

(2010) 03 BOM CK 0024

In the Bombay High Court

Case No : Originating Summons No. 1909 of 2009 in Suit No. 3091 of 2009 and
Chamber Summons No. 362 of 2010 in Originating Summons No.
1909 of 2009 in Suit No. 3091 of 2009

Jamsheed Kanga and Another

APPELLANT

Vs

Parsi Punchayet Funds and Properties and Others

RESPONDENT

Date of Decision : 05-03-2010

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 249

Bombay High Court Rules, 1950 — Rule 223, 238, 240, 241, 246

Citation : (2010) 4 BomCR 750

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : I.M. Chagla, F.E. D'Vitre, s, J.P. Avasia, I.C. Pereira and Yugandhara A. Khanwilkar, instructed by Dastur Dadhich and Kalambi, for the Appellant; A.A. Kumbhakoni, instructed by KRY Legal for Defendant No. 1 and R.A. Dada and Peray Gandhi, instructed by KRY Legal for Defendant Nos. 2 to 8, Minoo Siodia, instructed by V.P. Sawant in Chamber Summons No. 362 of 2010, for the Respondent

Judgement

V.M. Kanade, J.—On 07/01/2010, an application was made by Plaintiffs for granting an ad-interim relief in the Originating Summons. However, by consent of parties, it was agreed that all issues including preliminary issue raised by Defendants should be decided finally and, accordingly, the matter was fixed on 15/02/2010 at 3.00 p.m. for final hearing of the Originating Summons along with other preliminary objections raised by Defendants.

2. However, on 15/02/2010, Counsel for Defendant Nos. 2 to 8 sought further time to file reply which was vehemently opposed by the learned Senior Counsel appearing on behalf of Plaintiffs. He revived his application for ad-interim relief and submitted that the question of granting or refusing ad-interim relief was not taken into consideration on the earlier date since both the parties had agreed that the matter should be finally decided on 15/02/2010. He, however, submitted

that if Defendants wanted further time to file their reply, in that event, he may be permitted to revive his application for ad-interim relief.

3. This Court, however, granted two week's time to Defendant Nos. 2 to 8 to file their reply and fixed the matter for final hearing on 02/03/2010 at 3.00 p.m. Accordingly, I have heard the parties. During the course of hearing, Chamber Summons has been filed by one Framroze Mirza ? applicant. The relief claimed by him in the Chamber Summons is that his affidavit in support should be taken on record and he should be excluded from the present proceedings.

Facts:

4. Brief facts are as under:

5. Plaintiffs have taken out this Originating Summons under Chapter XVII of the Bombay High Court (Original Side) Rules. The Originating Summons has been filed by Plaintiffs for determination of questions relating to powers/authority of the Trustees and rights of the beneficiaries, the proper administration of the Trust, and consequential reliefs and directions as prayed for therein, arising out of the purported ban imposed by the present Trustees on two Parsi Zoroastrian Priests, viz. Mr. Framroze Mirza and Mr. Khushroo Madon, for performing any prayer or religious ceremonies at the Doongerwadi (Tower of Silence) and the Agiaries (Fire Temples) vested in the Trust being the Godavara Agiary at Fort and S.F. Jokhi Agiary at Godrej Baug, Malabar Hill.

6. According to Plaintiffs, the purported ban had been imposed as a result of certain Zoroastrian religious ceremonies allegedly conducted by the said two Priests, which, according to Trustees were unreligious since they were (i) praying for the dead who were cremated; (ii) performing Navjote ceremonies of children of Parsi girls married to non-Parsi husbands; and (iii) performing marriage ceremonies as per Zoroastrian rituals of any one Parsi marrying a non-Parsi spouse.

