

1927  
EMPEROR  
v.  
DAJIBA

the husband, although he is stated to have been present in Court at the time Kouti's application was made. The case is, therefore, one to which the principles laid down in *Murray v. The Queen-Empress*<sup>(1)</sup> and *Emperor v. Ranchhod Bawla*<sup>(2)</sup> apply. I agree with the order proposed by my learned brother.

*Application dismissed.*

R. R.

(1) (1893) 21 Cal. 103.

(2) (1912) 37 Bom. 369.

### ORIGINAL CIVIL FULL BENCH

*Before Sir Amberson Marten, Kt., Chief Justice, Mr. Justice Fawcett,  
Mr. Justice Kemp, Mr. Justice Mirza, Mr. Justice Blackwell,  
Mr. Justice Patkar and Mr. Justice Taleyarkhan.*

HATIMBHAI HASSANALLY, APPELLANT AND DEFENDANT v. FRAMROZ  
EDULJEE DINSHAW, RESPONDENT AND PLAINTIFF<sup>o</sup>.

1926  
December 21  
1927  
January 31

*Letters Patent, clause 12—Mortgage by deposit of title deeds—Property mortgaged situate outside jurisdiction of High Court—Mortgage created in Bombay—Cause of action within jurisdiction of Court—Suit for sale of mortgaged property instituted in High Court—Leave of Court obtained—Jurisdiction.*

*Held, by the Full Bench (Fawcett and Mirza JJ. dissenting), that—*

1. A suit by a mortgagee of land to enforce his mortgage by sale is not a "suit for land" within the meaning of clause 12 of the Letters Patent of 1865.
2. A suit by a mortgagee of land, which is situate wholly outside the limits of the ordinary original civil jurisdiction of the High Court, to enforce his mortgage by sale can be maintained in the High Court under clause 12 of the Letters Patent if the cause of action has arisen wholly or, in case the leave of the Court shall have been first obtained, in part within the said limits.

*India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>, overruled.

*Holkar v. Dadabhai*<sup>(2)</sup> and *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(3)</sup>, approved.

The Despatch of the Secretary of State in connection with the Letters Patent of 1862 and 1865, and the Report of the Commissioners in 1852 regarding the proposed amalgamation of the Supreme Court and the Company's Courts held (Fawcett and Mirza JJ. dissenting) to be inadmissible in construing clause 12 of the Letters Patent except as regards the past history of the law up to that date and the inconvenience found in the administration of that law.

<sup>o</sup>O. C. J. Appeal No. 15 of 1926: Suit No. 1168 of 1925.

(1) (1925) 50 Bom. 1.

(2) (1890) 14 Bom. 353.

(3) (1916) 26 Bom. L. R. 535; 48 Bom. 629 f. n.

On the question whether the Court had jurisdiction by reason of the fact that the defendant dwelt and carried on business at the date of the suit within the local limits of the High Court's ordinary original civil jurisdiction the Bench was equally divided. Marten, C. J., Blackwell and Taleyarkhan, JJ. held that it had; Fawcett, Kemp and Mirza JJ. that it had not. Patkar J. expressed no opinion as he considered it unnecessary in view of the answer given to question No. 1.

Per MARTEN, C. J.:—The expression "suits for land" in clause 12 of the Letters Patent refers to suits to obtain or recover land, or alternatively to suits which substantially involve the recovery of land or its equivalent. The word "for" in the expression would seem to indicate that the title to, or possession of, immovable property must be the primary object of the action. But the primary object of a suit to enforce a mortgage by sale is money.

The High Court has succeeded to the equitable jurisdiction conferred upon its predecessor the Supreme Court by the Supreme Court Charter, 1823. Though under clause 19 of the Letters Patent, 1865, the law or equity to be applied in each case coming before the High Court in the exercise of its ordinary original civil jurisdiction is the law or equity which would have been applied if the Letters Patent had not been issued, yet clauses 11 and 12 govern the local limits of the Court's jurisdiction. The Court must first acquire jurisdiction under clauses 11 and 12 before applying the law or equity applicable under clause 19.

Clause 12 in effect is divided into two branches made up of (a) jurisdiction *re* subject-matter, and (b) jurisdiction *re* residence and place of business. The former would apply to suits for land where the property is within the jurisdiction, or in all other cases where the cause of action arises wholly or in part within the jurisdiction. The second branch would apply to jurisdiction in all cases where the defendant himself is within the jurisdiction.

Per FAWCETT, J.:—A suit by a mortgagee of land to enforce his mortgage by sale is a "suit for land" within the meaning of clause 12 of the Letters Patent.

The words "suits for land" in clause 12 mean suits substantially relating to land. This should primarily be judged by considering what is the nature of the relief sought by the plaintiff.

The exercise of jurisdiction *in personam* by the High Courts in India must be looked for in and based upon the wording of clause 12 of the Letters Patent. If such jurisdiction involves the exercise of jurisdiction in a suit for land then it would be contrary to the provisions of the Letters Patent to recognize it. It can only be exercised if the suit comes within the words "all other cases" in that clause. The equity jurisdiction of the High Court must be confined within the four corners of clause 12 as it at present stands.

There is no sufficient reason to depart from the view which Mr. Justice Candy took in *Balaram v. Ramchandra*<sup>(1)</sup> as to the construction of clause 12.

A suit falling under Order XXXIV, Civil Procedure Code, is a "suit for land" within the meaning of clause 12, and where such land is situated wholly outside the local limits of the ordinary original civil jurisdiction of the High Court, the suit cannot be maintained either under clause 12 or under any external equity jurisdiction of the Court.

(1) (1918) 22 Bom. 922.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLYFRAMROZ  
EDULJEE

Per KEMP, J. :—A “suit for land” means not only a suit for possession of land but also suits for title to or compensation for wrong or trespass to land which are properly regarded as “local actions”.

On a strict interpretation of clause 12 of the Letters Patent it would appear that defendant's residence or place of business within the jurisdiction furnishes a separate ground in every kind of suit entertainable by the High Court. But whatever may be the correct interpretation of clause 12, a different interpretation which has for so long been adopted and acted upon up to the present is not one which can be lightly disregarded. I am not prepared under the circumstances to now adopt a new construction.

Per MIRZA, J. :—A “suit for land” means a suit which is substantially for land, that is, for the purpose of acquiring title to or control over land. It includes any suit in which a decree is asked for operating directly upon the land. A suit which prays for any relief with reference to any specific immovable property is a suit for land.

The uniform practice of the three High Courts at Bombay, Calcutta and Madras, referred to by Candy J. in *Balaram v. Ramchandra*<sup>(1)</sup> is entitled to great weight. The last part of clause 12 of the Letters Patent does not contemplate the exercise of equity jurisdiction *in personam*. Had it been the intention of the Legislature to confer on the High Court an equity jurisdiction *in personam* in respect of suits for land outside its jurisdiction, language similar to that of the proviso to section 16 of the Civil Procedure Code would have been used.

Per BLACKWELL, J. :—The expression “suit for land” means a suit to obtain land. Its meaning cannot be extended so as to include a suit “substantially” for land where a question of title to the land may be involved.

The High Court has no equity jurisdiction independent of the jurisdiction conferred by clause 12 of the Letters Patent. Unless a suit is brought within the four corners of clause 12, the High Court has no jurisdiction to entertain it by seeking to apply the equity powers of the Courts in England, or any other powers.

The High Court has jurisdiction in suits for land or other immovable property wherever the land or property is situated, if the defendant at the time of the commencement of the suit dwelt or carried on business or personally worked for gain within the limits of its ordinary original jurisdiction.

Per PATKAR, J. :—The words “suit for land” mean a suit in which the substantial question is the right to land, or the primary object of which is to establish claims regarding title to or possession of immovable property.

There are difficulties in the way of giving a definite decision on the point whether the residence of the defendant affords a distinct and separate ground for the exercise of jurisdiction in mortgage suits. Firstly, residence of the defendant alone within jurisdiction has never been accepted by any High Court as affording a ground for the exercise of jurisdiction. The uniform practice of the Bombay, Calcutta and Madras High Courts is to the contrary. It would give the High Court wider jurisdiction than that possessed by any Court except under the Dekkhan Agriculturists' Relief Act. Secondly, the decree of the High Court proceeding on the residence alone as the ground for

the exercise of jurisdiction in respect of land situate say, at Madras or Calcutta, may not be capable of execution.

Per TALÉYARKHAN, J.:—A suit by a mortgagee for the realization of the moneys advanced by him to the mortgagor by sale of the mortgaged property is substantially a suit for the recovery of the mortgage debt, and as such it is not a "suit for land" within the meaning of clause 12 of the Letters Patent.

The High Court has jurisdiction to try suits of every description when the defendant dwells or carries on business or personally works for gain within the limits of its ordinary original jurisdiction.

#### SUIT on mortgage.

On November 26, 1913, the defendant deposited with the plaintiff in Bombay the title deeds of his immoveable property situate at Poona with intent to create an equitable mortgage in favour of the plaintiff to secure re-payment of Rs. 30,000 due to the plaintiff with interest at nine per cent.

As the defendant failed to pay the mortgage amount the plaintiff sued the defendant for the amount with interest.

Percival J. passed a preliminary decree for sale by consent of the parties, on June 4, 1925.

On December 10, 1925, the plaintiff took out a notice of motion for a final decree before Taraporewala J.

On the hearing of the notice the defendant contended that as the property mortgaged was situate at Poona and the recent judgment of the Full Bench in the *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> had decided that in such a case the High Court had no jurisdiction the Court had no jurisdiction to make a final decree; but this contention was over-ruled by the learned Judge who followed and concurred with the decision of Shah J. in *K. S. Ramaswamy Iyer v. Dhanbhai Shridharrao Mirajkar*<sup>(2)</sup> that the preliminary decree was binding on the Court and until set aside ought to be made absolute, and he accordingly passed a final decree.

The defendant appealed.

The appeal came on for hearing before Marten C. J. and Kemp J., who decided to refer certain questions to

(1) (1925) 50 Bom. 1.

(2) O. C. J. Suit No. 77 of 1925 (Unrep.).

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27  
 HATIMBLAI  
 HASSANALLY  
 v.  
 FRANROZ  
 EDULJEE

a Full Bench. Before the Full Bench was constituted another appeal, being Appeal No. 56 of 1926<sup>(1)</sup>, from the decision of Fawcett J. also came before the same two Judges. In the latter appeal the question in issue was whether a final decree for sale of the mortgaged property could be impeached on the ground that it was a nullity as the property was outside the limits of the High Court's ordinary original civil jurisdiction and the Full Bench in the *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup> had decided that in such a case the High Court had no jurisdiction. This issue was accordingly kept in view when the Court framed the following questions for the Full Bench :—

1. Whether a suit brought by a mortgagee of land to enforce his mortgage by sale is "a suit for land" within the meaning of clause 12 of the Letters Patent.
2. Whether a suit by a mortgagee of land to enforce his mortgage by sale can be maintained in this Court (either under clause 12 of the Letters Patent or under the equity jurisdiction of this Court when the mortgaged land is situate wholly outside the limits of the ordinary original civil jurisdiction of this Court but the defendant dwells or carries on business or personally works for gain within the limits of such jurisdiction at the commencement of the suit.
3. Whether such a suit can be maintained under clause 12 of the Letters Patent or under the equity jurisdiction of this Court if the mortgaged property is situate wholly outside the limits of the ordinary original civil jurisdiction of this Court, and the defendant does not at the commencement of the suit dwell or carry on business or personally work for gain within such limits, but the cause of action has arisen wholly or in case the leave of the Court shall have been first obtained, in part within the said limits.
4. Where a mortgagee of land situate wholly outside the said limits has obtained a preliminary decree for sale in this Court and such decree has not been appealed from, can the mortgagor-defendant object to a final decree absolute being passed pursuant to the preliminary decree on the ground that the Court had no jurisdiction under clause 12 of the Letters Patent or otherwise to hear and maintain the suit?
5. Whether a final decree for sale of land situate outside the said limits passed by this Court in a mortgagee's suit to enforce his mortgage can be challenged by independent proceedings on the ground that such decree was a nullity.

Before the arguments were concluded the Full Bench originally constituted was dissolved owing to the sudden death of Shah J., one of its members; and the case was re-argued before a Special Bench consisting of

(1) *Rajaram Tukaram v. The Central Bank of India* (1927), see post p. 711.

(2) (1925) 50 Bom. 1.

Marten, C. J., and Fawcett, Kemp, Mirza, Blackwell, Patkar and Taleyarkhan JJ.

*Mulla*, with *M. C. Setalvad* and *B. K. Desai*, for the appellant.

*Kanga*, Advocate General and *B. J. Desai*, for the respondent.

The arguments advanced at the Bar are fully dealt with in the several judgments printed below.

The formal answers given by the second Special Bench (Fawcett and Mirza JJ., dissenting) to the above questions were eventually as follows:—

1. No.

2 and 3. Yes, under clause 12 of the Letters Patent because this suit is not a suit for land, and the cause of action has arisen partly within the limits of the ordinary original civil jurisdiction of this Court, and the leave of the Court under clause 12 has been obtained.

4 and 5. Unnecessary to decide.

The Full Bench being equally divided in opinion records no finding as to whether the mortgage suit referred to in Question No. 2 could be maintained under clause 12 if no part of the cause of action arose within the above limits, but the defendant (as in the present suit) dwelt or carried on business or personally worked for gain within such limits at the commencement of the suit.

The judgments are given hereafter as follows:—

MARTEN, C. J., p. 521.

FAWCETT, J., p. 571.

KEMP, J., p. 630.

MIRZA, J., p. 653.

BLACKWELL, J., p. 672.

PATKAR, J., p. 686.

TALEYARKHAN, J., p. 706.

C. A. V.

MARTEN, C. J.:—The first and principal question of the five questions submitted to this Full Bench is: “Whether a suit brought by a mortgagee of land to

1926-27

HATIMBHAI  
HASSANALLY

2.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
ELULJEE

enforce his mortgage by sale is a 'suit for land' within the meaning of clause 12 of the Letters Patent." It will be noticed that the question has been deliberately confined to enforcing a mortgage *by sale*. That is the relief asked for in the present suit, and that is the relief ordinarily asked for on the Original Side. Indeed it was even said during the hearing that many Judges in this Court have refused to grant foreclosure at all. And personally I do not remember any case in which I was asked to pass a foreclosure decree, although I must have had hundreds of mortgage suits before me at various times during the last ten years.

2. Clause 12 of the Letters Patent runs as follows:—

"And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, 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 said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, in which the debt, or damage, or value of property sued for does not exceed one hundred rupees."

3. It will be seen that clause 12 divides suits into at least two branches, viz., (a) suits for land within the jurisdiction, and (b) all other suits where the cause of action arises wholly or partially within the jurisdiction, provided in the latter case the leave of the Court is obtained, or the defendant dwells or works for gain within the jurisdiction. For the present I omit from consideration the possibility of construing clause 12 as containing two other branches, viz., (c) where part of the land is within the jurisdiction and the leave of the Court is obtained, and (d) where all the land is outside the jurisdiction or the whole cause of action arises

outside the jurisdiction, but yet the defendant dwells or works within the jurisdiction. Confining then clause 12 to the first two branches (a) and (b), then if the present suit is one for land, it cannot be brought in this Court, as though the defendant dwells within the jurisdiction, the whole of the mortgaged land is situate without the jurisdiction. If, however, the present suit is not a suit for land, then it can be brought in this Court with leave, for undoubtedly a part of the cause of action arose within the jurisdiction inasmuch as the mortgage in question was effected by a deposit of deeds made within the jurisdiction.

4. In this connection section 59 of the Transfer of Property Act provides that :—

“Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay,...by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.”

