State Bank of India Vs Mohuragang Gulma Tea Estate and Another

Appeal Suit No. 16 of 1988

Court: Calcutta High Court

Date of Decision: May 17, 1988

Acts Referred:
Constitution of India, 1950 â€" Article 143(a)

Hon'ble Judges: R.N. Pyne, Acting C.J.; U.C. Banerjee, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Umesh Chandra Banerjee, J.
The rules of the High Court at Calcutta has special significance in regard to the procedural aspect for the

purpose of due administration of justice. It has stood the test of time and the powers of the High Court to frame the rules have been preserved

under the Letters Patent which is saved by the provisions of Code of Civil Procedure. It appears that from time to time, the High Court by

resolutions adopted rules of the Original Side which are also being saved by the Letters Patent and CPC and have binding effect in regard to the

suits instituted in the Original Side of this Court and certain other matters related thereto.

2. The matter in issue in this appeal is indeed an interesting one, as also important since it involves question in regard to the interpretation of these

rules.

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.

4. In the matter under consideration, it appears that the plaintiff/respondent has applied before this Court under Chapter XIII of the Rules of

Original Side of this Court by way of an originating summons and obtained an ex parte order of injunction restraining the enforcement of a Bank

guarantee by way of an ad interim interlocutory relief. On the returnable date the appellant herein pressed for vacation of the ad interim order on

the ground that in the facts, question of having an originating summons taken out by a party does not arise, far apart the grant of an interlocutory

order of injunction since Chapter XIII of the Original Side Rules of this Court deals mainly with construction and interpretation of instruments and

other documents and no final relief as has been prayed for, can be granted under an originating summons. The learned Judge, however, was

pleased not to vacate the same and directed filing of affidavits. It is at this stage this appeal has been preferred against the grant of an ad interim

injunction on the plea of demurrer that an originating summons does not lie for the purpose of grant of relief as prayed for in the summons and since

all interlocutory orders are in aid of the main suit no ad interim relief can be had in the facts and circumstances of the case under consideration.

5. The plea of demurrer has a definite significance in legal proceedings.

6. It is a plea in law that even if the opponent''s facts are, as he says, they yet do not support his case. In order to succeed to a plea of demurrer,

therefore, in the facts and circumstances under consideration, the plaint as filed will have to be considered as if correct on factual aspect and

consideration of the matter be effected on the basis thereof.

7. Mr. Sarkar appearing for the appellant contended that the Court has no jurisdiction to deal with the matter in issue by way of an originating

summons. Mr. Bachwat submitted that a close scrutiny of the language of various rules under Chapter 13 of the Rules of the Original Side of this

Court would lend support to his contention that the Court can go into the issues as raised in the matter.

8. In order to appreciate the contentions it would be convenient at this stage to consider the language of the rules under Chapter 13 of the Rules of

the Original Side of this Court. Rule 1 of Chapter 13 reads as follows :

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 claming to be creditors, legatee, heir, or legal representatives or others;

(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.

9. Incidentally the marginal notes may also be looked into for the purpose of true intent of the rule makers. The marginal note reads as follows :-

Who may take out originating summons and in respect of what matters.

10. Rules 4 and 6 also ought to be looked in this context. Rules 4 reads as follows :

A vendor or purchaser of immoveable property or their representatives respectively may, at any time or times, and from time to time, take out an

originating summons returnable before the Judge in Chambers, for the determination of any question which may arise in respect of any requisitions

or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the

existence or validity of the contract).

Rule 6 reads as follows :-

6. Any mortgagee or mortgagor, or any person entitled to or having property subject to a charge, or any person having the right to foreclose or

redeem any mortgage, may take out, as of course, an originating summons, returnable before the Judge in Chambers, for such relief of the nature

or kind following as may by the summons be specified, and as the circumstances of the case, may require that is to say, sale, foreclosure, delivery

of possession by, or recovery of any deficiency from the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.

11. Strong reliance was placed on Rule 9, Rule 14 and Rule 17 which read as follows :-

9. Any person claiming to be interested under a Will, or other written instrument, may apply in Chambers by originating summons, for the

determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.

14. The affidavit where accepted shall be filed and numbered as an ordinary suit, and entered in the register of suits, but after the serial number the

letters ""O.S."" shall be placed to distinguish it from plaints in ordinary suits.