7. It is the case of Plaintiffs that they came to know about the ban sometime in July 2009 through press reports. A meeting was held on 09/06/2009 of the Board of Trustees of Defendant No. 1 and, according to the minutes, Mr. Khojeste Mistree alleged that the said two Priests, viz. Framroze Mirza, who has taken out Chamber Summons No. 362 of 2010, and Khushroo Madon are "renegade mobeds" (Priests). It is alleged that these Priests had performed unreligious ceremonies. He has also recorded that High Priest Dasturji Dr. Kaikhusro Minocher Jamasp Asa had earlier informed the Trustees that the two "renegade" Priests should be boycotted from all religious institutions, such as Agiaries, Atash Behrams and Doongerwadi. Subsequently, a notice dated 11/09/2009 was also issued to that effect in English and Gujarati. The letter dated 27/8/2009 also was written by certain Priests to the Trustees to applaud the Resolution which was passed by the Board. Since this decision was not communicated to Khushroo Madon who prayed at Doongerwadi on 06/09/2009, he was asked by the Board of Trustees to meet them on 08/09/2009. In the said meeting, the said Khushroo

Madon tried to explain to the Trustees that he has committed no wrong and cited teachings of Priests and Scholars in support of his arguments. However, the ban was not retracted by the Trustees. Plaintiff No. 2, therefore, wrote a letter dated 03/08/2009 to the Trustees objecting to the purported ban imposed on the said two Priests. In the said letter, he also stated that it was beyond the powers of the Trustees to impose such a ban. He also stated that there was no necessity for the Trustees to promulgate or endorse the ban on a particular practice especially when it pertains to the subject of religion.

8. Thereafter, Plaintiffs, through their advocates, sent a letter dated 16/10/2009 to the Trustees, objecting to the arbitrary, illegal and discriminatory ban which, according to Plaintiffs, was beyond the powers of the Trustees and they called upon the Trustees to desist from acting in furtherance of the aforesaid purported Resolution. A reply was given by Defendant Nos. 2 to 8 dated 14/11/2009 and it was alleged that they were entitled to impose the purported ban in the performance of their duties as Trustees of Defendant No. 1. Plaintiffs, therefore, have filed this Originating Summons.

9. It is alleged that Trustees do not have authority or power under the Trust Deed or otherwise in law to prevent a Parsi Zoroastrian Priest from performing Zoroastrian religious rites and ceremonies in the Trust's premises on the ground that the Trustees believe that the said two Priest have performed the aforesaid ceremonies. According to Plaintiffs, Trustees do not have an authority or power under the Trust Deed to dictate on religious matters and are, therefore, not competent or entitled to declare the abovementioned ceremonies as "unreligious". In the context of the said controversy, Plaintiffs have asked this Court the questions which are mentioned in para 18 of the Plaint and requested this Court to answer these questions and give consequential directions to the Trustees of Defendant No. 1 and also prayed for granting stay to the operation of the Resolution and direction dated 11/09/2009.

Submissions:

10. Mr. Chagla, the learned Senior Counsel appearing on behalf of Plaintiffs submitted that this Originating Summons has been taken out by Plaintiffs under Chapter XVII of the Bombay High Court (Original Side) Rules. He invited my attention to Rule 238 which lays down who can apply for issue of Originating Summons. He submitted that in the said Rule, the questions which could be answered are enumerated in Clauses (a) to (g) of the said Rule 238. He submitted that the questions raised in this suit are squarely covered by Clauses (a), (e) and (g). He submitted that Plaintiffs are Parsi Zoroastrians and are, therefore, beneficiaries of the Trust which was established on 25th September, 1884. He further submitted that the said two Priests are also Parsi Zoroastrian duly ordained Priests. He submitted that the said two Priests are entitled to perform their prayers at the Trust's property, viz. Doongerwadi (Tower of Silence) and the said two Agiaries. He submitted that the said two Priests were performing prayers for deceased who were also Parsi Zoroastrians. He submitted

that Trustees did not have power or authority to exclude the duly ordained Priest from performing religious ceremonies at the Trust's property. He submitted that the Trustees, by imposing a ban, had done some thing which was beyond their authority. Mr. Chagla, the learned Senior Counsel invited my attention to the Resolution passed by the Board of Trustees on 09/06/2009 annexed to the compilation of documents tendered by Plaintiffs. He then invited my attention to other documents annexed to the compilation of documents tendered by Plaintiffs viz notice dated 11/09/2009, letter of Dr Kaikhusroo Dastur Minocher Jamasp Asa dated 27/08/2009, Article dated 21/09/2009 published in the issue of Parsiana, letter dated 03/08/2009 addressed by Plaintiffs to the Trustees of Defendant No. 1, letter dated 16/10/2009 addressed by Plaintiffs to the Trustees of Defendant No. 1, letter dated 12/11/2009 addressed by advocates for Defendant Nos. 2 to 8 to Plaintiffs" advocate, typed copy of the news report published in the issue of Free Press Journal dated 24/07/2009 and a copy of the news report of the same date published in the issue of Free Press Journal. He then invited my attention to the Trust Deed. He took me through some of the recitals of the Trust Deed. He led particulars emphasis on the following recitals on pages 1, 2, 8 and 9 of the Trust Deed.

