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with the appeal afresh after hearing his contentions. As the 1st defendant did not apply to the appellate Court, then it is quite clear that the Court executing the decree could not entertain any application to alter the terms of the decree. We have more than once decided that it is not for the execution Court to enter into the merits or demerits of the decree. Its only functions are to carry out the directions of the Court. Therefore as the 1st defendant had taken no steps to get the appellate order set aside, the only decree that could be executed was the decree which is now before us which directs that the properties other than property No. 3 should be sold in default of payment of the decretal amount. The appeal, therefore, must be allowed and the order of the Subordinate Judge restored with costs throughout.

SHAH, J. :—I agree.

Decree reversed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GOVINDLAL BANSILAL, APPELLANT *v.* BANSILAL MOTILAL AND OTHERS, RESPONDENTS*.

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August 5.

Letters Patent, 1865, clause 12—Suit for partition—Part of property, outside British India—Leave of Court—High Court—Jurisdiction—Practice—Procedure.

In a suit filed in the High Court at Bombay for partition of immoveable properties situated in British India, part whereof was within the local limits of the Court, defendant No. 1 contended in his written statement that the plaintiff should be compelled to bring into hotchpot all the properties in his possession in the Hyderabad State, or in the alternative that the partition should be so effected as to allot to the plaintiff's share properties of sufficient value out of those lying at Hyderabad. During the pendency of the

* O. C. J. Appeal No. 51 of 1921 : Suit No. 688 of 1917.

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suit a Receiver was appointed by the Court and he was empowered to file a suit in Hyderabad with consent of parties for possession of properties situated there. The Receiver, however, was unable to obtain possession of the said properties the suit being held not maintainable by the Hyderabad Court. Thereupon, defendant No. 1 applied to the High Court for leave to file an additional written statement in which he counter-claimed a partition of all properties outside British India and prayed that leave should be given by the Court under clause 12 of the Letters Patent. The trial Judge dismissed the application holding that leave could not be given as the High Court had no jurisdiction to entertain a suit for partition of lands outside British India even though part of the properties was within the local limits of its original jurisdiction.

On appeal,

Held, that the Court had power to grant leave but that in the special circumstances of the case and in view of the attitude taken up by the plaintiff it was not advisable that leave should be granted to the defendant to file his counter-claim which asked for partition of properties outside British India, as it would delay the final decision of the suit and create difficulties in the way of granting a partition decree which would have no possible chance of being executed.

Balaram v. *Ramchandra* [1], referred to.

Vaghoji v. *Camaji* [2], considered.

PER MACLEOD, C. J. :—I think that, in the first instance, the Court would have power to grant leave in a partition suit where part of the property is outside British India. Undoubtedly where part of the property is outside British India, the Courts would be very slow to grant leave, so that the Court could exercise jurisdiction over such property, as difficulties would arise in the execution of any decree that might be passed in the suit, unless all the parties were agreed that the Courts should exercise jurisdiction and would assist in carrying out the terms of the decree that would be passed in the suit. The question whether the discretion should be exercised in favour of granting leave can be raised before the hearing, and while there may be cases where a Court would leave the matter to be decided at the hearing, there may be other cases where the Court would decide the question against the party asking for leave at once. If the leave is granted, still that does not prevent the Court at the hearing deciding that no direction should be given with regard to property outside the jurisdiction, but that the parties should be left with regard to that property to a separate suit.

APPEAL from an order of Pratt J.

(1) (1898) 22 Bom. 922. (2) (1904) 29 Bom. 249.

The plaintiff alleged that one Shivlal Lachram and his adopted son Motilal Shivlal were a separated branch of an undivided Hindu family and carried on business in 1852 as shroffs and money lenders in the names and styles of Shivdatram Lachram and Shivlal Motilal at Hyderabad (Deccan) and in the name of Shivlal Motilal at Bombay; that Shivlal died at Hyderabad in 1862 leaving his adopted son Motilal Shivlal who continued the said business; that Motilal Shivlal adopted the plaintiff, Bansilal, in 1865; that the plaintiff on his adoption became entitled to an equal share with his father Motilal Shivlal in all the properties in his hands including the said business, the same being ancestral joint family properties; and that Motilal Shivlal died on 15th June 1917 leaving him surviving the plaintiff, the plaintiff's five sons defendants Nos. 1 to 5, and two sons of the 1st defendant Govindlal being defendants Nos. 6 and 7, all of whom by survivorship became entitled to the family properties which were approximately valued at four to five crores of rupees. The plaintiff sued the various defendants for partition of the family properties. The partition sought was, however, confined to the properties situated in British India, although a general declaration was prayed for that all the properties at Motilal Shivlal's death were joint and undivided properties. As part only of the property was within the local limits of the High Court leave under clause 12 of the Letters Patent was duly obtained. Defendants Nos. 8 and 9 were respectively the wife and daughter of the plaintiff.