17. On the hearing of the summons, where the parties thereto do not agree to the correctness of the facts set forth in the affidavit, the Judge may

think necessary; and may give such directions as he may think just for the trial of any questions arising thereout. The judge may make such

amendment in the 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.

12. It appears that the plaintiff (Respondent herein) entered into an agreement with the foreign seller for purchase of a second hand motor vessel

''Frost Askvin'' later named M. V. Gulma for U.S. $ 415000 and the plaintiff deposited 10% of the purchase price of the vessel with the defendant

No. 1 at its Branch in London in the joint names of the plaintiff and the foreign seller. For payment of the balance 90% of the purchase price

payable to the foreign seller being U.S. $ 373500 the plaintiff and the defendant (appellant herein) entered into an agreement in writing, dated 24th

March 1977 whereby the appellant agreed to advance to the plaintiff the said amount from its Nassau Branch on the terms and conditions

mentioned therein for the purpose of effective adjudication of the disputes. The relevant terms and conditions are as follows :

3. The term loan shall carry interest during such applicable interest period (as hereinafter defined) from the date the term loan is disbursed till

repayment at a rate equal to 2% above LIBOR which expression shall mean the rate of interest offered by the Bank''s London City Office

presently located at 14/1B, Gresham Street, London EC 2 (U .K.) for 6 months deposit as quoted at 11 a.m. two days prior to the first day of

each interest period to Prime Banks in the London Interbank Market for deposits of EURODOLLARS any amount equal to principal amount

outstanding. If the Bank''s London City Office shall be unable or otherwise fails to provide the foregoing rate on any day for determination of the

interest rate the same shall be an Arithmetic mean of the offered rate supplied by any other Prime Banks in London selected by the Bank. The

interest period mean each successive period of 6 months commencing from the date on which the terms loan is made. Interest on the term loan

shall be payable on the last day of each interest period falls on a day which is not the business day that interest period shall be extended to the next

following business day unless such period falls in the next calendar month in which event such interest period will and on the immediately

proceeding business day. In the event of the borrower failing to make payment when due by acceleration or otherwise of all or any portion of the

term loan such unpaid amount shall bear interest from the date such payment shall be due until payment in full thereof at an interest rate during the

first month of default equal to 2% per annum above the one month rate (that is to say the rate charged by the Bank''s London Office to Prime

Banks in the London Interbank market for deposits of Eurodollars in the an amount equal to such unpaid amount for a one month period)

applicable on the day on which such unpaid principal portion shall be due and for each subsequent one month period at an interest rate equal to

2% per annum over the one month rate applicable on the first day of each succeeding one month period, such interest to be payable on the last

date of such one month period.

5. The principal amount of the term loan shall be repaid by the borrower to the bank in fourteen semi-annual instalments of U.S. $ 26,679 each,

the first of such instalments to be paid not later than six months from the date the term loan is disbursed and each subsequent instalment to be paid

every six months thereafter, provided that if any repayment falls due on a day which is not a business day the due date for payment shall be

extended to the next calendar month in which event such repayment shall be due on the immediately preceding business day.

6. The bank has agreed to advance the term loan on the understanding that United Industrial Bank Ltd. (hereinafter referred to as ""United

Industrial Bank"") shall assume responsibility to the Bank for the full amount of the term loan and interest thereon as also of any costs charges and

expenses for which the borrower shall be liable to the Bank in respect of the term loan. The borrower shall produce from the said United Industrial

Bank a guarantee guaranteeing due repayment of the amount of the term loan and Interest thereon and all other amounts for which, the borrower

shall be liable to the Bank in respect of term loan. The guarantee of United Industrial Bank shall be in a form acceptable to the bank.

7. The borrower shall also create in favour of the bank or its nominee a second statutory mortgage of the borrower''s vessel ""Frost Askvin"" subject

to the first mortgage to be created thereon in favour of United Industrial Bank.

9(a). All payments by the borrower under this agreement or the note shall be made to the bank at its office located at 460, Park Avenue, New

York, or any other office of the bank designated by the bank from time to time for the amount of the office. If the bank through which the term loan

hereunder shall be made in dollars.