And Whereas for very many years the management of the social and religious affairs and the settlement of religious, matrimonial and other social disputes of, and between, Parsees in Bombay were entrusted by the Community to a Punchayat or Committee selected from amongst the most influential or leading members of the said community and whereas the said Punchayet also acted as and were the recognized custodians and managers of the property so from time to time given for religious benevolent and other purposes and objects by members of the said community as aforesaid.

...And Whereas to be the Trustees or custodians of all the said funds and immovable property therefore given for religious and benevolent purposes as aforesaid....

And Whereas...the said four Trustees were and their successors have been usually styled or known as the "Trustees of the Parsee Punchayat" but are more correctly styled "the Trustees of the Funds and Immovable property of the Parsee Punchayet."

And Whereas the remaining portions of the said compound have in the uninterrupted and undisputed possession of the Members or Trustees of the said Parsee Punchayet as the custodians or managers thereof ever since the dates of their respective enclosure hereinbefore mentioned and from the several dates aforesaid the said lands have been and are now used by the whole Parsee community of Bombay as a place for the exposure of their dead and for the performance of other religious rites and ceremonies.

He then invited my attention to certain portion of the Second Schedule. He then laid more emphasis on the following paragraph on on page 88 the Trust Deed:

First upon trust from time to time and at all times for ever hereafter to permit and suffer the said piece or parcel of land and the several Towers buildings and erections thereon standing and being first described in the said first Schedule hereto to be used and frequented as heretofore by every member of the Parsee Community professing the Zoroastrian religion as a place for exposure of the dead and for the performance of religious rites and ceremonies.

He also invited my attention to the following paragraph on page 90 of the Trust Deed:

Secondly, upon trust from time to time and at all times for ever hereafter to permit and suffer the said hereditaments secondly described in the said first schedule hereto to be used or appropriated for such charitable benevolent or religious purposes or objects as the Trustees for the time being of these presents or a majority of them shall think proper....

11. Mr. Chagla, the learned Counsel appearing on behalf of Plaintiffs submitted that in the entire Trust Deed, no power is vested in the Trustees to impose a ban on Parsi Zoroastrian duly ordained Priest or to prevent Parsi Zoroastrians to choose their own Priest for the purpose of offering prayers for the dead at the Doongerwadi (Tower of Silence). He submitted that the Trustees are merely custodians of the funds and the property of the Trust and did not have an authority to decide the questions pertaining to ecclesiastical matters. He submitted that by passing a Resolution and imposing ban, they had acted beyond their authority which was given to them under the Trust Deed. He submitted that Towers of Silence are available only at three places in India and at all other places deads are either buried or cremated and this practice is accepted by High Priests. He submitted that even at the Towers of Silence due to unavailability of vultures and other such creatures, the dead bodies remain in the Tower of Silence for indefinite period and it raises stench and pollutes the air and, therefore, large number of Parsees are preferring other modes of disposal of bodies viz either by cremation or burial. He submitted that the said two Priests also, relying on scriptures, had performed ceremonies of cremation in Bombay outside the Doongerwadi premises in other crematorium and were praying for the dead in Doongerwadi (Tower of Silence). He submitted that Trustees have no authority to impose a ban to prevent them from offering such prayers for the deceased Parsi Zoroastrian. He invited my attention to the Resolution passed by the High Priests in 1985 where they had specifically accepted other modes of disposal of dead bodies viz burial or cremation. He, therefore, submitted that it cannot not be said that cremation of parsees is unreligious. He also submitted that the another allegation which was leveled against these two Priests was that they had permitted conversion of Non-Zoroastrian to Zoroastrian Religion. He submitted this also is an accepted practice in Zoroastrian Religion. He submitted that the grand-father of the present High Priest had, in fact, converted a French Lady into a Zoroastrian Religion who married Mr. J.R.D. Tata and the Division Bench of this Court had given a finding that conversion is permissible according