It will be noticed that section 59 does not confine the mortgaged property to property within Bombay. And it is not disputed that in Bombay a valid mortgage is created by the deposit there of title deeds relating to land outside Bombay. (See *Laxman Ganesh v. Mathurabai*<sup>(1)</sup>.) Accordingly, leave under clause 12 of the Letters Patent was granted by the Court in the present case on the assumption that the case fell within the second branch (b) of clause 12 of the Letters Patent and not the first branch (a).

5. There is no other clause in the Letters Patent in which the precise words “suits for land or other immoveable property” are used, but clause 14 refers to “causes of action not being for land or other immoveable property”. That clause runs as follows:—

“And We do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of

(1) (1913) 38 Bom. 369 at p. 376.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANROZ  
EDULJEE

one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit."

Consequently, if a cause of action is for land or other immoveable property, then the joinder of the several causes of action otherwise permitted by that clause cannot be justified thereunder. Further, section 16 or 17 of the present Civil Procedure Code cannot be relied on, for those provisions do not apply to this High Court in the exercise of its original civil jurisdiction. (See section 120.) And though Order II, Rule 4, prohibits the joinder of any cause of action "with a suit for the *recovery* of" land with certain exceptions, yet it expressly provides (as does R. S. C., Order XVIII, Rule 2) that nothing in this rule is to be deemed to prevent any party to a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

7. The main questions, therefore, before us are (1) what is the true nature of a suit to enforce a mortgage by sale? and (2) what is the true construction of the words "suits for land"? On the first point there are at least two opposite views. The one view is that a mortgage consists of two elements, the debt and the security, but that in the eyes of the law the paramount element is the debt, and that on this consideration the whole basis of the law of mortgages is based whether in India or in England. Consequently, a suit to enforce a mortgage by sale is one primarily to obtain the payment of a mortgage debt either directly from the mortgagor, or indirectly from the proceeds of sale of the mortgaged property, leaving only the surplus proceeds, if any, for the mortgagor. The opposite view is that the main object of a mortgage suit is to get at the land, whether the actual remedy adopted be by foreclosure

or by sale: that the very fact that a suit is brought means generally that a mortgagor has refused or is unwilling to pay, and that accordingly it is the security itself which is to be realized by the process of the Court. If the relief asked for is for foreclosure, then the result of the foreclosure decree is to transfer the whole of the interest in the property to the mortgagee. If, on the other hand, the remedy adopted is that of sale, then by means of the Court's action the property is transferred, and though it be to a third party, yet nevertheless it is the land which has been operated on by means of the process of the Court.

8. As regards the second point, there are also at least two opposite views. One is that these words mean suits for the recovery or delivery of land. The other view is that the words are wider and should be construed as meaning "suits relating to or concerning land". Midway between these two extreme views comes a third view, viz., that the expression means "substantially suits for lands, or suits whose primary object is the acquisition of land or some interest therein".

9. This is an outline of some of the main arguments presented to us. But the discussion has covered an extremely wide field ranging in fact over the history and procedure in connection with the law of mortgages both in England and in India for over one hundred years. So, although it may be urged that the real question for our decision lies in a nutshell, viz., what is a mortgage suit and what is a suit for land, yet what was said by Lord Macnaghten with reference to the rule in *Shelley's* case in his famous judgment in *Van Grutten v. Foxwell*<sup>(1)</sup> seems apposite in the present case, viz., (p. 671):—

"But it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there. In spite of the simplicity of the view which commended itself to Mr. Hargrave and Lord Thurlow, and which, indeed, was never at

<sup>(1)</sup> [1897] A. C. 658.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANCOZ  
EDULJEE

any time wholly obscured, there grew up a mass of decisions so numerous and so perplexing that, in Lord Eldon's opinion, 'the mind is overpowered by their multitude and the subtlety of the distinctions between them'."

10. On the present hearing about one hundred authorities were cited to us. But in a case of this extreme importance, I in nowise grudge the time involved. On the contrary the Court is much indebted to the Advocate General for the mortgagee, and to Mr. Mulla and Mr. Setalvad for the mortgagor, for their clear and able arguments, and their industry in bringing to our attention all material considerations.

11. Taking then the first point, I think this is a case where we must go back to first principles. It is clear that a mortgage consists of a debt and a security, and further that a suit to enforce that security necessarily relates to both the debt and the security. It is also clear that, by English law, of these two elements, the debt is regarded as the primary, and the security as the secondary element. All that the mortgagee is absolutely entitled to is his money. If he gets his money, he must restore the security, for his interest in the security is always subject to redemption. On those principles are based the leading doctrine, "Once a mortgage always a mortgage", and the prohibition against clogging the equity of redemption. (See *Samuel v. Jarrah Timber and Wood Paving Corporation*.<sup>(1)</sup>)

12. Over one hundred and twenty years ago Lord Eldon in *Seton v. Slade: Hunter v. Seton*<sup>(2)</sup> has thus stated the law, viz., (p. 273):—

"To say, time is regarded in this Court as at law, is quite impossible. The case mentioned of a mortgage is very strong: an express contract under hand and seal. At law the mortgagee is under no obligation to reconvey at that particular day; and yet this Court says, that though the money is not paid at the time stipulated, if paid with interest at the time a re-conveyance is demanded, there shall be a re-conveyance; upon this ground; that the contract is in this Court considered a mere loan of money, secured by a pledge of the estate

<sup>(1)</sup> [1904] A. C. 323 at pp 326-7.

<sup>(2)</sup> (1802) 7 Ves. Jun. 265.

But that is a doctrine, upon which this Court acts against what is the *prima facie* import of the terms of the agreement itself ; which does not import at law, that, once a mortgage, always a mortgage ; but Equity says that ; and the doctrine of this Court as to redemption does give countenance to that strong declaration of Lord *Thurlow*, that the agreement of the parties will not alter it ; for I take it to be so in the case of a mortgage ; that you shall not by special terms alter what this Court says are the special terms of that contract."

13. So, too, in 1816 in *Quarrell v. Beckford*<sup>(1)</sup> Sir Thomas Plumer stated at p. 278 :—

"What is a Mortgage ? Everybody knows, it consists of two things ; it is a personal Contract for a Debt, secured by an Estate, and, in Equity, the Estate is no more than a Pledge or Security for the Debt ; the Debt is the Principal—the Estate is the Accident. Whether the Mortgagee is, or is not, in Possession of the Pledge, his right is precisely the same, with this difference, indeed, that he has never any right, in Equity, to the Estate, except as a Fund to pay him his Debt ; for every other purpose, the Estate is the Estate of the Mortgagor, and when the Debt is paid, all the Mortgagee's right and interest in the Estate ceases ; he has then the legal Estate only, and not a beneficial Interest in it...All the Cases treat the Mortgagee, as soon as he is paid, as becoming a mere naked Trustee, holding the legal Estate for the benefit of the *Cestui que Trust*, the Mortgagor."

14. I next turn to a modern text book, Halsbury's Laws of England, Vol. XXI, p. 70, where the law, in my opinion, is concisely and accurately stated :—

"A mortgage consists of two things. It is a personal contract for a debt and an estate pledged as a security for the debt. Every mortgage implies a debt and a personal obligation by the mortgagor to pay it...Incident to every mortgage is the right of the debtor to redeem, a right which is called his 'equity of redemption', and which continues notwithstanding that the mortgagor fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate."

Then the note (*g*) says :—

"At common law, unless the mortgagor strictly complied as to time and place with the condition of payment, he forfeited his estate, which became the absolute property of the mortgagee...From early times, however, the Courts of equity held that until foreclosure by order of the Court the mortgagor, by applying within a reasonable time and offering to pay principal and interest and all proper costs, might redeem the estate forfeited at law [*Emanuel College (Master, &c.) v. Evans*]<sup>(2)</sup>. As the right was only enforceable in the Courts of equity it was called the 'equity of redemption'."

(1) (1816) 1 Madd. 269.

(2) (1625) 1 Rep. Ch. 10 (18).

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANROZ  
EDULJEE

15. As regards Indian law, if we turn to the Indian Trustees Act, 1866, and the Trustees' and Mortgagees' Powers Act, 1866, we find the Indian Legislature applying many of the remedial provisions of the Trustee Act, 1850, (13 & 14 Vic. c. 60), the Trustee Act, 1852 (15 & 16 Vic. c. 55) and Lord Cranworth's Act (23 & 24 Vic. c. 145) to Indian mortgages and trusts. The preamble to the former Indian Act states that it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees in cases "to which English law is applicable". And the interpretation clause 2 provides that:—

"Mortgage" shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money."

This definition is taken direct from section 2 of the Trustee Act, 1850, except that "the High Court" is substituted for "a Court of Equity". Clause 3 provides that:—

"The powers and authorities given by this Act to the High Courts shall and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction...."

The Act then confers various powers on the High Court, including vesting orders in lieu of a conveyance in the case of a trustee (section 18) or of a Court sale of land (section 32):

16. It will be noted that section 3 expressly refers to "*extraordinary*" original civil jurisdiction. That is a jurisdiction given by clause 13 of the Letters Patent, and is far wider than the ordinary original civil jurisdiction given by clauses 11 and 12 of the Letters Patent. Clause 13 gives the High Court in effect jurisdiction over the whole of the Presidency, viz., "power to remove and to try and determine as a Court

of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court whether within or without the Presidency of Bombay subject to its superintendence”.

17. The other Act, viz., the Trustees' and Mortgagees' Powers Act, 1866, is confined by section 45 to property within British India, and to cases to which English law is applicable. It contains a somewhat similar preamble, and the definition of “mortgage” includes “every instrument by virtue whereof immovable property is in any manner conveyed, pledged or charged as security for the re-payment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt”. This latter definition is taken from section 25 of Lord St. Leonard's Act (22 & 23 Vic. c. 35).

18. It was held by Mr. Justice West in *In re Kahandas Narrandas*<sup>(1)</sup> that under the former Act the High Court has power to appoint new trustees of a Hindu charitable trust. And this decision was followed by myself in *Lang v. Moolji and Bhagwan*<sup>(2)</sup>. The view taken by the Bench in each case was that English law was “applicable” although the parties were Hindus: and that consequently a Hindu trust could enjoy the benefits of that Act. Mr. Justice West's instructive judgment should be read in its entirety, but I may quote one passage at p. 173, viz. :—

“I think that ‘the English law was applicable’ in 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not, consistently with the statutes and the charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them, and so preventing their desuetude by a system of rules borrowed from the English Courts of Equity.”

19. I, therefore, regard these two Acts, viz., the Indian Trustees Act, 1866, and the Trustees' and Mortgagees' Powers Act, 1866, as affording clear legislative

(1) (1881) 5 Bom. 154.

(2) (1919) 21 Bom. L. R. 1111.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

recognition of the applicability of the English law of mortgages in certain cases whether within or without the Presidency town of Bombay. The English law of mortgages can in no way be said "to subvert the native substantive laws" if any on the subject. On the contrary, one main object of English mortgage law is protection from usury; and the necessity for that protection is at least as great in India as in England. Many competent people would indeed say more so. And in our Presidency, the Dekkhan Agriculturists' Relief Act, 1879, has extended that protection in a marked degree. Mortgage suits against an "agriculturist" must be brought in the local Court (section 11), the real nature of the transaction may be enquired into and accounts reopened (sections 10A, 12 and 13), payment by instalments ordered (section 15B) and only simple interest allowed at the rate allowed by the Court [section 13 (e)].

20. Next, if we turn to the Transfer of Property Act, 1882, which was applied to this Presidency as from January 1, 1893, although section 58 defines a mortgage to be "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan", &c.—a definition on which Mr. Mulla for the mortgagor strongly relied—yet the subsequent provisions in sections 60 to 101 are in effect the English law of mortgages, including in particular the mortgagor's right of redemption (section 60), though certain exceptions are made on a few points, such as consolidation (section 61), tacking (section 80), and the effect of a mortgage to secure further advances (section 79). These sections include, however, the English rule as to marshalling securities (section 81).

21. As a matter of history, it would appear that in a certain class of mortgages the mofussil Courts, prior to

the Indian High Courts Act, 1861, were disposed to adopt the old common law rule and to hold that if the mortgagor once failed to redeem on the date specified, then he could not recover the property. This decision was arrived at, although the Regulation No. 4 of 1827, section 26, required the Company's Courts to act according to justice, equity and good conscience in the absence of a specific law and usage. After the Indian High Courts Act was enacted, the Bombay High Court held this practice to be erroneous (see *Ramji Tukaram v. Chinto Sakharam*<sup>(1)</sup>, and *Shankarbhai Gulabbhai v. Kassibhai Vithalbai*<sup>(2)</sup>)—a view which can hardly be supported having regard to the Privy Council decision in *Thumbusawmy Moodelly v. Hossain Rowthen*<sup>(3)</sup>. But the contest between the letter and the spirit of the law in this limited class of cases was finally put an end to by the Transfer of Property Act, 1882, if not before, and thenceforth it was clearly established that the mortgagee did not hold the property absolutely, but only subject to redemption. In other words the equitable principle of “once a mortgage always a mortgage” applied to all mortgages throughout this Presidency. Indeed as regards “agriculturists”, as defined in the Act, the Dekkhan Agriculturists' Relief Act, 1879, extended that principle in a marked degree as I have already shown. But to avoid any possible misunderstanding I should add that this Act does not apply in the present case, nor do the questions submitted to us relate to cases where the defendant establishes that he is an agriculturist.

22. A good illustration of the primary importance of the debt as compared with the security is derived from the devolution of the mortgagee's interest on death. It is clear that under English law (prior to the

(1) (1864) 1 Bom. H. C. 199.

(2) (1872) 9 Bom. H. C. 69.

(3) (1875) 1 Mad. 1.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDUIJEE

new Acts) the interest of a mortgagee was regarded as an interest in moveables and not in immoveables, and that consequently it passed to his next of kin, and not to his heir-at-law. Thus, in *In re Loveridge : Drayton v. Loveridge*<sup>(1)</sup>, Mr. Justice Buckley says (p. 863):—

“Regarding this matter upon principle, it seems to me that the property is for purposes of devolution to be treated as personalty. The testator at the time of his death was entitled to the mortgage debt, which was personalty, and as security for that the land was vested in him subject to redemption. The estate in the land descended to the heir; but at the moment of the testator's death the heir was, as it appears to me, only a trustee for the legal personal representative, who was entitled to the debt and to the beneficial interest in the land in respect of the debt”

23. So, too, in Halsbury's Laws of England, Vol. XXI, at p. 184, it is stated:—

“So long as the equity of redemption is not released or foreclosed or extinguished by lapse of time, the mortgagee's interest continues to be personal estate, notwithstanding that he may have entered into possession.”

In this Court in *Tarvadi Bholanath v. Bai Kashi*<sup>(2)</sup> Sir Lawrence Jenkins and Mr. Justice Chandavarkar held a mortgage debt to be moveable property within the meaning of section 268 of the Civil Procedure Code of 1882.

24. If, however, a decree for foreclosure absolute is made, then its effect is thus stated in Halsbury, Vol. XXI, at p. 294:—

“The effect of the order for foreclosure absolute is to transfer the equitable estate of the mortgagor to the mortgagee, and the mortgagor has thenceforth no interest in the property. The mortgagee holds the mortgaged property as absolute owner in lieu of the mortgage money, and, if it is real estate, he holds it as such, and not as personalty.”

25. So much for the mortgagee. It is equally clear that the interest of the mortgagor, notwithstanding the creation of the mortgage, remains, as before, immoveable property, and descends as such on his death. (See Halsbury, Vol. XXI, p. 146.)

<sup>(1)</sup> [1902] 2 Ch. 859.

<sup>(2)</sup> (1901) 26 Bom. 305.