13. In pursuance of the aforesaid, the plaintiff caused a guarantee being No. 38/42, dated 24th March 1977 of the United Industrial Bank Ltd. to

be furnished in favour of the defendant No. 1. The plaintiff also created a second statutory mortgage of the said vessel in favour of the appellant

subject to the first mortgage in favour of the United Industrial Bank Ltd. The appellant thereafter duly disbursed and paid to the foreign seller U.S.

$ 373500 in terms of the agreement noted above.

14. It further appears that after taking delivery of the vessel the plaintiff arranged for modification thereto so as to make it suitable for plying in the

tropical conditions and in India-Gulf route by reason of which required a further advance to the extent of U.S. $ 89,051.40 therefore which the

appellant agreed to advance and in fact disbursed and paid the same to the plaintiff on terms and conditions contained in a further agreement in

writing dated December 13, 1978. Subsequently the plaintiff caused a guarantee being No. 39/145, dated December 13, 1978 of the United

Industrial Bank in favour of the appellant.

15. According, however, to the plaintiff the latter duly repaid the entire amount of the principal and interest in terms of the above noted two

agreements and nothing remained due and payable, indeed it was contended that the plaintiff had over paid the appellant to the extent of U.S.

$11410.78 and requested the appellant to release the two guarantees being No. 38/42 and 39/145 furnished by the United Industrial Bank to

release the said vessel M.V. Gulma from the mortgage created by the plaintiff as noted above. The defendant on the contrary, however, claimed a

further sum of U.S. $ 60,488.22 as interest by reason of non-payment on due dates.

16. According to the plaintiff upon the constructions of the above noted two agreements, the appellant No. 1 is not entitled to claim and the plaintiff

is not liable to pay interest upon interest for delayed payment, if any, of the instalments thereunder.

17. In the circumstance, the plaintiff stated that the following questions arise for determination by this Court under Chapter XIII of the rules of the

Original Side :

(a) Whether in the facts and circumstances of the case and upon the true construction of the agreements, dated March 24, 1977 and December

13, 1978 the plaintiff is entitled to :-

(i) the release and discharge of the guarantee being Nos. 38/42 and 39/145 respectively, dated March 24, 1917 and December 13, 1978 issued

by the defendant No. 2 in favour of the defendant No. 1.

(ii) redemption of the second mortgage in respect of the motor vessel ""GULMA"".

(b) Whether upon true construction of the said agreements the defendant No. 1 is entitled to claim interest upon interest from the plaintiff for the

delayed payment, if any, of the instalments payable thereunder.

(c) Whether upon construction of the said agreements payment by the plaintiff to the defendant No. 1 at its said designated office amounted to

payment in terms thereof.

(d) Whether upon the true construction of the said agreements the defendant No. 1 is entitled to claim interest for delayed remittance by it from its

said designated office to its said Nassau branch and by reason of delay by its said branch to credit the account of the plaintiff even after the receipt

of the said amounts.

(e) To what relief the plaintiff is entitled ?

18. For the grant of an interlocutory relief the plaintiff''s averment ought to be noted in extenso. In paragraph 20 A the plaintiff stated :-

20A. Inspite of the aforesaid and inspite of the fact that no amount is due and payable by the plaintiff to the defendant No. 1, the defendant No. 1

illegally, wrongfully and mala fide threatens enforce the said guarantees bearing Nos. 38/42 and 39/145 respectively, dated March 24, 1977 and

December 13, 1978 furnished .the defendant No. 2 in favour of the defendant No. 1. In this connection copies of the relevant correspondence are

annexed hereto and collectively marked "D". As the plaintiff did not intend strain its relationship with the defendant No. 1, it by its letter, dated

January 4, 1988 in full and final settlement of all disputes even offered to forgo its claim against the defendant No. 1 and even to pay U.S. $

5,489,99. The defendant No. 1, however, by its letter, dated January 6, 1988 did not accede to the said proposal of the plaintiff and wrongfully

insisted upon payment of its alleged claim of U.S. $ 65,978.75 and U.S. $ 16,889.22 aggregating to U.S. $ 82,867.59 and threatened that unless

the same was paid by January 20, 1988 it would invoke the guarantees furnished by the defendant No. 2 in its favour. It is significant that even

though the defendant No. 1 is threatening to enforce the said bank guarantees, it is not in a position to justify its alleged claim in terms of the

agreements between the plaintiff and the defendant No. 1 even to furnish the break up of its alleged claim. It is further significant to note that the

defendant No. 1 repeatedly admitted that, in terms of the said agreement between the plaintiff and the defendant No. 1 interest upon interest was

not payable.