to Zoroastrian Religion though it was not practiced for about 1200 years. He invited my attention to the Article which appeared in Jam-e-Jamshed on 9/3/2008 and to the judgment of Division Bench of this Court in Sir Dinshaw M. Petit, Bart v. Sir Jamsetji Jijibhai Bart (1908) 11 Bom LR 85 . He also invited my attention to judgment in Saklat and Ors. v. Bella (1925) LIII Indian Appeals 42. He then invited my attention to the Division Bench Judgment of this Court in Mazda Theatres Limited Vs. Gordhandas Tribhuvandas Mangaldas, and submitted that Division Bench of this Court in the said judgment had made the following observations:

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.

One would have thought that Rule 241 was precisely intended to cover a case like this where a lessor and lessee are disputing their mutual rights and the question of those rights can be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties are.

He also invited my attention to the judgment of this Court in Dinar Rashid Wadia and Another Vs. Kersy Eruch Lalkala and Others, .

12. Mr. Dada, the learned Senior Counsel appearing on behalf of Defendant Nos. 2 to 8 raised a preliminary objection regarding maintainability of the Originating Summons in this case. He submitted that the procedure prescribed under Chapter XVII of the Bombay High Court (Original Side) Rules is, essentially, summary in nature and in cases where there is a disputed question of fact, it would not be possible for the court to decide the complex issues and complicated facts. He invited my attention to Chapter XVII and the Rules framed thereunder. He submitted that Plaintiffs have called upon this Court, indirectly, to decide whether a particular practice is in accordance with the Religion or not and the object is to establish by indirect method that the practices undertaken by the said two Priests were not contrary to the Religion. He submitted that the controversy raised in the Originating Summons is not even a dispute of civil nature and the rights which are claimed by Plaintiffs are not even civil rights. He submitted that the ordinary disposal of the dead is sacrosanct and is a part of the Religion. He invited my attention to the Written Statement in which extracts from the holy scriptures are produced and on the basis of the said extracts he submitted that in the Zoroastrian Religion, the only accepted practice which has been followed for disposal of the dead is exposure of the dead body to the elements in the Tower of Silence. He pointed out the procedure which has been followed for disposal of the dead from various paragraphs in the Written Statement. He explained the status of the High Priest and submitted that the

said two Priests had been removed from their Anjuman and their actions have been declared to be unreligious by the High Priest. He submitted that one of the Priests had performed conversion ceremony. He submitted that there is sufficient material on record to show that the said two Priests are unfit to act as Priests. He further submitted that Plaintiffs have to prove that they have a right to enter these Agiaries with a particular Priest of their choice and assuming that they did have a right, could they insist for exercising their right by bringing the two Priests who are unfit to act as Priest. He lastly submitted that the Court should not go into this question since it involves religious issues.

13. In support of his submission, Mr. Dada, the learned Counsel appearing on behalf of Defendants, relied upon the Judgment in Vithaldas Cursonadas Vs. Dulsukhbhai Vadilal, . He also relied upon the judgment of the Division Bench of this Court in Sir Dinshaw Manekji Petit, Bart and Ors. v. Jamsetji Jijibhai, Bart and Ors. ILR (1908) (Bom) 509. He then relied upon the judgment of the English Court in Re Sir Lindsay Parkinson & Co. Ltd.'s Trusts Deed, Bishop and Ors. v. Smith and Anr. [1965] 1 All ER 609. He then invited my attention to the judgment of the learned Single Judge of this Court in Rama Aziz Parpia and Others Vs. Balkrishna K. Mehta and Others, and to the judgment of the Division Bench of this Court in Mrs. Lyla Darius Jehangir (nee Ghaswala) Vs. Bakhtawar Lentin of Mumbai and Others, . He then relied upon the judgments in Ratilal Panachand Gandhi Vs. The State of Bombay and Others, and in Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay, and finally he relied upon the judgment of the Apex Court Sri Sinna Ramanuja Jeer and Others Vs. Sri Ranga Ramanuja Jeer and Another, .

14. Mr. Dada, the learned Counsel for Defendant Nos. 2 to 8 also invited my attention to various portions of the Trust Deed and submitted that it is a mandate given by the Trust Deed to Trustees to uphold the religious practices which are to be performed in the property owned by the Trust and as such it is a bounden duty of the Trustees to ensure that unreligious practices are not performed in the premises owned by Trust.