26. If, then, as I hold to be the case, both in England and India the primary element in a mortgage is the debt and not the security, what is the primary element in a suit to enforce a mortgage by sale? Now, here the detailed relief really asked for is (1) an account of what is due to the mortgagee for principal, interest and costs under his mortgage, and (2) an order that in default of payment of the mortgage debt by a certain date, the mortgaged property or a sufficient portion thereof may be sold by order of the Court, and that the mortgagor may be ordered to execute a conveyance of the property to the purchaser at such sale, and that the proceeds of sale may be applied first in payment of the mortgage debt, and secondly as to any balance in payment to the mortgagor. If the mortgagor pays within the time limited by the order, or as subsequently extended, then there is an end of the suit. In that case the mortgagee in no sense recovers or gets any land. On the contrary he has to reconvey any interest in the mortgaged land which he may have to the mortgagor.

27. If, on the other hand, the mortgagor does not pay within the specified time, then equally so the mortgagee does not recover or get the land. That passes to the purchaser under a conveyance which the mortgagor is compelled by the Court's order to execute. The case is to some degree different if foreclosure is the remedy given, for in that case the ultimate result is that a mortgagee acquires the sole interest in the land, whereas previously he had only an interest subject to redemption. But that, as I have already stated, is not the precise question we have to determine here, and, therefore, I do not pursue it further. Similarly, the fact that a mortgagee may get leave to bid at the auction, and thus indirectly become a purchaser of the property, is to my mind immaterial in considering the present question. In that event he would acquire the

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBEHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

land qua purchaser like any third party and not qua mortgagee. Nor does the existence of a second mortgagee (if any) make any substantial difference in this respect. He may not be personally liable to the first mortgagee, but he may yet have to execute a conveyance to a Court purchaser, unless he pays the first mortgage.

28. It has been pointed out by my brother Fawcett that Order XXXIV, Rule 5, merely directs that the Court is to pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that Order XXI, Rule 92, provides that "the Court shall make an order confirming the sale, and thereupon the sale shall become absolute". He further states that the practice in the mofussil Courts is to be content with the order confirming the sale and not to require any conveyance. But, however that may be, the rules on the Original Side are quite clear in that respect. They set out in detail the procedure to be adopted by the Commissioner or Master in Equity for carrying out an order for sale. (See Rules 417—490.) Rule 460 expressly gives the Court purchaser a right to a conveyance, which by Rule 463 has to be settled by the Commissioner if the parties disagree. Rule 465 provides for enforcing the execution of such a conveyance. The foregoing rules relating to sales by the Commissioner are expressly made applicable to sales by the Court under Order XXXIV, Rule 5; and Rule 552 gives the right to a purchaser to obtain a certificate of sale and also at his own costs, a conveyance from the mortgagor. Further, the form of ordinary conditions of sale set out at page 326 of the Rules provides in condition 8 for the execution of a conveyance to the purchaser.

29. It was not even suggested at the bar that these rules are *ultra vires*. Section 104 of the Transfer of Property Act gives express power to the High Court to

frame rules for carrying out the provisions contained in Chapter IV relating to mortgages. Our Rules 541—555 are framed thereunder. Further, under clause 37 of the Letters Patent of 1865, this Court has power to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the Court, provided that the Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure. But, in my judgment, the rules in question are in no way inconsistent with Order XXXIV, Rule 5, or Order XXI, Rule 92, as has been suggested by my brother Fawcett. They are mere machinery for making effective the order of the Court. In fact they run on the same general lines as the rules prevailing under the English Chancery practice, except that unfortunately here we have no conveyancing counsel to advise on title. That arduous work in fact falls upon the Master in Equity himself. Apparently in the mofussil, the title is not investigated by a purchaser at a Court sale at all—so it is said. But there the value of the land is often trifling compared with that in the average High Court suit.

30. It, therefore, comes to this that the relief in a mortgage suit on the Original Side is really obtained by means of the “personal obedience” of the defendant to the Court’s orders, to borrow a phrase from the proviso to section 16, Civil Procedure Code. Normally the order confirming the sale does not operate as a conveyance under the practice on the Original Side. The purchaser is clearly entitled under Rules 460 and 552 to a conveyance as well, and that conveyance is made by the mortgagor through his personal obedience to the orders of the Court. If the mortgagor be unwilling to execute the conveyance, then I take it he may be imprisoned for contempt of Court, or alternatively the Commissioner may execute it for him

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMRIZ  
EDULJEE

1926-27

HATIMBHAJ  
HASSANALLY  
v.  
FRANCOZ  
EDULJEE

under Rule 465, or there may be a vesting order under section 32 of the Indian Trustees Act, 1866, which, by the express terms of that section, is to have the same effect as a conveyance.

31. If the purchaser is content with an order confirming the sale, that is his choice. In England he would not, for this order would merely confirm the auction and not effect a conveyance. So, too, I think that in dealing with valuable properties such as we are accustomed to in Bombay, the purchaser would normally require a conveyance. And in particular would he require this in a sale of foreign land. I have consulted the Commissioner Mr. H. H. Wadia on this point, and he informs me that "purchasers at Court sales of mortgaged property almost always require a conveyance", and he has been good enough to refer me to condition 8 of the usual conditions at Court sales already cited.

32. Nor, I think, need one be troubled by the fact that the decree may enable the purchaser to be put in possession of the land. It is in any event the purchaser who gets possession, and not the mortgagee. This, too, can be effected by an order *in personam* on the mortgagor. If in India there are facilities for sending the decree for execution by another Court, this does not affect the essential qualities of a mortgage suit. As I have already pointed out, Order II, Rule 4, does not prohibit possession being asked for in a mortgage suit. Nor is it essential to the validity of a mortgage suit relating to land outside the jurisdiction that every relief should be available to the plaintiff which he could claim if the land was situate within the jurisdiction. For instance, practical difficulties not unfrequently arise in debenture holder's actions brought in the English Courts in relation to lands abroad, where the local laws require registration or perhaps

prohibit foreigners from being on the register. In those cases the English Court does all it can do, and so would the Original Side here in an appropriate case.

33. Accordingly, with all respect, I disagree with the contention that though the English Courts act *in personam* in mortgage suits, the Original Side here does not do so, but acts directly and solely upon the land itself. Modern rules may give facilities for avoiding the actual imprisonment of the defendant. The English Courts also have power to make vesting orders or to nominate a person to execute a conveyance on behalf of a disobedient defendant. (See Trustee Act, 1850, sections 20 and 30, and Trustee Act, 1893, sections 30 to 33.) This does not mean that in mortgage suits the English Courts no longer act *in personam*, or cease to base their jurisdiction on that principle. So, here, Rule 465 is not exhaustive. The purchaser may still, I think, insist upon a conveyance by the mortgagor himself. And even if he does not, then the alleged operation in the mofussil of Order XXI, Rule 92, would only have much the same effect as a vesting order or as a conveyance executed by a nominee appointed by the Court.

34. In this connection it must be borne in mind that generally speaking this High Court has succeeded to the jurisdiction conferred upon its predecessor the Supreme Court by the Supreme Court Charter, 1823, (see section 11, Indian High Courts Act, 1861; clause 18, Letters Patent, 1862; clause 19, Letters Patent, 1865; and sections 106 and 130, Government of India Act, 1915). And under clause 36 of the Supreme Court Charter, 1823 (counting the clauses from the operative part and neglecting the recitals), the Supreme Court was expressly made a Court of Equity, and given an equitable jurisdiction corresponding to that of the Court of Chancery, including in particular power to

1926

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

summon the parties and to "compel...obedience to the decrees and orders of the said Court of Equity". In effect, therefore, this Court or its predecessor has been administering an equitable jurisdiction *in personam* for over one hundred years.

35. At the same time it must be pointed out that though under clause 19 of the Letters Patent, 1865, the law or equity to be applied in each case coming before the High Court in the exercise of its ordinary original civil jurisdiction is the law or equity which would have been applied if the Letters Patent had not been issued, yet I take it that clauses 11 and 12 govern the local limits of the Court's jurisdiction. In other words the Court must first acquire jurisdiction under clauses 11 and 12 before applying the law or equity applicable under clause 19. Further, it is clear that those local limits are not so extensive or at any rate are different from those stated in clause 23 of the Supreme Court Charter, 1823.

36. Counsel for the mortgagor approached this question differently from the line of argument suggested by my brother Fawcett. They contended, first, that the definition of mortgage in section 58 of the Transfer of Property Act shows that in India the primary element of a mortgage is the land and not the debt, and that hence the whole law of mortgages is substantially different. Secondly, it was urged that in any event this Court does not and cannot apply the same doctrine of *in personam* as the English Courts of Equity do, because the English Courts only pass mortgage decrees affecting foreign land, if they can find the defendant within the jurisdiction, and that in that class of suits they do not give leave for service out of the jurisdiction. On the other hand, it was argued that under clause 12 of the Letters Patent, if mortgage suits are not suits for land, then, provided the whole cause of action arose

within the jurisdiction, it would not be necessary to obtain the leave of the Court to sue, nor need the mortgagor be within the jurisdiction. Consequently, it was urged that the English equity jurisdiction depends on the defendant being within the jurisdiction, but the jurisdiction under clause 12 does not necessarily do so.

37. As regards the first point, I am satisfied that the definition in section 58 has no such wide-reaching effect as is contended. The subsequent clauses of the Transfer of Property Act, as I have already said, enact in effect the main provisions of the English law of mortgages and indeed amongst the descriptions of mortgages, section 58 (e) relates to an "English mortgage". It would indeed be strange if an English mortgage was thus to be deprived of its main characteristic. It was also pointed out by the Advocate General that section 8 provides that a transfer of property passes all the interest of the transferor in the property "and in the legal incidents thereof": and that such incidents include where the property is a debt or other actionable claim "the securities therefor" (with certain exceptions). This section seems again to recognize that of the two elements, viz., the debt and the security, the debt is the primary one—a view which I have already pointed out is strongly supported by the definition of mortgage in the Indian Trustees Act, 1866, and to some degree by the corresponding definition in the Trustees' and Mortgagees' Powers Act, 1866.

38. As regards the second point, it is true that there are some variations between the English practice and the practice of the High Court. The English practice as to service out of the jurisdiction is regulated by what is in effect a Code, viz., Rules of the Supreme Court, Order XI, Rule 1. But the facilities thereby given for service out of the jurisdiction have from time to time been extended, and can in no way be said to be finally

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EELJEE

fixed. Mr. Setalvad cited to us a passage out of Pigott on Service out of the Jurisdiction to the effect that originally the Courts of Equity used to give leave for service out of the jurisdiction. Then if the defendant appeared, well and good; but if he did not, the suit could not proceed, as any decree could not be made effective. Assuming that to be so, that would only mean this that the Chancery Court was prepared to exercise jurisdiction relating to any land, but that in fact it did not do so unless its decrees could be made effective by a process against the person of the defendant himself. This is analogous to the practice of the Chancery Courts in other respects which, for instance, will not usually pass a decree for specific performance of a building contract, although this rule is not without exceptions. (See Kerr on Injunctions, 4th Edition, p. 359.) This is because it considers that normally it cannot properly supervise the carrying out of such a decree. It may well be that under the present Rules of the Supreme Court, Order XI, Rule 1, although they have been extended from time to time, the Court either cannot or will not give leave for service out of the jurisdiction where the mortgage is one of foreign land, and the sole defendant is out of the jurisdiction. But what is thought proper in this respect as regards the English Courts as compared with the Courts of Scotland and Ireland on the one hand, and the Courts in Continental countries, such as France and Germany on the other hand, does not necessarily apply to matters in India between the City of Bombay and land twenty or thirty miles out, or on the other hand to land in other Presidencies. There is at any rate no difficulty as regards the territorial jurisdiction in British India, as there is, say, in the case of France.

39. Accordingly I do not propose to go into any further details on this point, interesting though they

may be. I, therefore, do not deal with the various English Acts cited at the bar tracing historically the evolution of service out of the jurisdiction. I may, however, refer to *Duder v. Amsterdamsch Trustees Kantoor*<sup>(1)</sup>, where, although the mortgage suit related to land outside the jurisdiction, Mr. Justice Byrne gave leave for service on the defendant outside the jurisdiction, because his co-defendant was properly served within the jurisdiction. This case shows that the jurisdiction of the English Courts is not necessarily ousted by the absence abroad of a defendant in a mortgage suit. Similarly, in *Bawtree v. The Great North-West Central Railway Company*<sup>(2)</sup>, the bonds were charged on land in Canada where the defendant Company was registered, but the trustees for the bondholders were served in England, and it was held by the Court of Appeal that the Company was a necessary and proper party, and that accordingly leave should be given for service out of the jurisdiction although the plaintiffs sought to have their charge on land outside the jurisdiction enforced by foreclosure or sale.

40. In this Court service out of the jurisdiction is regulated by clause 12 of the Letters Patent. We have no provisions corresponding to the Supreme Court Rules, Order XI, Rule 1. But unless the whole cause of action arises in Bombay, the leave of the Court has to be obtained to a mortgage suit where both the land and the defendant are out of the jurisdiction. Accordingly, in my opinion, this leave is a safeguard intended by the framers of the Letters Patent against an unfair use of the jurisdiction in mortgage as well as in other suits.

41. It was, however, contended that the cases might arise where the whole cause of action arose in Bombay. It was said that if the mortgage was executed in

1926-27

HATIMBHAI  
HASSANALLYv.  
FRANCIS  
EEDULJEE

(1) [1902] 2 Ch. 132.

(2) (1898) 14 T. L. R. 448.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Bombay, and the money was paid and to be repaid in Bombay, then the whole cause of action would arise there, and that no leave of the Court would be necessary. I express no opinion on the question whether the fact that the suit related to land outside the jurisdiction would make a part of the cause of the action arise without the jurisdiction. But even assuming the whole cause of action arose within the jurisdiction, then there would seem no great hardship in the Court of that jurisdiction enforcing the payment of the mortgage debt in question. For instance, if a Bombay bank lent money to a Bombay merchant on the security of land whether twenty or two hundred miles out of Bombay, probably both parties would prefer the High Court to decide any subsequent mortgage suit and not to oblige the parties to travel to some country Court where they would be without the assistance of their ordinary legal advisers. But if mortgage suits are suits for land, then, unlike in England, this High Court would have no jurisdiction in such a case, although the defendant was residing within the jurisdiction and could be served there; unless clause 12 can be construed to have a fourth branch (d) as regards residence, &c., as mentioned in paragraph 3 above.

42. In my judgment then it is erroneous to say that this High Court does not act *in personam* in mortgage suits. I am satisfied that it does, although in details there may be some differences nowadays between English and Indian practice. But those differences I do not regard as vital, nor as changing the essential qualities of a mortgage or a mortgage suit.

43. That brings me to the second main question, viz: What is a suit for land within clause 12? The words "suit" and "land" create no difficulty. It is the word "for" which causes all the difficulty. Speaking

for myself, and without attempting any definition, I should have thought those words referred to suits to obtain or recover land, or alternatively to suits which substantially involved the recovery of land or its equivalent. Personally I prefer the former meaning. For instance, a suit for foreclosure, or for specific performance, or for damages is a suit to obtain or recover foreclosure, specific performance or damages. We do not speak of a suit relating to or concerning foreclosure, specific performance or damages: But for the purposes of the present case, it is not necessary to insist on the former meaning. The alternative meaning which introduces the qualification of "substantially" may yet be adopted for testing whether a mortgage suit is a suit for land within clause 12.

44. Accordingly, suits for damages for trespass to land may well be regarded as substantially suits for land. Thus, in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(1)</sup>, where the defendant was alleged in effect to have trespassed across the boundary between two collieries and to have stolen the plaintiff's coal, and the defence was a denial that the land from which the coal was extracted belonged to the plaintiffs, it was held by Sir Lawrence Jenkins and Mr. Justice Woodroffe that "the substantial question" was "the right to the land", and that accordingly it was a suit for land. (See page 952.) Similarly, in the well-known case of *British South Africa Company v. Companhia de Mocambique*<sup>(2)</sup>, it was held that the English Courts would not entertain a suit for damages for trespass to foreign land, and accordingly the House of Lords reversed the decision of a majority of the Court of Appeal to the opposite effect. Or, again, if a plaintiff asks for a declaration of title to land and an injunction, that may in substance be an action for land,

(1) (1915) 42 Cal. 942.