19. It is on this backdrop the plaintiff also prayed for an order of injunction as an interlocutory relief restraining the appellant from enforcing the two

Bank guarantees bearing No. 38/42 and 39/145, dated March 24, 1977 and December 13, 1978 respectively furnished by the United Industrial

Bank in favour of the appellant. Strenuous submissions have been made as regards the prayers in the summons and the questions framed for this

Court to answer in the body of the plaint and as such the prayers in summons ought also to be noted here. The prayers read as follows :

(a) Whether in the facts and circumstances of the case and upon the true construction of the agreements, dated March 24, 1977 and December

13, 1978, the plaintiff is entitled to

(i) the release and discharge of the guarantees being Nos. 38/42 and 39/145 respectively, dated March 24, 1977 and December 13, 1978 issued

by the defendant No. 2 in favour of the defendant No. 1;

(ii) redemption of the second mortgage in respect of the, motor vessel ""Gulma"";

(b) Whether upon true construction of the said agreements the defendant No. 1 is entitled to claim interest upon interest from the plaintiff for the

delayed payments, if any, of the instalments payable thereunder ;

(c) Whether upon construction of the said agreements payment by the plaintiff to the defendant No. 1 at its said designated office at No, 1, Strand

Road, Calcutta, amounted to payment in terms thereof;

(d) Whether upon the true construction of the said agreements the defendant No. 1 is entitled to claim interest for delayed remittance by it from its

said designated office at No. 1, Strand Road, Calcutta, to its said Nassau branch and by reason of delay by its said branch to credit the account of

the plaintiff even after the receipt of the said amounts ;

(e) Release and discharge of the guarantees being Nos. 38/42 and 39/145, respectively, dated March 24, 1977 and December 13, 1978 issued

by the defendant No. 2 in favour of the defendant No. 1;

(f) Redemption of the second mortgage in respect of the motor vessel ""GULMA "";

(g) Injunction restraining the defendant No. 1, its servants, agents and assigns from giving effect to or enforcing bank guarantees Nos. 38/42 and

39/145 respectively, dated March 24, 1977 and December 13, 1978 or realising, collecting or receiving any money thereunder or giving effect to

in any way or manner whatsoever ;

(h) Injunction restraining the defendant No. 2, its servants, agents and assigns from in any way or manner making any payment under or in terms of

the Bank Guarantee bearing Nos. 38/42 and 39/145 respectively, dated March 24, 1977 and December 13, 1978 to the defendant No. 1 or to

anyone else ;

(i) Ad interim orders in terms of prayers (g) and (h) above ;

(j) Costs be paid by the defendant No. 1;

(k) Such further order or orders be made, and relief or reliefs be granted which in the facts and circumstances of the case, this Honourable Court

may deem fit and proper"". Apparent inconsistency as regards the questions raised in the summons and in the body of the .plaint filed under Chapter

XIII or the non-compliance of the Rules as to the form of the summons though strongly commented upon by Mr. Sarkar appearing for the

appellant, but in my view the same do not go to the root of the points raised in the matter under consideration. At best there exists an irregularity

which cannot in my view outweigh the course of justice. In that view of the matter the contention of Mr. Sarkar in that regard fails.

20. Mr. Sarkar next contended that the Court has no jurisdiction to deal with the matter in issue by way of an originating summons since Chapter

XIII of the Rules of Original Side of this Court deal mainly with the interpretation and construction of documents and other instruments and

determination of questions for declaration of rights only. No further relief or any consequential relief of any kind by way of injunction can be

granted since the Court in an originating summons cannot go into the matter and grant relief. In any event, it was contended that Rule 10 makes the

position clear enough as regards its applicability since it is a discretion of the Court and the Court ought not to grant any final relief apart from

declarations in an originating summons. It was contended that the claim of the Bank arose out of the agreement and/or trade usage and on this

score reliance was placed on Pagat''s Law of Banking 9th Edition wherein it has been stated as follows :

There is no common law right to charge even simple interest on an overdraft but the claim could be supported on the ground of universal custom of

bankers or on the basis of implied agreement. Where the customer has acquiesced in the system under which the interest is charged, that also

would justify the claim. Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of

banker and customer exists, and the relationship is not changed into that of mortgagee and mortgagor. The taking a mortgage or a charge by way if

legal mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to

preclude compound interest.