15. Mr. Kumbhakoni, the learned Senior Counsel appearing on behalf of Defendant No. 1 adopted the arguments made by Mr. Dada, the learned Senior Counsel appearing on behalf of Defendant Nos. 2 to 8 and also made submissions on the same lines.

16. Mr. Chagla, the learned Senior Counsel appearing on behalf of Plaintiffs, in rejoinder, submitted that the expression "Defrock" used by Counsel Mr. Dada during the course of his arguments while referring to the said two Priests would not be used against the said Priests since the word "Defrock" practically meant excommunication of the Priests. He submitted that, in fact, Trustees under the guise of imposing a ban by passing Resolution have indirectly tried to excommunicate these two Priests though it is not permitted under the Zoroastrian Religion. He then, in response to the submission made by Counsel Mr. Dada that the burden is upon Plaintiffs to prove that they have right to

choose their own Priest to perform prayers, submitted that the question of burden of proof does not arise in the Originating Summons and the only question which arises is regarding interpretation of the instrument which, in the present case, is the Trust Deed for the purpose of finding out whether on interpretation of the Trust Deed, action of the Trustees is permissible or not. He then distinguished the judgments on which reliance is placed by Mr. Dada, the learned Senior Counsel appearing on behalf of Defendants. He submitted that so far as English Judgment is concerned, ratio of the said judgment is not binding on Indian Courts. He further pointed out that three judgments on which reliance is placed by Defendants' Counsel on the point of maintainability of the Originating Summons, in fact, supported the Plaintiffs' case. He finally concluded by saying that Plaintiffs have asked this Court whether Trustees have power to prevent Parsi Zoroastrian duly ordained Priest to perform religious ceremonies in the properties owned by the Trust.

17. I have heard Mr. Chagla, the learned Senior Counsel appearing on behalf of Plaintiffs, Mr. Dada, the learned Senior Counsel appearing on behalf of Defendant Nos. 2 to 8 and Mr. Kumbhakoni, the learned Senior Counsel appearing on behalf of Defendant No. 1 at length.

Findings:

18. Chapter XVII of the Bombay High Court (Original Side) Rules lays down the procedure which has to be followed in the case of Originating Summons. Under the said procedure, Rule 238 lays down who can apply for issue of Originating Summons and circumstances under which it can be issued. The said Rule lays down that 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 such as beneficiary under the trusts could apply for issue of an Originating Summons. Clauses (a) to (g) of the said Rule lay down the questions which can be considered by the Court. Clauses (a) to (g) of the said Rule 238 read as under:

- (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 money 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.

Rule 240 lays down the persons who are to be served with the summons. Rule 246 vests a discretion in the Court to decide whether question of construction should be determined in Originating Summons or not. Rule 246 reads as under:

Rule 246. Court not bound to determine question of construction.- The Court or the Judge in chambers shall not be bound to determine any such question of construction if in its or his opinion it ought not to be determined on Originating Summons.

Under Rule 249, the Originating Summons has to be in Form No. 23 and should be filed as a plaint which is then numbered and entered in the register of suits. Rule 253 states that there is no obligation to file Written Statement or to file affidavit in reply. Rule 253 reads as under:

Rule 253. No obligation to file written statement or affidavit in reply.- A Written Statement or affidavit may be made in answer to the Plaint but there shall be no obligation to make the same unless the Court otherwise directs.

Rule 255 also lays down what is to be done by the Court on hearing the Originating Summons. Rule 255 reads as under:

Rule 255. What may be done on hearing originating summons.- The Judge hearing an Originating Summons may, if he thinks fit, adjourn the summons into Court. If the Judge considers that the matters in respect of which relief is sought cannot conveniently and properly be disposed of on an Originating Summons, he 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 to him to be just.

Rule 258 lays down that if the Judge is of the opinion that the matter is fit to be dealt with on an Originating Summons, he may pronounce such judgment as the nature of the case shall require, and any order made by him shall be drawn up as a decree of the Court unless it is dismissed under Rule 255.