(2) [1893] A. C. 602.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v  
FRAMROZ  
EDULSEE

although he does not formally seek a writ of possession. (See *Vaghoji v. Camuji*<sup>(1)</sup>.) Sir Lawrence Jenkins there held that the leading purpose of the suit was to establish a title to possession of land, and to secure that possession from molestation, and that the claim was not based on any contract, trust or fraud, but was brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiffs. (See pp. 258-9.)

45. On the other hand, there is, in my judgment, a substantial difference between these cases and those where the main object of the suit is to obtain money. Thus, although it has been held by the Calcutta High Court that a purchaser's suit for specific performance is a suit for land, yet it has been held by Sir Lancelot Sanderson and Mr. Justice Richardson in *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(2)</sup>, that a vendor's suit for specific performance is not a suit for land. There in the course of the argument as to clause 12, the Chief Justice observed (p. 672):—

"If anything more than recovery of the land was meant, why did not the Legislature say 'suit in respect of or concerning land'."

And in his judgment he says at pp. 677-8:—

"It is not necessary for me to express any opinion about that case (viz., the Colliery Case, 42 Cal. 942, above cited) because, in my judgment, that case does not cover the present one, for it is clear to me that the substantial question between the parties in this case is not the right to the land. The words in clause 12, if we give to them their natural meaning, in my judgment, cannot be said to cover this suit, which is a suit for specific performance of the agreement, which was made in Calcutta, and to recover a sum of Rs. 38,000 odd said to be due from the defendant to the plaintiffs by reason of that agreement."

And Mr. Justice Richardson added at p. 680:—

"To the best of my judgment, on the argument addressed to us, this is not a 'suit for land', either within the natural meaning of those words or within the meaning which has been given to them in previous decisions of this Court. It has been held that a suit in the nature of a suit by a purchaser for specific

(1) (1904) 29 Bom. 249.

(2) (1922) 49 Cal. 670.

performance is a suit for land...in my opinion the suit cannot be regarded as being in substance a 'suit for land' within that test."

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

46. In this connection it must be borne in mind that in a vendor's specific performance action the decree involves the execution and delivery of a conveyance of the land to the purchaser, and incidentally a previous inquiry into the title to the land unless already admitted. It cannot, therefore, be said that the suit does not relate to or concern land, if that is the real meaning to be attributed to the words "suits for land". So, too, in the case of the present mortgage suit, although the execution of a conveyance is a necessary or at any rate a usual part of an effective sale, yet the primary object remains, as I have said, the money. For instance, money is loaned out by banks and others in Bombay on an extensive scale on the security of mortgages of various description. If those banks wish to recover their debt, probably the last thing they desire is to be burdened with the land itself.

47. This brings me to what I consider is the crux of the case so far as the mortgagor is concerned. His counsel were constrained to argue that the expression "suits for land" meant "suits relating to or concerning land" and nothing narrower. They accordingly insisted on the extreme view I have already mentioned, and would not accept the *via media* of "substantially". The result must clearly be to include within the expression "suits for land" a large number of suits whose primary object is not land, but which yet undoubtedly may relate to or concern land. I refer, for instance, to administration suits and partnership suits. All specific performance actions would also be included, despite the view to the contrary taken in *Nagendra Nath Chowdhuri v. Eralgool Company, Ltd.*<sup>(1)</sup> with respect to a vendor's suit for specific performance.

(1) (1922) 49 Cal. 670.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

48. But at any rate as regards administration suits it is not open to the Indian Courts to adopt this argument of the mortgagor. Their Lordships of the Privy Council have laid it down clearly in *Benode Behary Bose v. Nistarini Dass*<sup>(1)</sup> that though an administration suit may relate to land, yet its primary object is to administer the estate of the deceased and that accordingly the High Court has jurisdiction to entertain the suit although the land or a part of it may be without the jurisdiction. Thus at p. 191 Lord Davey's judgment states:—

"On the question of jurisdiction their Lordships consider the decision right. The primary object of the suit was the administration of the estate of a deceased person resident within the jurisdiction, the principal executor being also resident there and the actual administration going on there. The High Court of Calcutta, in its Ordinary Jurisdiction, had a right to order administration of this estate, and, as ancillary to such an order, to set aside deeds obtained by the fraud of the executor...In like manner, their Lordships consider the Calcutta Court entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of their jurisdiction, those leases having been made as an incident of the same fraud."

49. But it must be borne in mind that a full administration decree in a normal case contains a contingent order for the sale of the land of the deceased. The Civil Procedure Code itself contains a common form administration decree to that effect. (See Appendix D, Form 17.) The contingency there contemplated is the necessity for a sale to carry out objects of the suit (see clauses 10 and 11) which usually means insufficient money to pay debts and perhaps legacies charged on land. In a mortgage suit the corresponding contingency is substantially the same, for the primary object of a mortgage suit is in my judgment the payment of money and the contingency of sale depends on the non-payment of that money.

50. If, then, the above Privy Council decision debars the counsel for the present mortgagor from applying

(1) (1905) 33 Cal. 180.

his wide definition to administration suits, I should have thought it would follow that his definition is defective, and that it cannot be relied on either as regards mortgage, or specific performance or partnership suits.

51. Similarly, in another Privy Council case, *Srinivasa Moorthy v. Venkata Varada Aiyangar*<sup>(1)</sup>, it was held that the Original Side had jurisdiction in a breach of trust case, although the trust property in dispute which was claimed by the executor and trustee as his own property was outside the jurisdiction. The judgment of the Board was given in that case by Lord Macnaghten, and he described the question of jurisdiction as being "too plain for argument". (See p. 267.)

52. Accordingly, after giving my best attention to the able arguments addressed to us by counsel, and to the numerous authorities that have been cited to us, on this and other points, I find myself in substantial agreement with the following passage from the judgment of Sir Basil Scott in *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(2)</sup>, where he says (p. 536) :—

"Speaking for myself, it appears to me difficult to understand how a suit in which the mortgagee seeks to have the land vested in him under his mortgage sold to somebody else by the agency of the Court is a suit for land. It is a suit to realize and dispose of his and his debtors' interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realize the security which has been vested in him. I can see no more reason for treating such a suit as a suit for land than there was in *Nistarini Dassi v. Nundo Lall Bose*<sup>(3)</sup>, where the plaintiff sought to set aside leases granted by the defendant-executors for land outside the jurisdiction, for holding it a suit in which the Court had no jurisdiction. Mr. Justice Stanley observed that the Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him. The Judicial Committee in appeal expressly upheld this ruling of the Calcutta High Court in reference to jurisdiction : *Benode Behary Bose v. Nistarini Dassi*<sup>(4)</sup>."

(1) (1911) 34 Mad. 257.

(3) (1899) 26 Cal. 891.

(2) (1916) 26 Bom. L. R. 535 ; 48 Bom. 629 *f. n.*

(4) (1905) 33 Cal. 180.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMRÓZ  
EDULJEE

I should add that *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(1)</sup> was a case of enforcing a mortgage by sale. The report in Bombay Law Reporter is wrong in saying at p. 535 that the "usual foreclosure decree" was passed. This will be seen from Sir Basil's judgment at p. 536. I have called for the record, and find, as he says, that in default of payment the mortgagee was to be entitled to apply "for a decree absolute for sale".

53. It necessarily follows that with all respect I disagree with the decision of Sir Norman Macleod, and Mr. Justice Crump and Mr. Justice Coyajee, in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>, which was also a case of enforcing a mortgage by sale. The decision of that Bench was given by Sir Norman Macleod and he deals in detail with the numerous authorities on the point. But, apart from the authorities, the reasoning on which that decision is based is not given in any detail. Indeed the Court appears to have thought the point clear, apart from the authorities. For instance, at the beginning of his judgment Sir Norman says (p. 9):—

"If the question had to be decided without reference to previous decisions of this Court, I do not think, speaking for myself, that there could be any doubt that the suit was a suit for land, but we are faced with the fact that ever since the decision in *Holkar v. Dadabhai Cursetji Ashburner*<sup>(3)</sup>, this Court has assumed jurisdiction to entertain suits on mortgages on land outside its jurisdiction."

54. In this connection it would have been more accurate to have said that this jurisdiction was also exercised for some eighteen years before *Holkar's* case<sup>(3)</sup>, or fifty-four years in all up to Sir Norman's judgment. For, as is pointed out by Sir Basil Scott in *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(1)</sup> (p. 538):—

"That makes a consecutive period of forty-five years, during which the practice has been uniform to entertain mortgage suits in this Court relating to land outside the Presidency, and many titles have been founded upon decrees in such suits."

(1) (1916) 26 Bom. L. R. 535: 48 Bom. 629 *f. n.*

(2) (1925) 50 Bom. 1.

(3) (1890) 14 Bom. 353.

The decision of Sir Basil Scott was given in 1916. *Holkar's case* <sup>(1)</sup> was only decided in 1890.

55. Then, again, at p. 26 Sir Norman says:—

"I have not the slightest hesitation in holding that a suit on a mortgage, as this is, is a suit for land within the meaning of that expression in clause 12 of the Charter. I entirely agree with the long series of Calcutta decisions to the effect, as summed up in the words of Jenkins C. J., that regard had to be had to the substance of the suit. The Judges of the Calcutta and Madras High Courts have declined to follow the specious argument that because in certain classes of suits, though they are suits for land, a Court of Equity in England will grant relief *in personam*, therefore such suits cease to be suits for land so as to exclude them from the meaning of that expression in clause 12 of the Charter. I think the difference between the two views may be expressed thus. Calcutta and Madras look to the relief actually claimed in the suit. Bombay considers the possibility of a decree being passed *in personam*. I do not for a moment dispute the powers of this Court to pass a decree *in personam* in spite of the fact that the suit relates to land outside the jurisdiction. Such a power is expressly granted to the Subordinate Courts by section 16 of the Civil Procedure Code. If the plaintiff asks for relief against the defendant only, the Court has jurisdiction though the suit relates to property outside the jurisdiction."

The learned Judge refers to section 16 of the Civil Procedure Code, but that section does not apply to the High Court on its Original Side, and he does not specifically state under what clause of the Letters Patent this Court is to act in granting the relief *in personam* in respect of land outside the jurisdiction which he concedes exists. As I read his judgment he does not rely on any question of residence under what I have called the fourth branch (d) of clause 12. In fact in the case before him the principal defendant was outside the jurisdiction. Nor do I find that the learned Judge examines what to my mind is the essential consideration, viz., the real nature of a mortgage and the real nature of a mortgage suit. If that is done, "the substance of the suit", to adopt the learned Judge's own test, seems to me to be one for money.

(1) (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

56. But the examination of authorities effected in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> relieves me from the necessity of recapitulating them in any detail. I will only endeavour to summarize them. At first sight it sounds as if the views which I have expressed are opposed not only to the opinions of the learned Judges who decided *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> but also to a long current of unanimous authorities in Calcutta and Madras. But on examination the true position is hardly that. It is true that from the very beginning Calcutta and Bombay have adopted different constructions of clause 12 so far as regards mortgage suits, and that the Madras High Court has substantially adopted the Calcutta view. But, curious to say, there is hardly any judgment giving detailed reasons for adopting either view of clause 12. And the recent decision of Sir Lancelot Sanderson in *Nagendra Nath Chowdhuri v. Eraligool Co., Ltd.*<sup>(2)</sup>, already cited, and another decision of Sir Victor Coutts-Trotter and Mr. Justice Shrinivasa Aiyangar in *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(3)</sup> seem to me to throw considerable doubt on whether the past practice of the Calcutta and Madras High Courts will be continued in the future, should the point arise for a specific decision before a Full Bench.

57. As far as the Bombay High Court is concerned, the view taken of clause 12 has been uniform in its result. The earliest decision was in 1872 that of *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(4)</sup> where Mr. Justice Gibbs and Mr. Justice Melvill decided that a suit to enforce a mortgage by sale was not a suit for land within section 5, Civil Procedure Code. That was an Appellate Side suit. There had previously been a

(1) (1925) 50 Bom. 1.

(3) (1924) 49 M. L. J. 311.

(2) (1922) 49 Cal. 670.

(4) (1872) 9 Bom. H. C. 12.

decision in 1869 in another Appellate Side suit, *Chintaman Narayan v. Madhavrav Venkatesh* <sup>(1)</sup> that a suit to recover the balance of rents was not a suit for land. The former decision appears to have been accepted and adopted in practice until it was challenged in the well-known case of *Holkar v. Dadabhai* <sup>(2)</sup> where Sir Charles Sargent affirmed the jurisdiction of the Original Side of this Court to deal with mortgages of land outside Bombay. That, again, was a case of enforcing a mortgage by sale. Before us, the references by the learned Judge to the powers of the Court *in personam* and to the presumed intention of the English framers of the Letters Patent were much criticized. But the judgment is a mercifully brief one, and as I read it, the references to the powers *in personam* were only intended to illustrate the real nature of a mortgage and a mortgage suit. The other reference I attach little importance to. But it may be assumed that the framers of the Letters Patent were familiar or had made themselves familiar with the relevant law and procedure in India and England.

58. This decision was followed by Chief Justice Farran in 1894 in *Kessowji Damodhar v. Khimji Jairam* <sup>(3)</sup>, which is cited in *Sorabji v. Rattonji* <sup>(4)</sup>. We

(1) (1869) 6 Bom. H. C. (A. C. J.) 29. (2) (1890) 14 Bom. 353.

(3) O. C. J. Suit No. 291 of 1893, decided on March 19, 1894—

FARRAN, J.:—It is quite impossible to say that Virji Canji, to whom the property at Zanzibar sought to be foreclosed in this suit had been mortgaged by Khimji Jairam before he executed the plaintiff's mortgage is not "a person having an interest in the property comprised in the plaintiff's mortgage". Under section 85 of the "Transfer of Property Act, 1882", he must therefore be joined as a party to the suit. No reason occurs to me to explain why the Legislature has made this change in the law, but it has expressed its meaning in such clear and unambiguous words that it would be altering and not interpreting the enactment if I were to give effect to the argument for the plaintiff and construe "all persons having an interest in the property

(4) (1898) 22 Bom. 701.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

have seen the original judgment of Sir Charles Farran, and it is in accordance with what Mr. Justice Strachey says at p. 706. Mr. Justice Strachey himself followed *Holkar's case* and extended it to foreclosure suits in *Sorabji v. Rattonji*<sup>(1)</sup>, although not without some doubt. In 1904 came Sir Lawrence Jenkins' decision in *Vaghoji v. Camaji*<sup>(2)</sup> which, as I have already stated, was to the effect that a suit for a declaration of title and an injunction was a suit for land. Next, in *Zulekai-bai v. Ebrahim Haji Vyedina*<sup>(3)</sup> Mr. Justice Davar held that a suit to recover title deeds was in effect a suit for land.

59. It was not till 1924 or 1925 that the matter came to be reopened in the Bombay Courts, and this was due to the decision in *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*<sup>(4)</sup> which I will refer to later. In *Yeshwada-bai v. Janardhan*<sup>(5)</sup> Fawcett J. held that a suit to recover maintenance charged on land was a suit for

---

comprised in the mortgage" as equivalent to "all persons interested in the right to redeem or the equity of redemption of such property". The second preliminary issue must therefore be found in the affirmative.