21. In support of this contentions Mr. Sarkar placed reliance on the decision of Lewis v. Green reported in 1905 (2) Chn. 340. Warrington J.

while dealing with the matter observed:

Now under those circumstances, the applicant persists in asking me to determine these questions of construction. In my opinion I ought not to do

so. It seems to me that under such circumstances as those under which this summons was issued, Order LIV (A) is not the appropriate mode of

procedure. The result will be this; the Court may, after considerable litigation, involving an argument in a court of first instance, an argument in the

court of Appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the questions of construction raised by

this summons the applicant is right. Well, what then ? No relief can be given on that. There are other points which have to be decided. They can

only be decided by bringing an action and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction,

he is ultimately found to be wrong. The respondent will have had to pay all the expense of the litigation on the question of construction, which will

be utterly useless. It seems to me that where one finds circumstances such as I find here, the procedure under Order LIV (A) is improper. It is only

intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the

litigation between the parties.

22. The decision in Lewis & Green was considered by this Court in the case of Gokul Chand De and Others Vs. Gopi Nath Dey and Others, . In

that decision this Court observed :-

In the present case, the answers given by the learned Judge on the question of construction, have not disposed of the summons and I have left

certain questions unanswered. Moreover, in the facts of the present case, the pleas in bar raised by the opposite parties, if sustained, might render

the question of construction unnecessary.

On the above grounds, I am of opinion that the Court should not have adopted the procedure by way of an originating summons, but should have

relegated the parties to a suit.

23. Mr. Sarkar submitted that as a matter of fact the learned trial Judge ought not to have entertained the plaint, since on a plain reading of the

correspondence exchanged between the parties, it is apparent that the claim lodged by the appellant is in regard to a charge of interest in terms of

trade usage and custom as it available to a Banker against his constituent.

24. Mr. Bachawat on the other hand placed strong reliance on three English decisions and submitted that proceedings commenced by an

originating summons is an action and interlocutory order by way of appointment of Receiver or injunction can be had therein. The first of the series

is the case of Re: Franke Drake & Co. v. Francke (a) reported in 58 Law Times wherein North, J. observed :

It is important that there should be no mistake about this matter. In my opinion, the proceeding commenced by an originating summons is an action,

and an application for the appointment of a Receiver can be made in that action either in court or in chambers at any time whether before or after

the trial or the hearing in Chambers, which is equivalent to the trial. In the present case I think it is necessary there should be a general

administration judgement, but I shall allow the plaintiff no more costs than if he had commenced his action by originating summons.

25. The next case relied upon is the case of Weston v. Levy reported in 1887 WN 76 wherein Stirling, J. appointed a Receiver in an originating

summons. For the purpose of proper appreciation the order made therein is set out in extenso hereinbelow:

This was a motion for the appointment of a receiver Swinfen Eady, for the plaintiff, submitted that the case of Re : Bywaters Estate (1 Jur. (N.S.)

227), and Brooker v. Brooker (3 Sm. & Giff. 475) , where authorities for what was asked, but in the absence of any decisions the court had

under the judicature Act, 1873 (36 & 37 Vict. c. 66) s. 25, sub-s 8, jurisdiction to make the appointment. The order made in Chambers was

equivalent to a judgement in an action commenced by writ. He also referred to Coleman v. Llewellin (34 Ch. .D. 143).

The defendant Levy appeared in person.

The defendant Valentine, second mortgagee, did not appear by himself or counsel. Stirling, J., made the order, appointing a receiver, at once.

26. The last in the series is the case of Barr v. Harding reported in 58 LT 74, wherein Kay, J. observed as follows :

The plaintiff should have proceeded by originating summons. I make the usual foreclosure order in this case and direct the taxing master to allow

such costs as the plaintiff would have been entitled to if he had proceeded in originating summons and no more.