The first defendant submitted that by his will, dated 3rd June 1917, Motilal Shivlal expressed an unequivocal intention to hold his one-half share in the properties in his hands as separate and effectually disposed of the said moiety under the provisions of his

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will appointing first defendant as executor. In addition, the first defendant contended that the plaintiff should be compelled to bring into hotchpot all the properties lying outside British India in the Hyderabad State and that if either on account of the professed inability of the plaintiff or otherwise the said Hyderabad properties could not be brought into hotchpot the partition should be so effected as to allot to the plaintiff and the 8th defendant (should she be entitled to a share) for their respective shares properties of sufficient value out of those situate and lying at Hyderabad.

A Receiver was appointed by the High Court and the parties agreed that the said Receiver should file a suit for possession of properties in Hyderabad with their consent and manage the same. The Receiver's suit was dismissed by the original as well as the appellate Court at Hyderabad on the ground that such a suit though filed with consent of parties was not maintainable.

The first defendant subsequently made an application to the High Court to file an additional written statement in which he counter-claimed partition of all properties outside British India including those at Hyderabad and Rajputana and prayed that leave should be given under clause 12 of the Letters Patent.

The application was heard by Pratt J. who dismissed it on the ground that, having regard to the preamble to the Letters Patent, where in a suit for land leave was asked for because part only of the land was within the local limits, the part outside must be within the limits of the Presidency of Bombay, and that the High Court had no jurisdiction to entertain a suit for partition of lands outside British India even though part of the property was within the local limits of the ordinary original civil jurisdiction. The

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material portion of his Lordship's judgment was as follows:—

PRATT, J.:—[His Lordship after stating the facts said:—] In argument a good deal has been said about the construction of clause 12 of the Letters Patent. The case of *Vaghoji* v. *Camaji*[1] was a case in which the land was wholly out of jurisdiction and I doubt if the dictum of Sir Lawrence Jenkins that leave under clause 12 is only required where the cause of action shall have arisen in part within the limits of the ordinary original civil jurisdiction was intended to overrule the construction put upon that clause in *Balaram* v. *Ramchandra*[2]. That construction is supported by *Jairam Narayan Raje* v. *Atmaram Narayan Raje*[3] and by *Seshagiri Rau* v. *Rama Rau*[4] and has now the sanction of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*[5]. If part, therefore, of the immoveable property is within the limits of the ordinary original civil jurisdiction, the suit as to the whole would be maintainable under leave granted under clause 12.

But the question still remains what whole?

The jurisdiction of the High Court extends over the Presidency of Bombay subject to such directions and limitations as to the exercise of ordinary original civil jurisdiction beyond the limits of the Presidency towns as may be prescribed by the Letters Patent. This is under section 9 of the Indian High Courts Act, 1861, 24 & 25 Vic. c. 104, recited in the preamble to the Letters Patent. These directions and limitations as regards the ordinary original civil jurisdiction are contained in clauses 11 and 12 and under them the

(1) (1904) 29 Bom. 249 at p. 253.
(2) (1898) 22 Bom. 922.
(3) (1880) 4 Bom. 482 at p. 487.
(4) (1896) 19 Mad. 448.
(5) (1914) 41 Cal. 972; L. R. 41 I. A. 110.

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ordinary original civil jurisdiction is to be exercised within specified local limits and in certain cases with leave without those limits. But when it is without these local limits, it must still be within the limits of the Presidency of Bombay. The whole of the immoveable property covered by the leave must, therefore, be property within the limits of the Presidency. The rule under clauses 11 and 12 of the Letters Patent is in truth a rule of local venue like that in sections 16 and 20 of the Civil Procedure Code and does not operate to confer jurisdiction in foreign lands or lands situate without the limits of the Presidency.