Under the decision in *Holkar v. Dadabhai*<sup>\*</sup>, I am bound to hold that this Court has jurisdiction to entertain this foreclosure suit against the defendant Khimji Jairam. A decree for foreclosure being a decree *in personam*: *Paget v. Ede*<sup>†</sup>, it follows I think as a corollary to that decision that this Court has similarly jurisdiction over the 2nd and 3rd defendants to whom Khimji Jairam has mortgaged his right to redeem and who now *pro tanto* stand in his shoes. Part of the cause of action has arisen in Bombay and leave to sue has been obtained under clause 12 of the Letters Patent. As to the added defendant, Virji Canji, it may be that the Court has no jurisdiction over him, but no relief is sought against him and the making him a party only amounts to giving him formal notice of the suit. If he asks to be dismissed from it it will be necessary to consider his plea. It would be improper to say more in his absence. The first issue will therefore be also found in the affirmative. Leave to amend plaint by adding Virji Canji as defendant.

\* (1890) 14 Bom. 353.

† (1874) L. R. 18 Eq. 118.

(1) (1898) 22 Bom. 701.

(3) (1912) 37 Bom. 494.

(2) (1904) 29 Bom. 249.

(4) (1914) L. R. 41 I. A. 110.

(5) (1923) 25 Bom. L. R. 1172.

land. - In *Pranlal v. Goculdas*<sup>(1)</sup> Pratt J. held he was bound by *Holkar's case*, but yet decided that he had no jurisdiction to decide a question of priority between two mortgagees. With respect I am unable to agree with either of these decisions. In *Jasraj v. Akubai*<sup>(2)</sup> Shah J. doubted *Holkar's case* but followed it having regard to *Venkatrao's case*. In *Rajah Kotakal v. Malabar Timber Co., Ltd.*<sup>(3)</sup> Fawcett J. held he was bound by *Holkar's case*, but suggested that the jurisdiction might be upheld if the proviso to section 16, Civil Procedure Code, was read into clause 12 of the Letters Patent. But if a mortgage suit is a suit for land, I fail to see how a proviso to a section which does not apply to the High Court and which was first enacted in 1877 can be read into a document of anterior date, viz., the Letters Patent of 1862 or 1865. However that may be these decisions of single Judges were soon reviewed in the Full Bench case of *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(4)</sup>.

60. As regards the Calcutta High Court, its practice appears to have originated in two decisions of Mr. Justice Macpherson in *Bibee Jaun v. Meerza Mahomed Hadee*<sup>(5)</sup> and *Sreemutty Lalmoney Dossee v. Juddonauth Shaw*<sup>(6)</sup>; the one being a suit for foreclosure and the other for redemption. In the first of these cases the learned Judge appears to have based his views of the true construction of clause 12 of the Letters Patent largely on sections 5 and 33 of the Code of 1859. This argument was also pressed before us, and I will deal with it later. The next cases were *In the matter of the petition of S. J. Leslie*<sup>(7)</sup> and *Juggodumba Dossee v. Puddomoney Dossee*<sup>(8)</sup>, where Sir William Markby

(1) (1925) 27 Bom. L. R. 570.

(2) (1922) 26 Bom. L. R. 539.

(3) (1924) 26 Bom. L. R. 541;  
48 Bom. 625.

(4) (1925) 50 Bom. 1.

(5) (1865) 1 Ind. Jur. N. S. 40.

(6) (1866) 1 Ind. Jur. N. S. 319.

(7) (1872) 9 Beng. L. R. 171

(8) (1875) 15 Beng. L. R. 318.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANROZ  
EDULJEE

was a member of the Bench, and *Land Mortgage Bank v. Sudurudeen Ahmed*<sup>(1)</sup>, a decision of Mr. Justice Trevelyan, and *The Delhi and London Bank v. Wordie*<sup>(2)</sup>, decided by Garth C. J. and Pontifex J. In one or other of these cases it was pointed out that the Calcutta Courts had in practice adopted the views of Mr. Justice Macpherson as to a mortgage suit being a suit for land. Sir Lawrence Jenkins had occasion to consider the matter in the Colliery case I have already cited, viz., *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(3)</sup>, where the suit was one for damages for trespass on land. In this case, as in *Vaghoji v. Camaji*<sup>(4)</sup>, his test in effect was whether the suit was primarily or in substance one for land. Accordingly, as I read his judgments, he would not have agreed to the view taken in some of the other Calcutta cases to the effect that the expression "suits for land" included suits relating to or concerning land.

61. I may here mention a point of Calcutta practice. I have already alluded to the distinction drawn in Calcutta between a vendor's suit for specific performance and a purchaser's suit, the latter, according to their rulings, being suits for land, and the former not. On the other hand, it would appear that in order to avoid the effect of the decision of Mr. Justice Macpherson in *Bibee Jaun v. Meerza Mahommed Hadee*<sup>(5)</sup> intending mortgagors have been required to purchase a small piece of land within the jurisdiction and to mortgage it along with the valuable land outside the jurisdiction, and that then the High Court has assumed jurisdiction. This is on the assumption that what I have called the third branch (c) of the Letters Patent applies. The point whether the Bombay High Court

(1) (1892) 19 Cal. 358 at p. 361.

(2) (1915) 42 Cal. 942.

(3) (1876) 1 Cal. 249.

(4) (1904) 29 Bom. 249.

(5) (1865) 1 Ind. Jur. N. S. 40.

would have jurisdiction to entertain a mortgage suit where part of the land is outside the jurisdiction and part within, does not arise in the present case for our decision. It was, however, held by Sir Norman Macleod and Mr. Justice Shah in *Govindlal Bansilal v. Bansilal Motilal*<sup>(1)</sup>, following Mr. Justice Candy's decision in *Balarām v. Ramchandra*<sup>(2)</sup>, that this Court has jurisdiction to entertain a partition suit where part of the land is within and part without the jurisdiction.

62. A similar view appears to have been adopted in Calcutta, and even if as Mr. Justice Candy says this construction is open to doubt, yet if it has been adopted by the several High Courts over a long series of years, many titles must now be dependent on it, and accordingly a question of *stare decisis* would arise. This construction, however, illustrates the difficulties in which the High Courts have been involved in their endeavours to construe this particular clause. And its relevance in the present case is, I think, to diminish the weight of the contention for the mortgagor that clause 12 did not intend the High Court to have jurisdiction over land outside Bombay. A partition suit does not depend on a contract, trust or any equity like a mortgage suit does. The Court is acting *in rem* and not *in personam*. And yet the Court holds it has jurisdiction to partition land outside Bombay or Calcutta as the case may be.

63. This brings me to the decision of their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*<sup>(3)</sup>. It was argued that this case was an express decision of the Board on the subject. If that was the view which I took then it would be sufficient for me merely to give judgment, saying that

<sup>(1)</sup> (1921) 46 Bom. 249.

<sup>(2)</sup> (1898) 22 Bom. 922.

<sup>(3)</sup> (1914) L. R. 41 I. A. 110.

1926-27

HATIMEHAI  
HASSANALLY  
v.  
FRAMKOZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

I respectfully followed that decision. But that is not the view I take. In that case the mortgagor purported to mortgage two lands outside the jurisdiction and a piece of land inside the jurisdiction. On the strength of the latter the registration of all the lands was effected in Calcutta. In fact the insertion of the land in Calcutta was a fraud. The mortgagor had no such land, and the whole object of its insertion was to invoke the jurisdiction first of the registration authorities, and subsequently of the Calcutta High Court. Accordingly their Lordships held that there being here a clear fraud, the registration was nugatory, for the land did not exist. Thus their Lordships say (p. 120):—

“Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the sub-registrar at Calcutta if the parties merely took the precaution to add, as a last parcel, Government House, Calcutta, or any similar item. The same considerations apply to the question of jurisdiction of the High Court of Fort William in Bengal in its ordinary original jurisdiction. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta when in reality such is not the case could bring the deed within the limited jurisdiction of the Court.”

64. Their Lordships' decision was also founded on another consideration, and it is this which has given rise to the argument for the appellant in the present case. The judgment runs (p. 120):—

“In the first place the property, No. 25, Guru Das Street, purporting to be mortgaged, is a non-existing property, and therefore no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of ordinary original jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage bond, and its decree is of no validity.”

It was consequently argued that this meant that if all the land was outside Calcutta, the High Court could in no event entertain a mortgage suit in relation to it.

But it is to be observed that under clause 12 it is essential that if the suit is not for land, the whole cause of action should have arisen within the jurisdiction or alternatively that leave should have been obtained in default of residence. It is not, however, shown in the report that the whole cause of action arose in Calcutta. And assuming that leave was given under the Letters Patent, that presumably would have been given on the assumption that there was land inside the jurisdiction. If in fact there was none, then the leave given would, I take it, be revoked. But apart from that, it does not appear that their Lordships necessarily took the view that a mortgage suit was a suit for land. The mortgage being in effect an unregistered one, the Calcutta Court would have had no jurisdiction, whether the suit was or was not one for land.

65. I do not overlook the fact that in a case coming from Calcutta, counsel may have argued on the assumption that the Calcutta view of clause 12 was the correct one, viz., that a mortgage suit is a suit for land. Similarly, the case may have been argued on the assumption that if part of the land was within the jurisdiction, the Calcutta Court could entertain the suit. Otherwise it is difficult to understand why the suit should have been maintained in any event. As to this Lord Moulton says (p. 119) :—

“Taking all these matters into consideration, their Lordships can come to no other conclusion than that parcel No. 28 was to the knowledge of the parties to the deed, a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and therefore within the jurisdiction of the sub-registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.”

I am, however, unable to see that their Lordships thereby positively upheld the jurisdiction where the suit related to land partly within and partly without the jurisdiction, any more than at p. 120 they positively ruled out any possibility of the High Court having

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

1926-27  
 HATIMBHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

jurisdiction should all the land be outside the jurisdiction.

66. As regards the Madras cases, the practice of the Madras High Court would seem to have followed the decision of Mr. Justice Moore in *Nalum Lakshimikantham v. Krishnasawmy Mudaliar*<sup>(1)</sup>. On the other hand in the recent case of *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(2)</sup>, which was a suit for the administration of a trust, the Chief Justice said (p. 311) :—

“ No one, I think, using language in its natural sense, would ever think of describing this plaint after the excision of the two grounds which Mr. Grant gave up, as being a suit for land, but it is said that there are decisions of this and other Courts which compel such a construction to be put on those words as would bring the present suit within them. It is sufficient for me to say that I do not think that any one of the authorities cited has that effect. I only desire to say one thing ; and that is chiefly in reference to the case in *Srinivasa Aiyangar v. Kamappa Chetty*<sup>(3)</sup> that, if that case is to be supposed to say that you are entitled to look at the amended Civil Procedure Code for the purpose of construing the words of the earlier statute, namely the Letters Patent with which we are concerned, I do not agree with it. But I am by no means convinced that that case is an authority for the position for which it was cited.”

And Srinivasa Aiyangar J. said (p. 312) :—

“ The expression ‘suit for land’, it seems to me, must be construed as an action the primary object of which is to establish claims regarding the title to property or possession of property and no suit can be described as a ‘suit for land’ as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected. Further, the preposition ‘for’ in the expression ‘suit for land’ would seem to indicate that the title to, or possession of, immoveable property must be the primary object of the action. A suit for an office or for the removal of a person from an office is a well-known form of action. This is a suit merely for the accounts of the management of a trust and for the administration of a trust.”

With respect, I agree with the view which Mr. Justice Srinivasa Aiyangar there takes of the word “for”.

<sup>(1)</sup> (1903) 27 Mad. 157.

<sup>(2)</sup> (1924) 49 M. L. J. 311.

<sup>(3)</sup> (1915) 30 M. L. J. 120.

67. I should here mention certain decisions on the English Statutes of Limitation. It was held by Lord St. Leonards in *Wrixon v. Vize*<sup>(1)</sup> that suits for foreclosure are suits to recover land within the meaning of those Acts. That decision has been held binding in subsequent cases, and must now be accepted as good law so far as regards those particular Acts. (See *Heath v. Pugh*<sup>(2)</sup>, *Harlock v. Ashberry*<sup>(3)</sup> and *Badeley v. Consolidated Bank*<sup>(4)</sup>.) But I do not go into further details, as the present case is one of sale and not of foreclosure and there are obvious differences in the final result of the two remedies. In the one case the mortgagee becomes the absolute owner of the land. In the other he only gets money and never gets the land. Further, I think there is some danger in construing clause 12 of the Letters Patent by the light of a Statute of Limitation in England. The objects of the two documents are quite different. And this difference is illustrated by *Tawell v. State Company*<sup>(5)</sup> and *London and County Banking Company v. Dover*<sup>(6)</sup>, where Sir George Jessel held that a foreclosure suit was not a suit for the recovery of land, nor even a suit "in relation to any real estate" within the meaning of certain procedure rules or Acts.

68. A different argument altogether, which was strongly urged upon us by the appellant and which I have fully considered, is that we ought to construe clause 12 of the Letters Patent by the light of section 5 of the Code of 1859, and that if we turn to section 33 of that Code, it is clear that the expression "suits for land" means suits relating to land. On the other hand, as pointed out by the Advocate General, section 33 is the only section in which the expression "suits relating

(1) (1842) 3 Dr. & War. 104.

(2) (1881) 6 Q. B. D. 345; on appeal  
7 App. Cas. 235.

(3) (1882) 19 Ch. D. 539.

(4) (1886) 34 Ch. D. 536 at pp. 549,  
551.

(5) (1876) 3 Ch. D. 629.

(6) (1879) 11 Ch. D. 204.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

to land" is used. In all the other sections the expression used is "suits for land", and in several of them the context shows that the expression must there be confined to suits for the recovery of land. Accordingly, there seems to me much force in his contention that the words "relating to" in section 33 are really bad drafting. This view is borne out by Stokes, Vol. II, p. 386, where he says:—

"Again, the Code of 1859 was unquestionably ill-drawn, ill-arranged and incomplete, and there had been a large number of decisions, which showed either some inconvenience in the rules of the Code or some ambiguity of expression, or absence of direction, which had given rise to disputes."

69. Apart from this, I deprecate having first to construe the Code of 1859 with its numerous clauses, and then to apply that construction to an entirely different document such as the Letters Patent and none the less so because the Letters Patent of 1862 were substantially altered by those of 1865, which now govern us. (See clauses 12 and 37.) Sir Lawrence Jenkins seems to have been averse to this in *Vaghoji v. Camaji*<sup>(1)</sup>. In this connection it must be borne in mind that the Code of 1859 regulated proceedings in the Company's Courts in the mofussil. On the other hand, the Supreme Court was enjoying the extensive jurisdiction given by the Supreme Court Charter of 1823. By clauses 36 and 5 the Supreme Court was vested in effect with all the powers of the Courts of Chancery and King's Bench in England. By clause 23 they were given jurisdiction over British subjects residing not only in the town and island of Bombay but in all the factories of the Company, and even in Native States. By clause 24 they were given jurisdiction over the inhabitants of Bombay subject to certain special provisions in the case of Mahomedans and Gentoos.

70. The effect of the High Courts Act of 1861 was to amalgamate the two Courts, the Supreme Court and the

(1) (1904) 29 Bom. 249 at pp. 254, 258.

Company's Courts, into one High Court and to some degree to cut down the jurisdiction of the Supreme Court outside Bombay itself. But nevertheless to a large degree the jurisdiction and powers on the Original Side have remained distinct from those in the mofussil. For instance, the High Court on its Original Side has had expressly preserved to it many of the powers previously vested in it as under the Charter of 1823. Consequently, it is still necessary in many instances to look to that Charter to ascertain that jurisdiction.