27. Next decision relied upon by Mr. Bachawat in the case of Harrowby & Anr. vs. L.eicester Corporation reported in 114 LT 129. In that

decision. Astbury, J. considered the merits of the matter and the preliminary objection, as regards the maintainability of the originating summons

was not favoured. The question raised in the last noted decision was. as follows :

Whether on the true construction of this agreement the defendants were at liberty to put an end to the agreement by notice in writing in the absence

of any determination as to the condition of water by local Government Board.

28. In that decision, while dealing with the observations of Warrington J. in the case of Lewis v. Green (supra) - Astbury, J. observed :

Of course it is impossible to say in the case of any contract that the parties may not litigate after they have determined what the true construction of

their contract is, but in the case before Warrington J. the whole point was whether the defendant owed the plaintiff money, which was entirely a

question of fact. Warrington, J. said that he was not going to try half the question. In the present case it may, in a sense, be said that there are two

disputes between the parties; one whether the notice is a good notice under Clause 13, and, secondly, what rights the defendants have or may

have independently of Clause 13 if it be the fact that this water has changed in its quality and is no longer fit for domestic use. As to what second

dispute, I do not think I have any concern on this summons at all. The only dispute which I am concerned with, and the only dispute I think to

which this summons is relevant, is whether a notice of determination purported to be given under Clause 13 is good or bad. If that is decided he

parties will know how they stand. If it is not decided, one of them at all events, may be placed in a position of considerable difficulty and

embarrassment. So such for the preliminary point.

29. Astbury, J. further went on to observe :

I think, on the true construction of this Clause, that the determination by the Local Government Board, or if there be an alternative, by some

alternative arbitrator, as to which I determine nothing, is a condition precedent to the right to give a notice, and I think the plaintiffs are entitled - on

this summons to a declaration that, on the true construction of this clause, the defendants are not at liberty to determine or put an end to this

agreement.

30. The above noted English decisions, in my view, do not lend any assistance to the contentions raised by the plaintiff as the same are clearly

distinguishable on facts. Astbury, J. in Lecister Corporation"s case categorically recorded that in the vent there being a question of fact, the matter

ought not to be dealt with by way of an originating summons.

31. Before, however, proceeding with the matter any further, two other decisions ought also to be considered. The first being the decision of the

Chancery Division in the case of In re: Giles Real and Personal Advance Company v. Michell reported in 43 Chancery Division 391 wherein

Cotton, L.J. observed :

There may be a question as to the validity of their mortgage having regard to their position as trustees, but the question of priority does not arise in

the administration of the trust. The Judge decided either that he had no jurisdiction to decide the question of priority of the mortgages, upon an

originating summons, or, that if he had, it was not proper to decide it in an action commenced in that manner. I agree with him. In my opinion the

court has no jurisdiction to decide such a question on an originating summons; but I decidedly hold that, if it has jurisdiction, it is not proper to

decide it upon an originating summons. Under the rules the court has jurisdiction only to decide certain special matters on an originating summons,

and the question whether the court has an originating summons, and the question whether the court has jurisdiction in this case depends upon

whether the rules give it power to decide the questions at issue here. I cannot find in Order LV, Rule 3, anything justifying such a point as this being

determined upon an originating summons.....I am of opinion that it would be very wrong to decide such questions as this in these informal

proceedings. This mode of procedure is better to decide matters which are not of an involved nature, and not questions which may require

considerable discretion. In my opinion the decision of Mr. Justice North was right. With respect to the question of costs we cannot deal with that,

as we have upheld his decision, and he has exercised his discretion concerning them.

32. In the same decision Lindley L.J. observed :

But in my opinion Mr. Justice North was quite right in refusing to decide such a question as this upon an originating summons. The procedure on a

summons is plainly laid down in the rules. By Rule 10 of Order LV, there is a discretion given to the Judge to make an order or not for

administration of a trust. Then by Rule 7 the application is to be supported by such evidence as the Judge may require, which is generally affidavit

evidence; and by Rule 9 it shall be lawful for him to pronounce such judgement as the nature of the case shall require. This procedure does not

seem applicable for deciding such a question as the present. A Judge may properly decline to decide a question of priorities between mortgagees

on affidavit if the question turns on disputed facts. Therefore, if it is treated as a question of convenience or expediency, it would not be right to

decide this point upon an originating summons, whether the court has jurisdiction or not. I am of opinion that the Judge was quite right in his mode

of dealing with the case.