It is true there are cases in which suits in regard to foreign lands are entertained under the equitable jurisdiction as suits *in personam*. But it is not necessary to refer to those cases for a suit for partition is a suit *in rem*.

It matters not that plaintiff has appeared to waive the point of jurisdiction, for consent cannot confer jurisdiction.

My conclusion, therefore, is that this Court has no jurisdiction to entertain a suit for partition of lands outside British India, even though part of the estate is within the local limits of the ordinary original civil jurisdiction.

The case of *Ramacharya* v. *Anantacharya*[1] was a case under the Civil Procedure Code, but the judgment of Telang J. sets forth very clearly the futility of an attempt to bring into hotchpot in a partition suit properties situate outside British India. The statements in paragraphs 4 and 5 of the defendant's written statement are irrelevant and should not have been made.

I dismiss the application with costs and certify for counsel.

(1) (1893) 18 Bom. 389.

Defendant No. 1 appealed.

Desai, for the appellant.

Bahadurji, acting Advocate General, for respondent No. 1.

Desai, with *Mulla*, for respondents Nos. 2, 6 and 7.

Munshi, for respondents Nos. 3, 4 and 9.

Bahadurji, acting Advocate General, with *Tarapore-vala*, for respondent No. 8.

MACLEOD, C. J. :—This is an appeal from the decision of Mr. Justice Pratt dismissing an application by the first defendant in the suit for leave to file an additional written statement. The suit was filed in 1917 by Bansilal Motilal, the father of the first defendant, asking for a declaration that all the properties in the hands of Motilal Shivlal at his death were ancestral joint family properties, and passed on his death by survivorship to the plaintiff and defendants Nos. 1 to 5 and defendants Nos. 8 and 9, and that all the properties in British India might be partitioned amongst the plaintiff and the other members of the joint family entitled thereto by and under the directions of this Honourable Court. Clause 11 of the plaint is as follows :—

"The first defendant resides and part of the properties both moveable and immoveable are situate and the cause of action has arisen in Bombay within the jurisdiction of this Hon'ble Court and the plaintiff submits that, with leave granted under clause 12 of the Letters Patent, this Hon'ble Court will have jurisdiction to try the suit and to order partition of all the joint family properties situate in British India."

Leave was granted under clause 12 of the Letters Patent.

The first defendant in filing his written statement in clause 12 said :

"This defendant submits that as the condition precedent to any portion of the joint ancestral properties situate or lying in British India being given to the plaintiff towards his share he may be ordered to bring into hotchpot all

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the properties in his possession at Hyderabad and to account for the same. This defendant submits that if either on account of the professed inability of the plaintiff or otherwise the said Hyderabad properties cannot be brought into hotchpot the partition of the said joint family properties should be so effected as to allot to the plaintiff and the 8th defendant (should she be held entitled to a share) for their respective shares properties of sufficient value out of those situate and lying at Hyderabad."

A considerable amount of the family properties both moveable and immoveable are in Hyderabad outside British India, and all attempts to deal with those properties by means of a Receiver appointed by this Court have not availed the parties, so that at the present moment this Court can exercise no control whatever over the properties in Hyderabad. The parties agreed that the Receiver appointed by this High Court of Bombay should file a suit in the Hyderabad State asking that he might be entitled to take possession of all the properties of the deceased within the Hyderabad territories and to manage them. That suit was dismissed, and the decision dismissing the suit was affirmed in appeal. The result, therefore, is that at present in regard to the properties in Hyderabad State there is a deadlock. The plaintiff says that is due to the attitude adopted in Hyderabad, not of the plaintiff himself, but of the authorities, and it is also due to the judicial decision of the Highest Court of Appeal in the State subject to the final decision of the Judicial Committee. The decision of the Court of Appeal was given on the 7th March 1921.

This application was made on the 1st of April 1921. The additional written statement sought to be filed was declared on the 21st February 1921. Now the reason given for the application for filing an additional written statement was to the effect that the first defendant wished to include in the additional written statement a counter-claim which, if treated on the same footing as a plaint, could, with leave granted

under clause 12 of the Letters Patent, come within the jurisdiction of this Hon'ble Court. In the additional written statement the first defendant counter-claimed that all the joint family properties situated in British India and in the territories of His Exalted Highness the Nizam and the income thereof and the properties at Nagaur and in any other Native State might be partitioned by this Hon'ble Court as contended for by the first defendant in his written statement, dated the 15th January 1919; that the plaintiff might be ordered to render an account of the income of the immoveable properties situated in the territories of His Exalted Highness the Nizam and the outstandings due in the said territories on the footing of wilful default, and for further and other relief which it is not necessary to set out in detail.