71. Further, if the construction which the appellant asks us to put upon clause 12 is correct, there would be this strange result, viz., that whereas prior to 1862 this Court undoubtedly had a wide equitable jurisdiction *in personam*, which would have enabled it to deal with mortgages of foreign land, that jurisdiction was taken away by the Letters Patent, and that on the contrary the Original Side was not even given the jurisdiction which was expressly conferred upon the mofussil Courts by the Code of 1877 by the proviso to what is now section 16, viz., the proviso that a suit to obtain relief respecting, or compensation for wrong to, immoveable property may "where the relief sought can be entirely obtained through his personal obedience" be instituted either in the Court where the property is or where the defendant resides or works. So, too, section 17 gives jurisdiction to either Court where property is situate within two jurisdictions, but as that section does not apply to the Original Side, it cannot be relied on. It will also be borne in mind that although section 5 of the 1859 Code had to be entirely recast in the Code of 1877, yet the Letters Patent of 1865 were left unaltered.

72. It was, however, strongly urged that we ought to look at the Despatch of the Secretary of State which accompanied the Letters Patent of 1862. And the industry of my brother Fawcett has produced from the

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Asiatic Library the Report of the Commissioners who were appointed in 1853 to consider the question of the amalgamation of the Supreme Court and the Company's Courts and the draft rules which they prepared. But to my mind it would be wrong of us to look at either document for the purpose of construing clause 12 except perhaps in so far as they may deal with the history of the law up to that date, and the inconveniences found in the administration of that law. (See the *Solio* case<sup>(1)</sup>.) Personally I fail to see how the opinion of an officer of a Government Department, however exalted, can have any relevant bearing in a law Court on the construction of an Act of Parliament any more than, say, the Objects and Reasons or the Debates in Parliament should be looked to. (See *Administrator-General of Bengal v. Prem Lal Mullick*<sup>(2)</sup>, and *Krishna Ayyangar v. Nallaperumal Pillai*<sup>(3)</sup>.) And if the letters of one such officer are looked at, surely the replies might also have to be taken into consideration. Still less, in my opinion, ought the proposed drafts by the Commissioners to be looked at which were written some nine years before the Letters Patent in question.

73. But if contrary to the view which I take these documents ought to be looked to, to my mind they carry the matter little further. Indeed some discussion arose as to what was the true construction of the Despatch of the Secretary of State himself. This much, however, is clear that the original proposal of the Commissioners was that the clause corresponding to clause 12 should be "suits relating to or concerning land", and that on the other hand when we come to clause 12 as finally enacted, those wide words are omitted, and the word "for" is used. Accordingly to my mind that would be an argument that eventually the authorities did not intend "suits for land" to have the wide meaning of

<sup>(1)</sup> [1898] A. C. 571 at p. 575.

<sup>(2)</sup> (1895) L. R. 22 I. A. 107.

<sup>(3)</sup> (1919) 22 Bom. L. R. 568, F. C. 43 Mad. 550.

“suits relating to or concerning land”. So, too, in the Despatch itself, clause 17 which was much relied on can be contrasted with clause 24.

74. In the view which I take of this case, it is unnecessary to decide the point of *stare decisis* which was advanced by the Advocate General for the respondent. He relied strongly upon the judgment in the House of Lords in *Bourne v. Keane*<sup>(1)</sup>, as showing that where the construction of a statute is doubtful and a particular construction has been adopted over a long series of years, and titles to land have been acquired in reliance upon those decisions, then speaking generally the Court will not overrule the previous course of decisions on the subject. If the Letters Patent related solely to Bombay, there would be much force in this contention. But the Letters Patent of Calcutta and Madras are in substantially a similar form, and consequently it is common ground that if the matter went to the Privy Council, it would have to be decided not on *stare decisis* in Bombay or Calcutta but on what was the correct view in the face of the conflicting decisions in the various Courts. But, so far as this Court is concerned, I think we may at any rate weigh the past practice in Bombay against the past practice in the Calcutta High Court, and that we should not disturb our own practice, unless we are clearly convinced that it is founded on an erroneous interpretation of the Letters Patent, or unless a different decision is arrived at by their Lordships of the Privy Council. At the present moment it is fair to say that titles have been shaken in a large number of cases by the recent decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>. The present suits are instances of it. And in this connection a statement was put in to show that during the last five years decrees for sale have been

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE<sup>(1)</sup> [1919] A. C. 815.<sup>(2)</sup> (1925) 50 Bom. 1.

1926-27  
 HATIMBHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

effected in some sixty different suits by the Commissioner of land outside the jurisdiction. There must be a still larger number of suits in which this Court has entertained mortgage proceedings relating to foreign land in which it has become unnecessary to proceed to a Court sale.

75. Summarizing, then, my conclusions on the whole case, I would hold that just as the primary element in a mortgage is the debt and not the security, so the primary or substantial object of a mortgage suit is the payment of the debt, and that the sale sought for is merely ancillary to the main or final end, viz., the payment of the mortgage debt. Consequently, in my judgment a mortgage suit of that nature is not a suit for land within the meaning of clause 12 of the Letters Patent, any more than an administration suit is. If that opinion, which is in accordance with the past practice of this Court for some fifty-four years prior to *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>, is in fact erroneous, then I am content to err in company with Sir Charles Sargent, Sir Charles Farran and Sir Basil Scott in this Court, and I believe in company with Sir Lancelot Sanderson in the High Court of Calcutta. Further, as it would seem to me, the judgments of Sir Lawrence Jenkins and Sir Victor Coutts-Trotter support that practice, rather than the reverse.

76. Accordingly, in my judgment, the first question submitted for our decision ought to be answered in the negative.

77. Having regard to the answer given to the first question submitted to us, it follows that in my judgment Questions Nos. 2 and 3 ought to be answered in the affirmative, viz., "Yes, under clause 12 of the Letters Patent". This is because a part of the cause of action

(1) (1925) 50 Bom. 1.

arose in Bombay, viz., the creation of this suit mortgage by the deposit there of the title deeds of the land in question, and because the requisite leave was obtained from the Court under clause 12.

78. As regards Question No. 2, another argument was advanced to us that even if the suit could not be maintained under clause 12, it could be maintained under the general equity jurisdiction which we have inherited from the Supreme Court. But in view of the provisions of clauses 11 and 12, I feel unable to accept this view which is largely founded on the suggestion made by Fawcett, J., in *Rajah Kotakal v. Malabar Timber Co., Ltd.*<sup>(1)</sup>, which I have already dealt with. (See para. 59.)

79. Another point under Question No. 2 still remains, and it is this. If, contrary to the view which I hold, the present suit was a suit for land within the meaning of clause 12, then the further point arises whether the Court had not jurisdiction under clause 12 by reason of the fact that the defendant at the time of the commencement of the suit both dwelt and carried on business within the limits of the ordinary original civil jurisdiction of this Court. This point depends on whether the last alternative under clause 12 beginning with the words "or if the defendant...shall dwell" is a separate alternative, or whether it is dependent on the earlier alternative beginning with the words "or in all other cases".

80. We thought this question important enough to require a further argument; and after giving my best attention to what has been urged, I would hold that the final alternative beginning with the words "or if the defendant...shall dwell" is a separate alternative, and that accordingly Question No. 2 should be answered in the affirmative on this ground also. In arriving at

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

(1) (1924) 48 Bom. 625 : 26 Bom. L. R. 541.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

this conclusion I attach great importance to the fact that in the first alternative dealing with land, the verb "situated" is carried on past the words "in all other cases" to the words "within the local limits". Consequently, it seems to me that on a natural grammatical construction, the clause runs: "If in the case of suits for land...such land...shall be situated...within the local limits...or if the defendant...shall dwell...within such limits." In effect, therefore, this would divide clause 12 into two branches made up of (a) jurisdiction *re* subject-matter, and (b) jurisdiction *re* residence and place of business. The former would apply to suits for land where the property is within the jurisdiction, or in all other cases where the cause of action arises wholly or in part within the jurisdiction. The second branch would apply to jurisdiction in all cases where the defendant himself is within the jurisdiction.

81. The latter jurisdiction is not a novel jurisdiction, for it is similar to the jurisdiction given by clause 24 of the Supreme Court Charter of 1823 which directed that "the Supreme Court...shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay". It is true that clause 12 of the Letters Patent of 1862 would not bear that construction, for it is clear that there the alternative of residence is confined to suits other than those for land. But that clause was in any event substantially altered by clause 12 of the Letters Patent of 1865 which enabled cases to be heard where only a part of the cause of action arose within the jurisdiction provided the leave of the Court was obtained. There is no such provision in the Letters Patent of 1862. And the distinct alteration in the wording of the 1865 Letters Patent by making the last alternative an independent one beginning with the words "or if," is in striking contrast to the Letters Patent of 1862 where

this final "if" is not inserted. It was argued on behalf of the appellant that this final "if" was only inserted in the Letters Patent of 1865 to prevent an awkward sounding sentence, but I am not prepared to accept this as a sufficient explanation.

82. Nor as a matter of general principle does there seem to me anything wrong in a defendant thus being sued in the forum of the place where he lives or works. On the contrary *prima facie* he should be the last person to complain of this. Whether if the suit relates to foreign land, all the relief claimed can be granted is another matter. But as regards relief *in personam*, there should be no difficulty.

83. As regards authorities, Mr. Justice Candy in *Balaram v. Ramchandra*<sup>(1)</sup> has dealt with the construction of clause 12, and has stated that no argument appears to have hitherto been advanced to the effect that residence alone would give jurisdiction under this clause (see p. 926). - But in *Srinivasa Moorthy v. Venkata Varada Ayyangar*<sup>(2)</sup>, Sir Arnold White appears to have thought that residence alone would give jurisdiction (see p. 253).

84. As exemplifying, however, the difficulties caused by this clause, Mr. Justice Candy states in the former case at p. 925 that the uniform practice of the three High Courts of Bombay, Calcutta and Madras had been (*inter alia*) to construe the clause as giving jurisdiction to entertain a suit where part of the land was within the local limits. He doubted whether this was a correct view of the clause, but was not prepared to question it after the lapse of time. In *Govindlal Bansila v. Bansilal Motilal*<sup>(3)</sup>, Sir Norman Macleod and Mr. Justice Shah upheld this construction, and held that a partition suit would lie provided a part of the land was within the jurisdiction and the leave of the Court was obtained.

<sup>(1)</sup> (1898) 22 Bom. 922.

<sup>(2)</sup> (1906) 29 Mad. 239.

<sup>(3)</sup> (1921) 46 Bom. 249.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

I do not propose to say anything further on this beyond what I have stated (see paras. 61-62), except that this view demolishes to a large extent many of the arguments which were urged against the powers of this Court to carry into effect a mortgage decree where the land is outside the jurisdiction. In his final speech Mr. Mulla for the mortgagor was forced to contend that the decision of Sir Norman Macleod and Mr. Justice Shah in *Govindlal Bansilal v. Bansilal Motilal*<sup>(1)</sup> and the corresponding Calcutta decision were incorrect, and the Court had no jurisdiction unless all the land was within the jurisdiction. And indeed it seems to me quite illogical to hold that this Court has jurisdiction in a partition action to pass decrees *in rem* affecting foreign land merely because some other land is within the jurisdiction, and yet that it cannot deal with foreign land in a mortgage suit either *in personam* or *in rem*, unless some land within the jurisdiction is included. And this although a mortgage suit necessarily involves a contract or an equity, while a partition suit need involve neither, but be merely one between two absolute co-owners. It does not, however, follow that because a Court can hear a suit, it must necessarily grant all the relief a plaintiff asks for. And it would be clearly impracticable for this Court to pass effective decrees *in rem* affecting land in, say, Africa or France, whether the suit was a partition or any other suit, and whether or no any land within the jurisdiction was included.

85. Since the arguments were concluded, my brother Fawcett has obtained a copy of the Despatch accompanying the Letters Patent of 1865. But, for the reasons already given as regards other documents of a similar nature (see para. 72), I would hold it to be inadmissible in evidence. In any event it gives me no assistance. And it is clear that it cannot be contended

<sup>(1)</sup> (1921) 46 Bom. 249.

that the alterations admittedly made by the Letters Patent of 1865 were unimportant. The alteration giving jurisdiction with leave where part of the cause of action arises in Bombay must of itself account for a large number of additional suits in our High Court every year. In support of the view which I take, I would cite what Lord Halsbury has stated as to the danger of accepting even the opinion of the draftsman himself as to the meaning of the documents he has drawn. In *Hilder v. Dexter*<sup>(1)</sup> he says as follows (pp. 477-478) :—

“...I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done...I was largely responsible for the language in which the enactment is conveyed.”

This passage is also cited in Lord Birkenhead's “Fourteen English Judges” at p. 337.

86. Under all the circumstances, I do not feel bound by any past practice to adopt the mortgagor's views of the true construction of clause 12 as regards residence. There is no force in the question of *stare decisis*, for titles will not be prejudiced by adopting what I consider to be the natural construction of this clause, even if it can be said that there is a definite decision on the point. On the contrary, titles will be assisted, if anything, as in the present case. And this construction may perhaps explain why Sir Norman Macleod in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup> conceded that a jurisdiction *in personam* does exist even in the case of foreign land. His real objection may have been that it did not exist

1926-27.

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

(1) [1902] A. C. 474.

(2) 1925) L. R. 50 Bom. 1 at p. 26.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

if the defendant himself was outside the jurisdiction as well as the lands in suit.

87. As regards Questions Nos. 4 and 5, it was agreed by counsel that they should be postponed until we had given our decision on Questions Nos. 1, 2 and 3. In view of our decision on the first three questions, it is now unnecessary to decide Questions Nos. 4 and 5. And should it be said that ordinarily an appellate Court should determine all substantial questions in case there should be a further appeal to the Privy Council, my answer in the present case is that although this is the course which this Court adopts in a normal case, the present is an abnormal one. Our Bench of Judges is a small one, and we have been mainly employed for several days in hearing what is after all the main question and one of the greatest public importance, viz., Question No. 1. And owing to the lamentable death of my brother Shah, it became necessary to have that question reargued before a larger Bench. And there has been yet another rehearing on Question No. 2 and residence. It is accordingly not feasible—having regard to the interests of other litigants who are waiting to have their cases heard—for us to devote the time of another Full Bench to decide these further questions, which, in the view we take, are now unnecessary for the purpose of deciding the present suits.

88. Accordingly, I would answer Questions Nos. 4 and 5 by saying : “Unnecessary to decide”. I would add that our answers to Questions Nos. 1, 2 and 3 are irrespective of any special legislation, such as the Dekkhan Agriculturists' Relief Act.

89. In conclusion, I would suggest the advisability of the Letters Patent being amended in such a way as to put at rest the controversies on the true construction of clause 12. This is of course a matter for others to

decide, but the difficulties of clause 12 are not confined to mortgage suits and in my judgment it is not right that important commercial communities like those in or dealing with Bombay should be left in doubt as to their ordinary legal remedies in case of need, nor should titles to land be left to depend on the true construction of ill-drawn documents such as clause 12 of the Letters Patent.

