238

Citation : AIR 2004 Bom 159 : (2004) 3 BomCR 504

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Rajesh Shah, Soloman and Narvekar, instructed by Solaman and Co, for the Appellant; Zubin Behram Kamdin, instructed by Wadia Gandhi and Co. for Defendants 1 to 5, D.J. Khambatta, Levi Ruben and D.A. Barot, instructed by Gagrut and Co. for Defendants 6 to 17, Sailesh Shah and Mridula Bhatia, instructed by Shiralkar and Co. for Defendants 18 to 22, for the Respondent

Judgement

A.M. Khanwilkar, J.—This order would dispose of the preliminary objection taken on behalf of the Defendants that the remedy of originating summons in the fact situation of the present case is not the appropriate remedy. The plaintiffs have filed the suit on the following premise.

2. That, Sir Rustom Jehangirjee Vakil was the adopted son of one Khan Bahadur Jehangirjee Pestonjee Vakil and his wife Bai Soonabai. The said Rustom Jehangirjee Vakil died on or about 1st Nov. 1933, leaving behind him his widow, namely, Tehmina, three daughters, namely, the original plaintiffs Nos. 1 and 2 and one Mrs. Gospi Homi Colah, and three sons, namely, Jehangir, Percy and Toos. It is not necessary to advert to other factual narrations, in the plaint. Suffice it to mention that the plaint refers to trust deed executed by the Jehangir, which makes provision of the beneficiaries. The trust dated 14th January, 1992, (sic) Trust, provides that Rustom Jehangirjee Vakil may appoint the beneficiaries of the trust by deed or by will, failing which the heirs of Rustom were to be the beneficiaries of the said trust. The plaint proceeds on the assertion that so far as the plaintiffs are aware, the said Rustom did not leave any will or deed making

appointment of beneficiaries of the said trust property. Accordingly, it is claimed that the plaintiffs being heirs of the said Rustom became beneficiaries in respect, of the said trust property. It is then asserted that defendants Nos. 6 to 16 have disputed the rights of the plaintiffs and have claimed that the sons of the said Rustom are the only beneficiaries in respect of the trust property. It is then stated that the claim of the Defendants Nos. 6 to 16 is based on an alleged writing dated 18th Nov., 1924 purporting to be a will of the said Rustom. The plaintiffs claim that neither the original writing in Gujarati or a copy of the said writing in Gujarati has been shown to them; whereas the plaintiffs have been given only copy of alleged English translation thereof. The plaintiffs then state that they do not admit the said alleged writing and put the defendants to strict proof thereof. It is then stated that, in any event, the Will is admittedly not probated and hence, the same cannot be reckoned to deny the reliefs claimed by the plaintiffs. It is then stated by the plaintiffs that the alleged writing does not refer to and was never intended to refer to the said property or the trust property and on proper construction thereof, the same applies to some other properties. The plaintiffs, therefore, assert that there has been no appointment of beneficiaries by the Rustom in respect of the trust property and that the plaintiffs were the beneficiaries thereof and were entitled to receive a share in the income as per the shares set out in paragraph 11. On the above basis, the present Originating Summons has been taken out for the following reliefs, which were subsequently amended. The amended reliefs of the Originating Summons would read thus :

"(a) Whether the Plaintiffs and Defendant Nos. 18 to 22 are the Beneficiaries of the Trust in respect of 6/16th share of Jehangirjee Pestonjee Vakil in the properties described in Schedule "A" under the Indenture of Settlement dated 14th January, 1892 executed by Jehangirjee Pestonjee Vakil and others, a copy whereof is annexed as Exhibit 5 to the Plaint in support of this Originating Summons and whether the Plaintiffs and Defendant Nos. 18 to 22 are entitled to receive from Defendant Nos. 1 to 5, being the present Trustees of the said Trust, an aggregate of 3/17th of the Th. share in the income of the said Trust;

(b) For a direction to the Defendant Nos. 1 to 5 as the Trustees of the said Trust to pay to the Plaintiffs and Defendant Nos. 18 to 22 their respective shares in the income of the said Trust as follows :