19. Perusal of the aforesaid Rules clearly reveals that the procedure prescribed under Chapter XVII is of summary nature and a discretion is vested in the Court under Rule 246 and the Court is not bound to determine the question of construction and under Rule 255, it can refuse to pass any order on Originating Summons by dismissing the same and referring the parties to a suit in the ordinary course.

20. In the present case, after having heard the learned Counsel for Plaintiffs and Defendants and after having perused the Plaint, Written Statement and taking into consideration the controversy which is involved, in my view, this matter in which the said relief is sought by Plaintiffs cannot be conveniently and properly

disposed of in Originating Summons and, therefore, I propose to dismiss the Originating Summons and refer the parties to suit in ordinary course for the reasons mentioned below.

21. In the present case, Plaintiffs have asked this Court, the following questions:

18. In the circumstances, the following questions arise for determination as a matter of interpretation of the General Trust Deed of 1884.

(a) Whether under the Trust Deed the Trustees are entitled to prevent any duly ordained Parsi Zoroastrian Priest from performing Zoroastrian religious rites and ceremonies in the premises of the Doongerwadi and the said two Agiaries?

(b) Whether the Trust Deed empowers the Trustees to restrict Parsi Zoroastrians in their choice of a duly ordained Parsi Zoroastrian Priest to conduct Zoroastrian religious prayers and ceremonies at the Doongerwadi and the said two Agiaries?

(c) Whether the purported ban on the said Framroze Mirza and the said Khushroo Madon, was within the power and authority of the Trustees under the Trust Deed?

(d) Whether the Plaintiffs are entitled to an order and direction of this Hon''ble Court that the Trustees of Defendant No. 1 forthwith abstain from any action pursuant to the said purported ban or in the implementation thereof, and to forthwith remove all notices, and withdraw all instructions, in relation to the said purported ban?

(e) Whether pending the hearing and final disposal of this Originating Summons, the Plaintiffs are entitled to an order of this Hon''ble Court staying the operation of the purported resolution and directions dated 11th September, 2009?

19. The Plaintiffs say and submit that in the event that this Hon''ble Court holds that the Trustees do not have the power or authority to impose the said purported ban, Plaintiffs would be entitled to an order and direction of this Hon''ble Court that the Trustees of Defendant No. 1 forthwith abstain from any action pursuant to the said purported ban or in the implementation thereof, and to forthwith remove all notices, and withdraw all instructions, in relation to the said purported ban. The Plaintiffs say and submit that as the purported resolution of the Trustees and directions dated 11th September, 2009 are ex-facie beyond the power and authority of the Trustees under the Trust Deed, pending the hearing and final disposal of this Originating Summons, the Plaintiffs are entitled to an order of this Hon''ble Court staying the operation of the purported resolution and directions dated 11th September, 2009;

The context and the circumstances under which these questions are raised by Plaintiffs have been elaborated in the Plaint.

22. At this stage, in my view, it would be relevant to consider the settled legal position in respect of the questions which can be answered in Originating Summons and, for that purpose, I would also like to refer to judgments on which reliance is placed by the learned Senior Counsel appearing on behalf of both

sides.

23. In the case of *Vithaldas Cursondas Vs. Dulsukhbhai Vadilal*, , the learned Single Judge of this Court, after tracing the origin of these Rules and also after noticing that the Rules do not forbid questions of fact being determined on Originating Summons, has made the following observations:

The rules do not forbid questions of fact being determined on an originating summons and I am not prepared to hold that this form of action is always inappropriate whenever there is a question of fact in dispute.

But I think it clear that an originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. There is no machinery for discovery and inspection and Rule 223 indicates that the action should be confined to matters which are capable of decision in a summary way.

Though the judgment in *Sir Lindsay Parkison & Co. Ltd.'s Trusts Deed Bishop and Ors. v. Smith and Anr.* [1965] 1 All ER 609 is an English Judgment, in my view, observations which are made therein are quite relevant, more particularly since the present rules generally follow the English procedure. The observations which are made in this judgment are as follows:

Under that rule it was, In think, open to the plaintiffs to institute these proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs, but I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, sought normally to be commenced by writ and not by originating summons; for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them.