FAWCETT, J. :—The first question to be determined is the meaning of the words “a suit for land” in clause 12 of the Letters Patent. There is no doubt that primarily the natural and ordinary meaning of such an expression has to be looked at; and if it is clear, then that meaning must be adopted independent of any other considerations. But unfortunately the words have an ambiguity, which is sufficiently shown by the course of the decisions by the Courts in India upon this question. There has been a difference of opinion, which ranges from the view that the words mean a suit for the recovery of land to the view that it means a suit concerning, or relating to, land. A middle view, that was, for instance, favoured by Sir Lawrence Jenkins in *Vaghoji v. Camaji*<sup>(1)</sup> and *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(2)</sup>; was that regard must be had to the purpose and substance of the suit to see whether its operation upon the land is sufficient to bring it within the meaning of this expression. No doubt a natural meaning of the word “for” is “for obtaining or recovering” so that the expression might be intended to cover only suits for the recovery of land. But, on the other hand, the word “for” undoubtedly also bears a meaning of “concerning or relating to”, and therefore the opposite view is a legitimate one. Thus a “suit for” libel, wrongful dismissal, goods sold and delivered, or infringement of copyright, obviously is nearer the latter meaning

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE<sup>(1)</sup> (1904) 29 Bom. 249.<sup>(2)</sup> (1915) 42 Cal. 942.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

than the former. Even the learned Advocate General on behalf of the respondent-plaintiff did not confine himself to asserting that the expression is limited to suits for recovery of land, but alternatively he urged that it covers also suits which involve the question of title to land, such as suits for damages for trespass to land. This clearly would extend the primary, natural and ordinary meaning of the expression. It is plain, therefore, that the Court must resort to other sources of information in order to decide what is the meaning of the expression, as used in clause 12 of the Letters Patent. As laid down by Lord Herschell in *Bank of England v. Vagliano Brothers*<sup>(1)</sup> the Court should "in the first instance" see what is the natural meaning of the language used apart from any other consideration; but he guards himself by saying that this is only *the first step*, and that he does not mean to say that resort may not be had to other aids to construction in proper cases, as for instance to the previous state of the law, if a provision is "of doubtful import". It seems clear that the rules laid down for construing an obscure enactment in *Heydon's case*<sup>(2)</sup> are still good law, as approved in *Salkeld v. Johnson*<sup>(3)</sup>; "*The Solio case*"<sup>(4)</sup> and many other authorities. Just as a Court has power to examine "all the surrounding circumstances" to arrive at the true meaning and effect of a transaction (as stated by the Privy Council in *Bajjnath Singh v. Hajee Vally Mahomed Hajee Abba*<sup>(5)</sup>) so a Court, if it finds that the meaning of a statutory provision is not clear in itself, can examine the surrounding circumstances that led to or accompanied its enactment. But, in doing so, it must of course avoid assuming that a Codifying Act intended to leave the law unaltered, or "roaming over

(1) [1891] A. C. 107 at pp. 144, 145.

(3) (1848) 2 Ex. 256 at p. 272.

(2) (1584) 3 Col. R. 8.

(4) [1898] A. C. 571 at p. 573.

(5) (1924) 3 Ran. 106 at p. 125.

a vast number of authorities in order to discover what the law was".

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

2. The first thing, I think, to be considered is whether any of the other provisions of the Letters Patent throw any light on the meaning of these words. In the arguments before us reference has in particular been made to clauses 14 and 19 of the amended Letters Patent of 1865. Clause 14 uses the expression "causes of action for land or other immoveable property", and excludes the power of the High Court, in the case of a plaintiff having several causes of action against the defendant, to allow them to be joined together in one suit, if the causes of action are for land or other immoveable property. I cannot see that this in any way assists us in determining what is meant by a suit for land. The expression "causes of action for land" is in one way an inaccurate one; it means what in ordinary parlance would be called a cause of action for a claim or suit for land, just as in section 10 of Act VIII of 1859, referring to this question of joinder of several causes of action, it was more properly expressed by using the words "a claim for the recovery of land" rather than a "cause of action for the recovery of land". If, as I think they do, the words merely mean causes of action for a claim or suit for land or other immoveable property, then we are merely brought back to the same question, what is meant by a suit for land? Clause 19 provides that "with respect to the law or equity to be applied to each case coming before the said High Court", the law or equity to be applied was that which would have been applied, if the Letters Patent had not been issued. This application of law or equity is to be made to each case coming before the Court, and the words "coming before the Court" must surely mean "*properly* coming before the Court", so that it does not in any way purport to throw any light on the question of whether

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

a particular suit does or does not come within the jurisdiction of the Court. That is to be decided by the terms of clause 12, so far as the ordinary original jurisdiction of this Court is concerned. The only other provision that I think was referred to in argument in this connection was clause 37, which directs the Court in making its rules and orders for the purpose of regulating proceedings in civil cases to be guided as far as possible by the provisions of Act VIII of 1859, and those of any subsequent amending law. That section is only useful, so far as it shows that the Code of Civil Procedure, 1859, was considered as a suitable guide in the matter of making these rules. In clause 37 of the Letters Patent of 1862 it was provided that the proceedings in civil suits of every description in the High Court should be regulated by this Code of 1859. That went even further than the present clause 37. This, however, is a point which relates more to the question of the assistance that can be furnished by a consideration of analogous provisions of the Code of 1859 than to the question whether any other provision of the Letters Patent shows what is the meaning of the expression.

3. The next source of information which can properly be looked at is what is generally expressed as statutes *in pari materia*. Under this head, first of all, comes section 5 of the Civil Procedure Code, Act VIII of 1859. Apart from any use that may be made of the Despatch of the Secretary of State forwarding the Letters Patent of the High Court at Calcutta to the Governor-General-in-Council in May 1862, it is, I think, quite clear that the similarity of the language used in section 5 of that Act to the language used in the later clause 12 of the Letters Patent of 1862 and 1865 shows that the latter must have been mainly based upon the wording of this section 5 of Act VIII of 1859. It has not in fact been disputed before us that this is so,

although I do not mean to exclude the contention that the meaning of the words as used in the Act of 1859 is not a proper basis for construing the subsequent clause 12 of the Letters Patent. The connection between the two enactments has been pointed out by Sir Lawrence Jenkins, then Chief Justice of Calcutta, in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(1)</sup>, and I do not think I need add anything on this subject except to say that this clearly modifies the view he took in *Vaghoji v. Camaji*<sup>(2)</sup>, at p. 258, that the use of the expression "suit for land" in the Code of 1859 throws no light on the use of the same expression in the Letters Patent. The two enactments cover identical classes of cases, and they at any rate afford some ground for an initial presumption that the expression "suit for land" as used in both enactments was intended to mean the same thing. It is, therefore, of considerable importance to my mind to consider whether any light on the meaning of "suit for land" as used in section 5 of Act VIII of 1859 is thrown by any other part of that Act. We have first of all section 10, which refers to a claim for the recovery of land, and this leads to the obvious consideration that, if the Legislature had intended a suit for land to be identical with a suit for the recovery of land, then the latter expression would have been used in section 5.

4. The next relevant section is, I think, section 26. In head 5 of this section reference is made to a claim for land or for any interest in land. That, in my opinion, points to the words suit for land including a suit for any interest in the land. Section 33 is an important section. It provided that "if the claim relate to land or other immoveable property" and it appears to the Court that such land or other property is not situate within the limits of the Court's

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE<sup>(1)</sup> (1915) 42 Cal. 942 at p. 951.<sup>(2)</sup> (1904) 29 Bom. 249.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

jurisdiction, then "the Court shall return the plaint to the plaintiff in order to its being presented in the proper Court". This, at any rate at first sight, seems to imply that the Legislature considered that any suit relating to land was a suit for land. But, on the other hand, it may be said that section 192 shows that the relation to land must be substantial, for that section would cover cases of a suit for specific performance of a contract relating to immoveable property, where the plaintiff framed his suit so as merely to ask for specific performance or for damages for breach of contract. But certainly the use of these words "relates to land", in section 33, to my mind, shows that the Legislature intended to put a wide rather than a narrow meaning upon the words "suit for land". This section 33 was repealed by section 1 of Act XXIII of 1861, but its substance was re-enacted in section 3 of that Act. This says that:

"If it appear to the Court in any case relating to land or other immoveable property that such land or other property is not situate within the limits of the jurisdiction of the Court, ...the Court shall return the plaint to the plaintiff in order to its being presented in the proper Court."

This practically re-enacts what was said regarding this in the old section 33, and the fact that it was re-enacted in this form, in my opinion, shows that these words "relating to" were advisedly used by the Legislature, and that their appearance in section 33 cannot properly be attributed merely to bad drafting, as the learned Advocate-General suggested. On the other hand, there are undoubtedly provisions such as sections 190, 223 and 224 which can be relied upon as supporting the contention that a suit for land means a suit for the recovery of land. The latter two sections were referred to by the Judges in *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(1)</sup> where it was decided that

(1) (1872) 9 Bom. H. C. 12.

a suit for recovery of mortgage debt by sale of the mortgaged property was not a suit for land within the meaning of section 5 of the Code of 1859. But these sections obviously contemplate a suit where the relief asked for is delivery of land or other immoveable property, and I do not think that it is fair to say (especially in view of section 33 of the same Act) that they suffice to show that a suit for land was intended to be confined merely to a suit for recovery of land—a view which has in fact been given up even in this Court, as I have already mentioned. In section 190, for instance, it is not a necessary construction that the Legislature meant that every suit for land must be for the recovery of whole or part of such land; and in any case these sections do not come into such close relation with section 5 of the Act as section 33 does. Section 33 directly relates to the question of jurisdiction, and the two sections obviously have to be read together. To my mind, therefore, the Judges in *Yenkoba's case*<sup>(1)</sup> put undue weight upon the provisions of sections 223 and 224, and it seems to me that the contrary decision of the Calcutta High Court in *In the matter of the petition of S. J. Leslie*<sup>(2)</sup>, which is reproduced in *Nalum Lakshimikantham v. Krishnasawmy Mudaliar*<sup>(3)</sup>, is a sounder view than that taken by the Bombay High Court. The reference which the Bombay decision makes to the powers of the Court of Chancery in England can better be considered later in connection with the similar reference to those powers in the case of *Holkar v. Dadabhai*<sup>(4)</sup>.

5. Another Act which I think can usefully be referred to in connection with the meaning of this expression is the Indian Limitation Act, XIV of 1859. Clause 12 of section 1 of that Act provided for suits for

(1) (1872) 9 Bom. H. C. 12.

(2) (1903) 27 Mad. 157 at pp. 160, 161.

(3) (1872) 9 Beng. L. R. 171.

(4) (1890) 14 Bom. 353.

1926-27

HATIMBEAI  
HASSANALLY  
v.  
FRAMBOZ  
EGULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

the recovery of immoveable property or of any interest in immoveable property to which no other provision of that Act applied, and it was held by the Bengal High Court in *Surwan Hoossein v. Shahazadah Golam Mahomed*<sup>(1)</sup> that a suit brought to enforce a security against land was a suit for recovery of an interest in immoveable property within the meaning of this clause. That view was also taken by the Madras and Bombay High Courts, and this decision was relied upon by the Bengal High Court in *In the matter of the petition of S. J. Leslie*<sup>(2)</sup>. It helps to show that the Legislature in 1859 intended to include suits for an interest in immoveable property in the expression "suit for land" and that these words might cover a suit like a suit for a mortgage to recover his debt by sale of the mortgaged property.

6. It is no doubt true that the words "relating to" as used in section 33 of Act VIII of 1859 and section 3 of Act XXIII of 1869 are very wide, and that the Legislature could have drafted both sections 5 and 33 to show more plainly what really was intended. But, in my opinion, it is at any rate clear that the Legislature in the Code of 1859 did intend to use the expression "suit for land" in a wide rather than a narrow meaning. On the other hand, having regard to the expression "suit for land" being the main one used and the expression "suit relating to land" being the subsidiary one used, I think it was open to the Court to rule that a suit, in order to be one for land, should relate to the land in the sense that the relief sought for from the Court was such as would directly operate upon the land and affect the control or possession of that land. And from early days it was laid down, at any rate by the Calcutta High Court, that it did not follow that every suit that had reference to land was a suit for land:

<sup>(1)</sup> (1868) 9 W. R. 170.

<sup>(2)</sup> (1872) 9 Beng. L. R. 171.

see *Juggodumba Dossee v. Puddomoney Dossee* <sup>(1)</sup>. I have already referred to the somewhat similar view of Sir Lawrence Jenkins in *Vaghoji v. Camaji* <sup>(2)</sup> and *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.* <sup>(3)</sup>. The Courts could, in my opinion, harmonize the two expressions in this manner under the ordinary principle that statutes should be construed so as to make the different parts of it consistent as far as possible.

7. I would also point out that this expression about suits relating to land was not a new one in this connection. It appears in Lord Cornwallis's Bengal Code of Regulations, which were drawn up in 1793 under the powers that had been conferred in the Regulating Act of 1773, ( 33 Geo. III, c. 52 ) and the subsequent Act of 1781 ( 21 Geo. III, c. 70 ), which are referred to in Cowell's " Courts and Legislative Authorities in India ", pp. 60 and 61. As is stated in Cowell at p. 109, Lord Cornwallis, when he came out to India as Governor-General in 1786, " brought with him instructions from the Court of Directors, dictated with a view to carry out the object of Parliament, which was, in the words of the Act, " to establish permanent rules for the settlement and collection of the revenue, and for the administration of justice founded on the ancient laws and local usages of the country ". Accordingly, as stated at p. 111, in 1793 " he established a complete system of judicature throughout the Presidency of Bengal, and formed the existing regulations into a regular Code ".

8. The original jurisdiction of the Civil Courts that were established under this Code is defined in section 8 of Regulation III of 1793, as follows :—

" The Zillah and City Courts respectively are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal

<sup>(1)</sup> (1875) 15 Beng. L. R. 318 at p. 328.

<sup>(2)</sup> (1904) 29 Bom. 249.

<sup>(3)</sup> (1915) 42 Cal. 942.

1926-27

HATIMBHAI  
HASSANALLY  
v.FRAMROZ  
EDULJEE

property, land-rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature in which the defendant may come within any of the descriptions of persons mentioned in section vii, provided the landed or other real property to which the suit or complaint may relate shall be situated, or in all other cases the cause of action shall have arisen or the defendant at the time when the suit may be commenced shall reside, as a fixed inhabitant, within the limits of Zillah or City over which their jurisdiction may extend."

It will be noticed that the relevant words used are "landed or other real property to which the suit or complaint may relate". Some more details as to the arrangements for the administration of justice in the Bengal Presidency in 1780 and thereafter are given in Volume I of Morley's "Analytical Digest", published in 1850. The introduction at p. xxxix relates to the well-known incident of Sir Elijah Impey, the Chief Justice of the Supreme Court, having been appointed by Warren Hastings to be Chief of the Court of Sudder Dewanny Adawlut that he had established and refers to records showing that he declined appropriating to himself "any part of the salary annexed to the office of Judge of the Sudder Dewanny Adawlut until the pleasure of the Lord Chancellor should be known", as sufficiently refuting Macaulay's well-known virulent accusation against him. He goes on to say:—

"Sir Elijah, in fulfilment of the duties which devolved upon him by virtue of his new office, and without any remuneration, prepared a series of Regulations for the guidance of the Civil Courts which he submitted to Government in November 1780. They were approved of by that body, and were afterwards incorporated, with additions and amendments, in a revised Code passed in 1781 which was translated into the Persian and Bengali languages."

He then gives details about the jurisdictions and functions of the Courts in question. It seems to me a reasonable inference that this section 8 of Regulation III of 1793 was based upon Impey's Regulations of 1780 that I have just mentioned.

9. Lord Cornwallis's Code formed a model for similar Regulations in the two other Presidencies,

Madras and Bombay. As stated in Cowell at pp. 123 and 124, "in the Madras Presidency it appears that the Adawlut system framed upon the plan of Lord Cornwallis adopted in Bengal, was introduced in the year 1802". The Madras Regulation II of 1802 for establishing and defining the jurisdiction of the Courts of the Adawlut in Madras and the Madras Presidency contains a section 5, which is almost an exact reproduction of section 8 of Bengal Regulation III of 1793 and contains the same words:—

"Provided the landed or other real property to which the suit or complaint may relate shall be situated, or in all other cases, the cause of action shall have arisen, or the defendant at the time when the suit may be commenced shall reside as a fixed inhabitant within the limits of the Zillah over which their jurisdiction may extend."

As to Bombay, Cowell says (p. 125):—

"With regard to the Adawlut system in the Bombay Presidency, it appears that the Court of Directors in 1794 transmitted to the Government of that Presidency a copy of the Regulations proposed by Lord Cornwallis for the internal Government of the Bengal Provinces: and eventually Courts of Civil and Criminal Judicature were constituted by the Bombay Government on principles similar to those on which the Courts in the Presidency of Bengal had been established."