Out of Th. (one-fourth) share in the income of the Trust constituted under the Indenture of Settlement dated 14th January, 1842 (sic. 1892) relating to the properties described Schedule "A" thereto --

(i) 1/17th share to Defendants Nos. 18 and 19 in their capacities as the legal representatives of the late Bachan Noshervan Anklesaria, Plaintiff No. 1;

(ii) 1/17th share to Defendants Nos. 20 to 22 in their capacities as the legal representatives of the late Shera Bajor Vakil, original Plaintiff No. 2;

(iii) 1/34th share to now designated as Plaintiff No. 1; and

(iv) 1/34th share to now designated as Plaintiff No. 2;

(c) for costs; and

(d) for such further and other determinations, declarations , directions and orders as the nature and circumstances as the case may require."

3. The Defendants Nos. 6 to 17 are objecting to grant of any relief in the Originating Summons. The first objection taken is that the same is barred by limitation. They next contend that several disputed questions have been raised by the parties and cannot be examined in an originating summons. This is the principal question that is required to be considered in the present order. Insofar as the factual matrix is concerned, according to the said defendants, Sir Rustom Vakil had executed a Will on 18th Nov., 1924 and which Will has been acted upon by the concerned and was subject matter in proceedings before this Court in Suit No. 635 of 1934, as well as Suit No. 153/1952 before the Joint Civil Judge, Senior Division at Ahmedabad. It is contended on behalf of the said Defendants that by the said Will, Sir Rustom Vakil had bequeathed the salt works at Bassein for the benefits of his son and it also provides that neither his daughter nor any of the relatives would have any right to the said property. On the above assertion, it is contended that the claim set up by the Plaintiffs that Sir Rustom Vakil has not appointed any beneficiary is the disputed fact. Besides, the existence, even the efficacy, of the said Will qua the suit trust property is also disputed by the Plaintiffs, for which reason, according to the Defendants, these issues cannot be resolved by way of originating summons. In support of this contention, reliance was placed on the decision of this Court reported in *Vithaldas Cursonadas Vs. Dulsukhbhai Vadilal*, . Reliance is placed on the dictum in this judgment wherein it is observed that an originating summons is not the proper procedure to be adopted where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. It is contended that even in the present case, considerable amount of oral evidence will have to be adduced, for which reason originating summons is not the appropriate remedy. Reliance is then placed on the decision reported in 1969 (71) Bom LR 764 in the case of *Bhagwandas Ichharam Panchal v. Royal Western India Turf Club Limited*. In the said decision, reference is made to several other decisions to examine the scope of proceedings in originating summons. More or less, same view is taken that where disputed facts of complexity are involved, the remedy of originating summons is unavailable. Reliance is also placed on the decision reported in *Homi P. Ranina and Others Vs. Eruch B. Desai and Others*, ; as well as in *Rama Aziz Parpia and Others Vs. Balkrishna K. Mehta and Others*, Emphasis is placed on the dictum in the latter decision, wherein it is observed that originating summons cannot be pressed into service for resolution of conflict of interest or for adjudication of rights and liabilities.

4. In response to the last proposition canvassed on behalf of the Defendants, relying on the observations in *Rama Aziz Parpia and others* (supra), Counsel for the Plaintiffs have placed reliance on the decision of the Division Bench of this

Court reported in *Mazda Theatres Limited Vs. Gordhandas Tribhuvandas Mangaldas*, which observes that Rule 141 covers cases where the lessor and the lessee were disputing their mutual rights and the question of that right could be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties were. It is observed in this decision that remedy under Rule 241 of the Rules of the High Court of Bombay 1950, must be very broadly and liberally interpreted. The right contemplated by that rule is any right, and the whole object of that rule is to make a procedure available to parties which is both cheap and expeditious for determination of disputes as to construction of a written instrument, which dispute could be settled by the Court interpreting the instrument and determining what the rights of the parties are.