The application was dismissed by the learned Judge on the ground that when in a suit for land leave is asked for because only part of the land is within local limits, the remaining portion of the land must be within the limits of the Presidency of Bombay, and it would necessarily follow from that, that, according to the view taken by the learned Judge, this Court has no jurisdiction to entertain a suit for partition of land outside British India, even though part of the estate is within the local limits of the ordinary original civil jurisdiction.

Now the proper construction of clause 12 of the Letters Patent has been a constant subject for discussion. On the one hand it has been argued that, in a suit for land or other immoveable property, unless the whole of the land or immoveable property is within the jurisdiction, the Court has no jurisdiction to try the case; the other construction is that, if part of the land or immoveable property is situate within the jurisdiction, then in case the leave of the Court

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shall have been first obtained the Court will have jurisdiction to try the suit. In *Balaram* v. *Ramchandra*[1] the plaintiff sued for partition of certain property, alleging it to be joint family property, consisting of a house in Bombay and certain fields at Vavla in the Thana District. It was held that as to Vavla property the Court had no jurisdiction because the leave had not been asked for under clause 12 of the Letters Patent. Mr. Justice Candy considered the construction of clause 12 of the Letters Patent. He said (p. 925):

"The uniform practice of the three High Courts at Bombay, Calcutta and Madras has apparently been to read that clause as if it ran as follows...'(*a*) In the case of suits for land or other immoveable property, such land or property situated either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the the said High Court',...I confess, were the matter *res integra*, I should be inclined to doubt the correctness of the above construction, but there are obvious difficulties in whatever way we regard the clause, and I am not prepared after this lapse of time to question the uniform practice of all the Courts."

Therefore, it was at that time considered by the decisions of the Courts of Calcutta, Madras and Bombay that clause 12 of the Letters Patent with regard to suits for land should be given the wider construction.

In *Vaghoji* v. *Camaji*[2] the suit was a suit for land entirely outside the local limits of the jurisdiction of the High Court, and, therefore ordinarily speaking, the question would not arise what construction should be applied to clause 12 of the Letters Patent. But Sir Lawrence Jenkins said (pp. 253-254):

"It is some times overlooked that under section 12 of the Letters Patent leave is only required where the cause of action shall have arisen in part within the local limits of the ordinary original jurisdiction of the High Court: in no other case is there any power or need to give leave under the section."

(1) (1898) 22 Bom. 922.

(2) (1904) 29 Bom. 249.

Balaram v. *Ramchandra*[1] was referred to as deciding that in a partition suit the Court has no jurisdiction over land outside the local limits. But, with all due respect, what was held in *Balaram* v. *Ramchandra*[1] was that the Court had no jurisdiction with regard to the land outside the local limits unless leave had been obtained to sue under clause 12 of the Letters Patent.

In *Bachoo* v. *Nagindas*[2] the suit was for partition of property which was partly within the local limits of the jurisdiction and partly outside but not outside British India. Leave was obtained under clause 12 of the Letters Patent. But when the case came on for trial before me on the Original Side, it was faintly argued that the Court had no power to grant leave under clause 12 in the case of a suit for land partly within and partly without the jurisdiction, and following the decision in *Balaram* v. *Ramchandra*[1] and other decisions of the Calcutta and Madras High Courts, I held the Court could grant leave under clause 12 in suits for land where the land was partly within and partly without the jurisdiction ; and although the case was taken first to the Court of Appeal and then to the Privy Council, no further argument appears to have been raised on the question what is the proper construction of clause 12, and it might safely be presumed that, if as a matter of fact the Court had no jurisdiction to grant leave in the case of a suit for land partly within and partly without the jurisdiction, even if the parties did not raise the point, the Court must have taken the point, and the suit would have been held to be bad.

But the learned Judge considered that the land outside the local limits must still be within the local limits of the Presidency of Bombay. He refers to section 9 of the Indian High Courts Act of 1861, recited in the

[1] (1898) 22 Bom. 922.