33. The other decision which ought also too be noted in this context is the decision in the case of Lock v. Pearce reported in 1893 (2) Ch. 271

wherein Lindlay J. observed :

It is what is technically called an originating summons, asking, first, for a declaration that there was no forfeiture in fact, by reason of the breach of

covenant to repair the premises. I will pause there to ask if any Chancery practitioner over heard of such a thing ? Obviously not. Their right was to

proceed by an action commenced by writ. An originating summons is a process introduced in order to save costs, and is not applicable to such a

case as this at all Then the summons proceeds to ask in the alternative for an order for relief against the said defendant"s right of re-entry and

forfeiture upon such terms as to the court may seem fit, whether that relief can be given them depends upon the true construction of the action.

Then the summons goes on to ask for an injunction by way of prohibition or otherwise restraining all further proceedings Upon the judgement in the

actions of ejectment in the country court, on ground, among other things, of want of a prayer in an originating summons ? For such a purpose an

originating summons is utterly inappropriate.

34. Be it noted here that the point for consideration in the matter under consideration is whether the plaintiff/respondent owned the

defendant/appellant any money which is entirely a question of fact. Whereas, the appellant contended that the claim of the Bank is based on trade

usage and custom as also for damages, the respondents contended that since the term "loan" is covered in terms of an agreement, question of

payment of interest on interest dehors agreement does not and cannot arise. From the facts it appears that the defendant/appellant"s claim for a

sum of U.S. Dollar $ 60,488.22 arises by reason of non-payment of the Bank"s dues on due dates. On the state of pleadings and the questions

raised in the summons, it also appears that question of redemption of mortgage is also a necessary issue before the Court.

35. Questions (b), (c) & (d) as raised by the plaintiff on a close scrutiny, involve certain amount of evidence which, in my view, would be

inexpedient to deal with in an originating summons. In any event in regard to the question of payment of interest on interest being for bidden in the

case of term loan along with issue of trade usage supplementary oral evidence is required for effective adjudication.

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 CPC would have to be given a complete go by. Needless to say however that the CPC

prescribes certain forms of decree which is not available to an originating summons. The intent of the rule makers would 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 resumed

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 maker. 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. The plea of trade usage and Banker"s right to charge

interest on interest which are obviously matters of fact ought to be dealt with, and the English decisions cited by Mr. Bachawat in that respect, do

not lend any assistance. The view expressed above find support from Daniel"s Chancery Practice (8th Edition Vol. I) wherein it has been

categorically stated that the object of the order is to enable the Court to decide question of construction where the decision will settle the litigation

between the parties not questions which if decided one way only will do so. It has been further stated that if no question of construction arises, the

Court even if it has the jurisdiction, will not give partial relief by making of declaration of rights of the person interested.

37. In the view I have taken as noted above as regards the maintainability of the originating summons in the facts under consideration, I am not

expressing any opinion as regards the grant of interlocutory relief by way of an injunction or appointment of Receiver in an originating summons and

as such the cases cited on that score need not be dealt with excepting recording that the passages cited from Odger"s and Atkin"s Pleading as also

Daniel"s Chancery Practice do not have any bearing in the facts of the case under consideration since the views expressed related to administrative

actions and I find some justification in Mr. Sarkar"s submission on that score.

38. In the premises, this appeal succeeds on the ground of non-maintainability of the originating summons. The order of the learned trial Judge is

thus set aside and quashed and as such the originating summons is also dismissed. The respondent-plaintiff, however, would be at liberty to agitate

the issues in a properly constituted suit and as such in the interest of justice, operation of this order is stayed for a period of two weeks from the

date or reopening of the Court after summer holidays. The plaintiff/respondent to pay the costs of this appeal.

39. Mr. Bachawat appearing for the respondent orally prays for issuance of certificate under Article 143(a) but in our view the issues raised are

not the questions of general public importance, which require. to be adjudicated by the Supreme Court. In that view of the matter the prayer is

rejected.

R.N. Pyne Act. C.J.

40. I agree.