5. Having considered the rival submissions and going through the pleadings of the parties, to my mind, following principal points would arise for consideration for deciding the Original Summons :

(1) Whether Rustom Vakil died without making any appointment of beneficiaries of the trust by deed or by will; or whether he made a will dated 18th Nov. 1924 as claimed by the Defendants ?

(2) Whether the plaintiffs are the beneficiaries under the deed of trust dated 14th January, 1892 made by Jehangirjee Vakil ?

(3) Whether the alleged will dated 18th Nov. 1924 made by Rustom Vakil does amount to an appointment of beneficiary in relation to the trust property as such, as to disentitle the plaintiffs from a share in the income of the said property ?

(4) Whether the alleged will dated 18th Nov. 1924 can be pressed into service at all because it is not probated ?

(5) Whether the action initiated by the Plaintiffs is barred by limitation ?

6. The question for my consideration today is, whether the abovesaid points can be conveniently decided by this Court by way of originating summons. According to the defendants, several disputed facts are raised for which considerable oral and documentary evidence will have to be recorded, which will be of complex nature. Therefore, contends learned Counsel that, the remedy of Originating Summons is inappropriate. Whereas, according to the plaintiffs, the factum of non existence of the alleged Will dated Nov. 18, 1924, as claimed by them if established, they will succeed in getting the relief as claimed by them as a necessary consequence. It is further contended that, assuming that the defendants succeed in establishing the existence of the alleged will dated 18th Nov. 1924, in that situation, the next question have to be considered is whether the same pertains to the trust property and results in appointment of beneficiary therefore so as to exclude the claim of the Plaintiffs. This question is essentially one of construction of the proved document. If that question was to be answered

in favour of the plaintiffs, even then the plaintiffs would succeed in getting reliefs as claimed in the originating summons. It is contended that all other points are incidental, and at any rate either one of construction of the proved document or legal aspects. If it is so, then the preliminary objection will have to be overruled as untenable.

7. I find substance in the argument canvassed on behalf of the plaintiffs. To my mind, to resolve the controversy in the Originating Summons as filed the moot question is about the existence or non existence of the alleged Will dated Nov. 18, 1924. To establish this fact, both the parties will be at liberty to adduce oral and documentary evidence. Obviously, to establish that fact, the evidence that will have to be adduced will not be of a complex nature. In the event the Defendants succeed to prove the alleged will or the existence of document appointing beneficiary in relation to the trust property, then the other points would be only incidental thereto and essentially construction of the document and legal aspects of the matter. Whereas, if the Defendants were to fail to prove the alleged Will or the existence of the document appointing beneficiary in relation to the suit trust property, then, as per the stipulation in the trust deed, the Plaintiffs would succeed in getting the relief as prayed, being the heirs of Rustom Vakil. Similarly, even if the Defendants would succeed in proving the alleged Will, the next question is as to whether the same purports to appoint beneficiaries in relation to the trust property. This again is essentially a point relating to construction of the said document. Understood thus, all the principal points in issue which will arise for consideration in this originating summons can be conveniently decided by this Court. On the above reasoning, the line of authorities pressed into service on behalf of the Defendants would be of no avail. Moreover, as rightly contended by the plaintiffs, relying on the Division Bench decision of this Court in the case of Mazda Theatres Limited (*supra*), this Court is capable of construing and/or interpreting the document, such as the trust deed or will, which is subject matter in issue and further determine the rights of the respective parties on the basis of that document. Accordingly, I have no hesitation in taking the view that the remedy of originating summons as invoked by the plaintiffs is the appropriate remedy and can be proceeded with in accordance with law. The preliminary objections are therefore overruled.

8. It is made clear that any observation made hereinabove shall not be construed as any expression of opinion on the merits of the contentions between the parties, but is only recorded to answer the question regarding maintainability of originating summons in the fact situation of the present case,

9. At this stage, Mr. Kamdin prays for stay of operation of this Order on the ground that the Defendants are inclined to prefer appeal against this order. This order shall not be given effect to for a period of three weeks from today. Liberty to apply for listing on a specific date.

10. All concerned to act on the copy of this order duly authenticated by the Court Stenographer of this Court.