[2] (1914) 16 Bom. L. R. 263.

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preamble of the Letters Patent. But I cannot see that the preamble in any way fetters this Court in construing clause 12 of the Letters Patent which directs that in the case of a suit for land or immoveable property, if part of the land is within the local limits, then the suit can proceed provided leave of the Court has first been obtained. What gives the Court jurisdiction is, first, that part of the land is within the local limits; and, secondly, the fact that leave has been granted. The question of granting leave is purely a question for the discretion of the Court and it will be considered according to the facts of each case whether it is advisable that leave should be granted. In ordinary cases leave is granted practically as a matter of course, unless either the portion of the land or the part of the cause of action inside the local limits is so trifling that it is not desirable that the suit should be tried in the High Court. It is open to the defendant to apply for a revocation of the leave granted, and if the defendant can show that the Court had no power to grant leave, then no doubt that application should be made at the earliest opportunity, as, if the Court had no power to grant leave, that is fatal to the suit. But if it is merely a question of discretion, whether or not leave should be granted, it is open to the defendant to ask the Court to exercise its discretion against the plaintiff according to the circumstances of the case; and undoubtedly, where part of the property in a partition suit is outside British India, the Courts would certainly be very slow to grant leave, so that the Court could exercise jurisdiction over such property, as undoubtedly difficulties would arise in the execution of any decree that might be passed in the suit, unless all the parties were agreed that the Courts should exercise jurisdiction and would assist in carrying out the terms of the decree that would be passed in the suit.

The question really then in this case seems to me to be whether, on the facts which are now presented to us, it is advisable that leave should be granted to the defendant to file this counter-claim which asks for partition of the properties outside British India, considering the very contentious attitude which is taken by the plaintiff and his wife, the eighth defendant, and the decision of the Hyderabad High Court which has decided that it will not allow the Receiver to continue a suit filed with the consent of all the parties with the object of getting possesion of the properties in Hyderabad. I think, speaking for myself, that, in the first instance, the Court would have power to grant leave in a partition suit where part of the property is outside British India. But the question whether its discretion should be exercised in favour of granting leave, no doubt, can be raised before the hearing, and while there may be cases where a Court would leave the matter to be decided at the hearing, there may be other cases where the Court would decide the question against the party asking for leave at once. Of course, if the leave is granted, still that does not prevent the Court at the hearing deciding that no direction should be given with regard to property outside the jurisdiction, but that the parties should be left with regard to that property to a separate suit. I cannot exclude the possibility of a partition suit being filed in which all the parties are anxious that the joint family property wherever situate should be divided according to law, and are willing to assist the Court in such a division. I am not prepared to say, if the parties were so willing, that the Court would have no jurisdiction whatever to order partition in cases where the properties were in part within the local limits even if the remainder of the properties were outside British India. But in this case, if the

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Court granted leave, the chances of the parties being willing to partition the property in the case of the Court passing a partition decree appear to me to be rather remote, and as the plaintiff and the eighth defendant have asked us to decide the question with regard to leave on its merits at this stage, I think we have to consider what the chances can be, on the facts presented to us at present, of their attitude changing when the suit actually comes on for hearing. Certainly it is a question which should be decided as soon as possible. Otherwise if leave is granted the suit after a considerable time will come on for hearing, and the Court, seeing the obvious difficulties in the way of granting a partition decree which would have no possible chance of being executed, will probably confine itself to the properties within the jurisdiction or certainly to the properties within British India, and leave the parties to partition the properties outside British India as best they may in other proceedings. I think, therefore, as this question has come before us for argument at this stage we should be only delaying the final decision with regard to partition of all the properties if we allowed leave to be granted.

I do not think that the decision in *Ramacharya* v. *Anantacharya*[1] can be taken as laying down anything in opposition to what I have said. That was a suit for partition filed in the First Class Subordinate Judge's Court at Satara. The defendants pleaded that the plaintiff should bring into hotchpot certain family property at Gwalior. Admittedly the suit being filed under the Civil Procedure Code, the Satara Court had no jurisdiction to deal with property at Gwalior. But the Court was asked to exercise its authority against

[1] (1893) 18 Bom. 389.

the plaintiff *in personam*, and Mr. Justice Telang said (pages 391, 392):