Then, in the case of *Rama Aziz Parpia and Others Vs. Balkrishna K. Mehta and Others*, , the learned Single Judge of this Court in para 20 of the judgment has observed as under:

20. ...An originating summons is not a process for declaration of the rights of the parties, nor is it a lis, as popularly understood. A perusal of the form of the plaint prescribed also makes it clear that, though in taking out the originating summons, the person interested is required to file a plaint, there is no prayer required to be made in the plaint, and it would be sufficient, if the questions, for which the Court's answers are sought, are indicated therein, see Rule 249 of the High Court (Original Side) Rules, 1980.

In the Division Bench Judgment of this Court in *Mrs. Lyla Darius Jehangir (nee Ghaswala) Vs. Bakhtawar Lentin of Mumbai and Others*, , though the Division Bench has noticed the observations made by Pratt J. in *Vithal Das Cursondas*

(supra), it has also considered the observations made by the learned Single Judge in Rama Aziz Parpia (supra) and in para 11, the Division Bench has observed that the proceedings highlighted by the learned Single Judges of this Court in the case of Vidhtaldas Cursondas and Rama Aziz Parpia (supra) appear to us to be sound. The Division Bench, therefore, approved the following passage in Vithal Das Cursondas (supra) viz.

that an originating summons is not a proper procedure to be adopted where the disputed facts are of such complexity as to involve considerable amount of oral evidence. This is an action which should be confined to matters being capable of decision in a summary way; not that it forbids the questions of fact being determined on an originating summons in all class of cases.

On the other hand, Mr. Chagla the learned Senior Counsel appearing on behalf of Plaintiffs has relied upon the judgment of the Division Bench of this Court in Mazda Theatres Limited Vs. Gordhandas Tribhuvandas Mangaldas, and the judgment of the learned Single Judge of this Court in Dinar Rashid Wadia and Another Vs. Kersy Eruch Lalkala and Others, .

In Mazda Theatres Limited (supra) Division Bench of this Court set aside the order passed by the learned Single Judge who came to the conclusion that the originating summons was not maintainable and under those circumstances the Division Bench has observed as under:

The learned Judge also seems to have been under the impression that contractual rights cannot be determined under Rule 241. That again, with respect, is a misapprehension. Rule 241 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.

There cannot be any dispute regarding the ratio of the judgment in the case of Mazda Theatres Limited (supra). However, in the said case also, the Division Bench merely has noted that it should be a dispute which can be settled by the court interpreting the instrument and determining what the rights of the parties are and in the fact situation of that case viz that the lessor and lessee in that case were disputing their mutual rights, the Court came to the conclusion that those rights could be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties are. In the said case, by a lease, certain benefits were vested in Plaintiffs and one of the clauses stated that Plaintiffs should give complimentary pass to the lessor and reserve one box for six seats for use of the lessor and his family and friends in every show on every day. The entertainment duty was levied by an amendment and the duty was to be paid on every complimentary ticket. The Division Bench observed that if a right is declared under an instrument in favour

of the party, there would be a corresponding liability upon someone else and, therefore, held that there was an obligation and liability upon Plaintiffs to pay entertainment duty. Mr. Dada, the learned Senior Counsel for Defendants on the other hand, firstly, submitted that, in that case, the Defendants had given their consent for having the said clause construed by means of originating summons and the decision which was given by the Division Bench on the originating summons was, therefore, by consent of parties and, secondly, he submitted that, in the said case, the Court was asked to interpret a clause in the lease deed and, under these facts and circumstances, the Division Bench has made the aforesaid observations. The ratio of the Division Bench Judgment in the case of Mazda Theatres Limited Vs. Gordhandas Tribhuvandas Mangaldas, , therefore, in my view, does not assist the Plaintiffs' case.

So far as the judgment in the case of Dinar Rashid Wadia and Another Vs. Kersy Eruch Lalkala and Others, is concerned, the learned Single Judge was pleased to make observations in the said judgment in the light of the facts of the said case and the question which the Court was asked to answer was about the existence or non-existence of the Will and, therefore, the learned Single Judge held that even if evidence would have to be adduced to establish that fact, it would not be of a complex nature.

24. Keeping in view the ratio of the judgments referred to hereinabove, I shall now consider why in the facts and circumstances of the present case, it is not possible to decide the said question.

25. I have already mentioned the circumstances under which Plaintiffs have filed this Originating Summons while stating the facts of the case and, therefore, I do not propose to repeat the facts again. Briefly stated, however, the controversy had arisen after the said two Priests performed religious ceremonies after cremation of the dead at places out side the Doongerwadi (Tower of Silence). They offered prayers in the said premises which was objected to by the High Priest who considered such practices to be unreligious. Secondly, one of the Priests viz. Khushroo Madon also converted Non-Zoroastrian into Zoroastrian Religion and made him a Parsi Priest which is also criticized by the High Priest and, thereafter, the Trustees passed Resolution on 09/06/2009 and imposed a ban on these two Priests from performing religious ceremonies at Doongerwadi (Tower of Silence) and the said two Agiaries. According to Plaintiffs, the said two Priests have not performed any unreligious practices, firstly because cremation of the dead body or its burial is not completely banned by the Zoroastrian Religion and, secondly, conversion also is not unreligious practice. It is, therefore, urged that the Trustees did not have an authority to decide whether action of the said two Priests was religious or unreligious and, on that basis, imposed a ban on them from performing religious ceremonies in the Trust's premises. It has, therefore, been urged by Plaintiffs that the Trustees only are the custodians of the funds of the property of the Trust and do not have an authority to take decision in ecclesiastical matters, whereas the Trustees have alleged that it is

their bounden duty to maintain the Trust's properties and ensure that religious practices are being performed in the said properties and since disposal of the dead by putting the body in Tower of Silence is the integral part of the Zoroastrian Religion, the said two Priests who had admitted that they wanted to take a contrary view to the view taken in the scriptures, should not be permitted to perform religious ceremonies in the Trust's property. Taking into consideration the said controversy, it is evident that the issue would involve interpretation of what are religious ceremonies which are to be performed in the properties of the Trust. According to Plaintiffs, two Priests have not performed any unreligious ceremony and, therefore, Trustees did not have any right to impose the ban. On the other hand, Defendants state that High Priest has already declared that the actions of the said two Priests are unreligious. This being the position, it is not possible for this Court to decide the issue merely by interpreting the provisions of the Trust Deed and though the questions which are raised by Plaintiffs in para 18 appear to be innocuous questions, it cannot be forgotten that they have been raised in the context and circumstances mentioned in the Plaint and Written Statement viz the performance of religious ceremonies after cremation of dead body of Parsi Zoroastrian. Under these circumstances, therefore, I am unable to accept the submissions made by Mr. Chagla, the learned Senior Counsel appearing on behalf of Plaintiffs that only by interpreting the Trust Deed, it can be declared that action of the Trustees is beyond their authority given to them under the Trust Deed. Plaintiffs, therefore, by posing these questions to the Court are asking this Court to indirectly decide the cause espoused by them viz cremation of the dead and seeking a declaration that such a practice is not unreligious. In any event, this Court will have to address itself to the said question while giving answers to the questions raised by Plaintiffs. In my view, it is quite well settled that the complex and contentious issues should normally not be decided by the Court while answering the questions raised in Originating Summons.

26. There is sufficient material brought on record by Defendants which indicate that High Priests of Parsi Zoroastrians have deprecated the practice followed by the said two Priests of disposing the body of the dead by cremation other than by putting the dead bodies in the Tower of Silence and of conversion and, thereby, have challenged Plaintiffs' claim that practice followed by the said two Priests is not unreligious.

27. Mr. Dada, the learned Counsel Senior Counsel appearing on behalf of Defendants has also relied on substantial portion of the Trust Deed which states that the High Priest has a right to decide the issue which, according to Mr. Dada, is a conclusive decision to decide the controversy and that the conclusive decision has been given by the High Priest on the said controversy, who has held that the said action of the two Priests is unreligious. In the light of this material which is on record, in my view, the matter cannot be accurately and properly resolved by merely interpreting the Trust Deed and it will be necessary to adjudicate this issue after giving opportunity to both parties to lead evidence on

this aspect which can be properly done in a suit and not in Originating Summons, more particularly because it involves religious issues which affect majority of the members of Zoroastrian Religion.

Conclusion:

28. The Originating Summons is, therefore, dismissed. Suit does not survive. Since Originating Summons itself is disposed of, Chamber Summons No. 362 of 2010 does not survive and the same is disposed of accordingly. Liberty is granted to Plaintiffs to take out appropriate proceedings before the appropriate court. All contentions raised by both parties are kept open.