"Here the property alleged to be family property lies outside the jurisdiction of this Court and indeed outside British India. It is plain that the Court has no jurisdiction and no machinery for partitioning that property. Such jurisdiction and machinery are wanting in exactly the same way whether the suit is one like *Dada Naik's case*, where the plaintiff, in the first instance, claimed partition property outside the jurisdiction, or whether it is like the present case where the defendant asks that property should be brought into hotchpot for purposes of division although it lies outside the jurisdiction. It must, therefore, be futile to call on the plaintiff to bring that property into hotchpot for purposes of partition...But it is said that although the Court cannot make partition of property in a foreign jurisdiction it may nevertheless take such property into its calculation and award to the plaintiff in possession so much only of the property in British India as will equalize the shares of the plaintiff and defendant. In the first place, this is doing indirectly that which the law says may not be done directly. Secondly, it excludes a plaintiff who has property in a Native State, for no fault of his own, from what ordinarily would be his proper share in properties in British territory. And thirdly, in the event of the property in British territories being less than that in the Native State, it will exclude him from all share or benefit out of the former property. It appears to me that these results are much more inequitable than the results of refusing to entertain jurisdiction in any way, direct or indirect, in relation to the property in Native States."

The circumstances here are different, but I do not wish at this stage of the proceedings to say anything that might affect the decision of the Court which hears this suit on the question with regard to hotchpot, which will no doubt be raised under the written statement of the first defendant which has already been filed. I think, therefore, that the decision of the learned Judge must be confirmed, but not on the ground on which the original application was dismissed. I think that the Court should exercise its discretion in not granting leave in this case, as it will only tend to defer the final decision of the points at issue between the parties, whereas if the question with regard to the partition of properties outside British India is at this stage excluded from the cognizance of the Court, then the parties may be able to come to

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some decision with regard to those properties, which they cannot possibly do as long as the question of partition is pending in this suit. The appeal is dismissed with costs in favour of the plaintiff. The other parties to pay their own costs.

SHAH, J.:—I concur in the order proposed by my Lord the Chief Justice. Having regard to the importance of the case and to the arguments which we have heard, I desire to state briefly the grounds on which it seems to me that the leave applied for should be refused. I need not recapitulate the facts which have been stated in the judgment just delivered. The point with reference to which various arguments have been urged is whether, as regards the counter-claim made by defendant No. 1 for the partition of immoveable property situated in the dominions of His Exalted Highness the Nizam, leave under clause 12 should be granted. The first question that arises relates to the construction of clause 12 of the Amended Letters Patent. On the one hand, it is contended that clause 12 limits the jurisdiction of the High Court in the case of land or other immoveable property, to property situated within the limits of the ordinary original jurisdiction of this Court and that no leave can be granted as to the part of the property situated outside Bombay. On the other hand, it is urged that such a limited construction has been consistently rejected by the High Courts in India, and that on the proper reading of the clause there is no justification for that restricted reading. I do not desire to discuss the cases on this point in detail. I may refer to the decision in *Balaram* v. *Ramchandra*[1] in which so far back as 1898 Candy J. accepted the view that in case the property was partly situate in Bombay and partly outside Bombay, with leave obtained, the Court would have jurisdiction to deal

[1] (1898) 22 Bom. 922.

with the property outside Bombay in the suit. Thereafter certain observations of Sir Lawrence Jenkins C. J. in *Vaghoji* v. *Camaji*[1] have been relied upon as conflicting with this reading of clause 12. No doubt if those observations are read without reference to the context and without relation to the facts of the case, they are susceptible of being read in that manner. But, on a consideration of the whole judgment in that case, I do not think that the current of decisions on that point was intended to be overruled. It is also clear that the point now under consideration did not arise in that case. The question was raised in the case of *Bachoo* v. *Nagindas*[2], the decision thereon being at p. 269. The property there was partly situated in Bombay and partly in the district of Thana outside Bombay, and leave was granted. It is true that the point was not raised before the Court of Appeal or the Privy Council when the case came to be dealt with on the merits by them. But the case affords an instance in which the wider construction was accepted and the restricted construction definitely rejected by the trial Court without any objection being taken by the parties in the Court of Appeal here or before the Privy Council. A reference has been made to the case of *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*[3] as practically deciding this point in the same sense. It has been suggested on behalf of the appellant in the course of the argument that by necessary implication their Lordships of the Privy Council have accepted the view of clause 12 which has so far been taken by the Indian High Courts. It is urged by way of reply with reference to this decision that the point was not raised, and a decision on the point could not be spelled out by

(1) (1904) 29 Bom. 249. (2) (1914) 16 Bom. L. R. 263.

(3) (1914) 41 Cal. 972; L. R. 41 I. A. 110.

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implication. That may be perfectly true. But apart from that case it seems to me that the case of *Bachoo* v. *Nagindas*[1] is a direct instance in point; and having regard to the course of the decisions, it seems to me that so far as this Court is concerned the construction of clause 12 so far accepted must be taken to be the true construction. The restricted reading would involve the result that this Court would have no jurisdiction to deal with any immoveable property situated outside Bombay, while a Subordidate Judge in the mofussil would be able to entertain a partition suit even though a part of the immoveable property may be situated outside his jurisdiction anywhere in British India under sections 16 and 17 of the Code of Civil Procedure. I do not think that the jurisdiction of this Court was intended to be so restricted or that it is in fact so restricted.

That being so, it follows that this Court has the power to grant leave, if under the circumstances of the case it is appropriate to do so. With regard to that the facts, broadly speaking, are that the plaintiff has filed a suit in this Court for partition of property in British India, including immoveable properties situated in Bombay, and for a declaration in respect of all property including property situated outside British India with leave obtained under clause 12. Among the various points raised in defence, one is that the whole property situated outside British India should be brought into account before partition of the property in British India could be effected. The counter-claim which is now made is, to a certain extent, a re-assertion of the point which was raised in the written statement of defendant No. 1. During the interval, however, the parties have not been able to see their way to take up a position which would render it

[1] (1914) 16 Bom. L. R. 263.

possible to partition the whole property at one time. Having regard to the facts, so far as they have transpired, it is difficult to believe that any useful purpose could be served by now allowing leave with reference to the counter-claim to property situated outside British India.

There is one general consideration with reference to the granting of leave when, as in this case, the property is situate not only outside Bombay but outside British India, viz., whether this Court would have any jurisdiction to deal with property situated in a foreign territory. It has been urged on behalf of respondents Nos. 1 and 8 that this Court has no jurisdiction in any case to deal with property situated in a foreign territory in a partition suit in which immoveable property is concerned: and in support of that contention the decision in *Ramchandra Dada Naik* v. *Dada Mahadev Naik*[1], the remarks in *Jairam Narayan Raje* v. *Atmaram Narayan Raje*[2] and *Vaghoji* v. *Camaji*[3], and the decision in *Ramacharya* v. *Anantacharya*[4] have been relied upon. In this appeal, however, I do not propose to decide this question. It is conceivable that in some cases it may be possible for this Court to deal with a partition suit in such a manner as to effect a partition once for all of all the property inclusive of the property situated in a foreign territory. As to the possibility of such a case arising I do not desire to raise any doubt. In such a case the point whether the Court has jurisdiction or not, if raised, would have to be dealt with by the Court, when the decisions and the observations, to which I have referred, would have to be considered. At the same time these cases suggest a fair general consideration to be borne in mind in determining whether it is

(1) (1861) 1 Bom. H. C. App. lxxvi.
(2) (1880) 4 Bom. 482 at p. 486.
(3) (1904) 29 Bom. 249 at p. 255.
(4) (1893) 18 Bom. 389.

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proper to grant leave in a particular case. Without expressing any opinion upon the question as to whether it is an invariable rule that in no case can this Court deal with property situated in a foreign territory in a partition suit, I am satisfied on the facts of this case, that the leave has been properly refused. It is true, as contended by the appellant, that clause 12 contains no territorial limitation as to the situation of the immoveable property outside the local limits of the original jurisdiction of this Court. For the purpose of granting leave, it is sufficient, according to law, if a part of it is situated within such limits. But the Court has to exercise its discretion in granting leave under that clause, with reference to the facts of the case. Though the fact that the plaintiff has obtained leave under this clause is a circumstance in favour of the appellant, so far as the present point is concerned, I think that on the whole the leave asked for should not be granted.

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Solicitors for the respondents: Messrs. *Merwan Kola & Co.*; *Bhaishankar, Kanga & Girdharlal*; *Manchershaw & Narbadashankar.*

Appeal dismissed.

G. G. N.