Section 7 of Regulation III of 1799, which established a Civil Court in Salsette, contained the same provisions as section 8 of Bengal Regulation III of 1793, so as to give that Court jurisdiction:—

"Generally of all suits and complaints of a civil nature in which the defendant may come within the description of persons mentioned in section 6 provided the landed or other real property to which the suit or complaint may relate shall be situated, or in all other cases, the cause of action shall have arisen, or the defendant at the time when the suit may be commenced shall reside as a fixed inhabitant within the limits of Salsette."

Similarly, in Regulation I of 1860 establishing a Civil Court in Surat, there was in section 7 a provision in the same language as to "the landed or other real property to which the suit or complaint may relate" having to be situated within the limits of the Court's jurisdiction.

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

10. As to Bengal, I would add that the provisions of section 8 of Bengal Regulation III of 1793 were also extended to Benares and the Ceded Provinces by section 7 of Bengal Regulation VII of 1795, and section 5 of Bengal Regulation II of 1803. Section 5 of Bengal Regulation V of 1831, extending the powers of Munsiffs and Sudder Ameens in the trial of civil suits, also reproduced the provisions of section 8 of Bengal Regulation III of 1793. It is to be noted that the Bengal and Madras enactments that I have mentioned remained in force at any rate up to the enactment of the Code of Civil Procedure, Act VIII of 1859, and they were not actually repealed till Act X of 1861 was passed. As regards Bombay, the Regulations of 1799 and 1800 that I have referred to were superseded by Mountstuart Elphinstone's Code of 1827. Section 21 of Bombay Regulation II of 1827 gave jurisdiction to the Civil Courts in all original suits and complaints subject to certain limitations. One of these is in the second clause which runs as follows:—

“Provided that in the case of immoveable property it is situated within the Zillah, and that in other cases the cause of action shall have arisen, or the defendant, when the suit commenced, shall have resided as a fixed inhabitant within its limits.”

This is obviously based on the former provisions that I have mentioned, but the words “in the case of immoveable property” are substituted for “relating to immoveable property”. They do not make any material change. It is to be noted, however, that under section 31 of Regulation XVII of 1827 the Collector was given a very extensive jurisdiction in regard to suits for the possession of land and connected disputes, and provision was made for transfer of all original suits on those subjects to the Collector.

11. It is of some interest to note in regard to this question that the Indian Law Commissioners, in paragraph 82 of their Report to the Governor-General of

India, dated July 2, 1842, which is at pp. 508 to 530 of the volume containing "Copies of the Special Reports of the Indian Law Commissioners", printed under the authority of the House of Commons in 1843, state as follows:—

1926-27

HATIMBHAI  
HASSANALLY".  
FRAMROZ  
EDULJEE

"By the Code of 1827, civil jurisdiction over a certain class of suits, those relating to land, was given to the Collectors of revenue, their assistants and head native officers; and by a very wide construction put upon this part of the code, the entire cognizance of every suit having the most remote connection with land, was taken away from the Zillah Courts, and transferred to the Collectors. A limit has, however, been put to this very extensive jurisdiction by Act XVI of 1838, and the revenue officers are now confined to, 1st, giving possession of lands, or the like to any party forcibly dispossessed of the same, if a plaint be preferred within six months of the date of dispossession."

This Act XVI of 1838 contained provisions corresponding to those of the existing Mamlatdars' Courts Act, Bom. II of 1906, so that the jurisdiction of the Civil Courts would then depend on the provisions of section 21 of Regulation II of 1827, to which I have drawn attention. This particular section (except a part which does not bear on the question under consideration) remained in force till it was repealed by Act X of 1861. Thus throughout the whole of the Company's territories from the commencement of the nineteenth century to 1859, the Civil Courts could only entertain suits relating to land, if the land was situate within the local limits of their jurisdiction. In addition to this we find that the expression "landed or other real property to which the suit may relate" was also adopted by legislation of the Governor-General-in-Council. For, in Act No. IX of 1844 of the Governor-General-in-Council, which applies to the three Presidencies of Bengal, Madras and Bombay, section 3 gave jurisdiction to Sudder Ameens "to take cognizance of all such suits as are mentioned in section 1 of this Act: provided the landed or other real property to which the suit may relate shall be situated, or in all other cases the cause of action,

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

shall have arisen, or the defendant at the time when the suit may be commenced shall reside as a fixed inhabitant, within the limits of such local jurisdiction as aforesaid". This Act has additional weight from the fact that it was presumably drafted by the Indian Law Commissioners, who were appointed in 1833 by the Charter Act of that year, 3 & 4 Will. IV, c. 85, and, as is well known, Macaulay was a member of that Commission. I may refer in this connection to Ilbert's "Government of India", 1st Edition, pp. 89 and-90. That this Commission was responsible for the draft is shown by a reference to this proposal in regard to the Sudder Ameens in paragraph 89 of the Report, submitted by them, dated July 2, 1842, published at p. 514 of the "Copies of the Special Reports of the Indian Law Commissioners", which were published under the orders of the House of Commons in 1843. This paragraph refers to a Report of December 4, 1841, on the subject, which I have not been able to obtain. That the Indian Legislature should have adopted this expression "relating to" supplies at any rate a reasonable basis for the view that the Code of 1859 used the expression "suit for land" in a sense approximating more to the words, "suit relating to land" than to the words "a suit for the recovery of land."

12. I next come to what may be called historical considerations bearing on the intention of the framers of the Act of 1859 and the Letters Patent. In the case of *Holkar v. Dadabhai*<sup>(1)</sup>, which has been overruled by the Full Bench in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>, the main consideration which led the Court to decide that this Court had jurisdiction to entertain a suit for specific performance of an agreement made in Bombay but relating to land situate outside the original jurisdiction of the High

<sup>(1)</sup> (1890) 14 Bom. 353.

<sup>(2)</sup> (1925) 50 Bom. 1.

Court, was that the Court of Equity in England would have entertained the suit, and that it could not have been intended by the framers of the Letters Patent, who were presumably English lawyers, to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the High Courts. As held by Sir Lawrence Jenkins in *Vaghoji v. Camaji*<sup>(1)</sup> this was Sir Charles Sargent's *ratio decidendi*. *Holkar's case*<sup>(2)</sup> treats the question of what was the intention of the framers of the Charter as the most important consideration; and I therefore propose to give in some detail the history leading up to the enactment of the Code of 1859 and the issue of the Letters Patent of 1862. I scarcely need cite specific authority for doing this; but as instances where the Privy Council has examined the course of legislation and the history of the matter in order to ascertain the intention of the Legislature, I may refer to *Brown v. McLachlan*<sup>(3)</sup> and *Maha Prasad v. Ramani Mohan Singh*<sup>(4)</sup>. As to India the provisions of section 57 of the Indian Evidence Act specifically allow the Court to refer for its aid to appropriate books or documents of reference "on all matters of public history". In the first instance, I shall endeavour to limit my references to the case of documents which can without challenge be legitimately resorted to. I think the first thing to be emphasized in considering this history is the intention of the Government, which succeeded the East India Company, to amalgamate the two Courts that up to then had existed in each of the three Presidency towns, viz., (1) the Supreme Court, and (2) the Sudder Dewanny Adawlut, which was the High Court for the Company's Courts in the mofussil. There is plenty of material to show that. Thus in the Imperial Gazetteer of India, Vol. IV, Edition 1909, at p. 146, it is stated that

1926-27

HATIMPHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

(1) (1904) 29 Bom. 249.

(3) (1872) L. R. 4 P. C. 543 at p. 550.

(2) (1890) 14 Bom. 353.

(4) (1914) L. R. 41 I. A. 197.

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

the present system may be said to have been inaugurated by the passing of the Indian High Courts Act, 1861, and in 1852 it had been urged upon the Parliamentary Committee for East Indian affairs that it was desirable "that the Supreme and Sudder Courts in each Presidency should be consolidated so as to unite the legal training of the English lawyers who sat in the one with the intimate knowledge of native customs, habits and laws possessed by the civil servants who presided over the other". A similar statement will be found in Cowell's "Courts and Législative Authorities in India", 3rd Edition, at pp. 160 and 161; but the proposal had been started long before 1852. Thus the Indian Law Commissioners' Reports of 1847, printed under the orders of the House of Commons, contains at pp. 630 to 633 a draft by that Commission of what was then known as the *Lex Loci* Act, section 8 of which states as follows:—

"And whereas it is probable that a High Court of Appeal will be established at Calcutta or at each of the three Presidencies which will supersede all the functions whereby the several Supreme Courts and Sudder Courts now correct the decisions and control the proceedings of the inferior Courts: but it is uncertain how much time may elapse before such High Court of Appeal can be established: it is therefore hereby enacted..."

Cowell at p. 161 states that Sir Charles Wood actually introduced a Bill in 1853 in which

"he was anxious to include a provision for effecting that object and to empower Her Majesty to issue her Charter for the establishment of a United Court. But the members of the Indian Law Commission, though they approved of the proposed change, thought that it would be useless to attempt to unite the Courts till the Codes of Procedure were established. A Royal Commission, however, was issued to obtain the basis on which the forms of procedure could be framed."

This refers to the enactment of the Government of India Act of 1853, 16 & 17 Vic., c. 95, section 28 of which provided for the appointment of a body of English Commissioners, with instructions to examine

and consider the recommendations of the Indian Law Commissioners. This is mentioned in Ilbert's Government of India, Edition 1898, p. 95. According to a foot-note on that page the Commissioners, who included Lord Romilly and Sir John Jervis (Chief Justice of Common Pleas), were instructed in 1853 to consider specially the preparation of a simple and uniform Code of Procedure for Indian Courts and the amalgamation of the Supreme and Sudder Courts. They submitted various reports, which were printed under the authority of Parliament. Their first and fourth reports refer particularly to this question of amalgamation of the two Courts in each Presidency town, and contain certain drafts which are clearly their proposals for what became section 5 of the Code of 1859 and clause 12 of the Letters Patent. I do not for the present consider these drafts, as a doubt has been raised whether they can be looked at or not; but I think the reports made by a statutory body appointed for the particular purpose I have mentioned are documents, which afford the most accurate information available as to the defects of the prior system and proposals for its amelioration. I think that, having regard to the remarks of the Earl of Halsbury in *Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trademarks*<sup>(1)</sup>, there is clear authority for looking at such reports, which also come under the words "appropriate books or documents of reference" in section 57 of the Indian Evidence Act. In foot-note (g) at page 140 of Hardcastle's Statutory Law, 3rd Edition, are given further instances where such reports of statutory commissions have been looked at and considered by the Courts, and it certainly would be difficult to find any more accurate source of information as to what was really the intention at any rate of the English

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDUJEE

<sup>(1)</sup> [1898] A. C. 571 at p. 576.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Commissioners, whose report would necessarily have very great weight in the decision of the Government on matters about which the Commissioners were authorized to advise Her Majesty. As stated in Cowell at p. 160, there was a clear intention to have a uniform criminal law, a uniform system of Courts of Civil and Criminal Procedure, and in the end as far as practicable a uniform civil law and equal liability to the jurisdiction. This helps to bring out the close connection between the Code of Civil Procedure of 1859 and the issue of the Letters Patent of 1862. Another point that should be mentioned is the probability that the framers of those enactments would be influenced not so much by the law in England as by a consideration of what was desirable for India, having regard to the system already in operation there. As already mentioned, the Indian Law Commissioners had directed their attention to the question of jurisdiction of the Civil Courts of the Company, and it had been re-enacted by Act IX of 1844 that suits relating to land had to be brought in the Court within the limits of which that land was situated. This is a consideration which, I think, should not be overlooked; and it seems to me extremely probable that in defining the original civil jurisdiction of the High Court this would be given considerable weight. There would in fact be the intention that the High Court should have a similar jurisdiction in all respects to that which the Code of 1859 prescribed in regard to mofussil Courts.

13. Another very important consideration is that history shows clearly that there was an intention to curtail the jurisdiction of the Supreme Court and definitely define the jurisdiction that the High Court might exercise. There had, as is well known, been very considerable controversies as to the extent of the jurisdiction of the Supreme Court, which Macaulay in

his essay on Warren Hastings refers to as "immense and undefined". He draws a vivid picture (which is reproduced in Cowell at p. 50) of the rule of the Supreme Court amounting to a reign of terror. This of course refers to the early disputes which arose between the Bengal Government and the Supreme Court of Calcutta, which are mentioned at pp. 46 to 49 of Cowell's work. Somewhat similar disputes in the Bombay Presidency are mentioned at pp. 94 and 95, and there was a decision of the Privy Council reported in Knapp's Privy Council Reports, Vol. I, p. 1, which went against the Supreme Court. The Indian Law Commissioners had not been idle in the matter. They had considered the question of the procedure in the Supreme Courts, and as a result of their reports and proposals various Acts were passed such as No. VII of 1844 for improving the Law of Evidence, No. VI of 1854 to amend the practice and course of proceeding on the Equity side of the Supreme Courts, No. V of 1855 to assimilate the process of Execution of all sides of the Supreme Courts, and No. VI of 1855 to extend the operation and regulate the mode of executing writs of Execution in the Supreme Courts. In many respects the law of India became then ahead of the law of England, and as a further instance of this I may refer to section 37 of Act IX of 1850, under which the Judges of the Courts of Small Causes in Calcutta, Madras and Bombay were empowered to determine all questions as well of fact, as of law or equity, in all cases which they had authority to try. Similarly, section 38 of Act VI of 1854 empowered the Supreme Courts on its Equity side to determine a legal title or right of a party that otherwise might have to be established in a separate proceeding at law. Thus the Supreme Courts were placed in some respects in a better position than Courts of Equity in England. It was not, I believe

1926-27

HATIMBHAI  
HASSANALLYv  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

until the Judicature Act of 1873 that there was statutory authority for the Courts in England to administer law and equity concurrently. On the other hand in some respects the powers of the Supreme Court were restricted as compared to what might have been the powers of the Court of Chancery in England. As one instance of this I would cite clauses 4 and 5 of Act VI of 1855, which prohibited the Sheriff from selling immoveable property situate beyond the local limits of the jurisdiction of the Court, without first notifying the proposed sale to the Judge of the District, in which the property was situate and causing a notice of the proposed sale to be stuck up in the office of the Collector of the District and on some conspicuous part of the property to be sold. In view of these considerations I do not think it can safely be assumed that the framers of the Charters of 1862 and 1865 intended in any way to confer the same jurisdiction on the High Courts in India as was exercised by the Court of Chancery in England. Clause 12 purports to give an exact definition of the limits of the High Court's original civil jurisdiction and in order to determine whether the Court has or has not jurisdiction, it is necessary in my opinion to consider whether in fact a suit is a suit for land or not, without any regard to what are the powers of the Court of Chancery in England. It has to be borne in mind that, however admirable may have been the system under which the Court of Chancery in England extended its jurisdiction so as to do justice in cases which otherwise in strict law might have resulted in injustice, there was an obvious inclination on the part of that Court to proceed upon the maxim that a good Judge should seek to extend the Court's jurisdiction and therefore to narrow the class of suits *in rem* and extend the class of suits *in personam*. (Cf. the remark of Lord Herschell in

*British South Africa Company v. Companhia de Mocambique*<sup>(1)</sup>, that "the Courts of Equity...were in early days, at all events, keen to supplement the deficiencies of the Common Law" &c.) This is, I think, well shown by the reasoning under which the Courts of Chancery held that a foreclosure suit is not a suit *in rem* but a suit *in personam*, contrary to the view which has the authority of the House of Lords in *Pugh v. Heath*<sup>(2)</sup>, that such suits were clearly suits in regard to immoveable property under the Limitation Act: and Mr. Westlake in his *International Law*, section 174, has declined to treat such cases as properly falling under the head of suits *in personam*. Therefore, in my opinion, the reasoning of Sir Charles Sargent is not correct. The framers of the Charter no doubt were, as he says, English lawyers; but they were also proceeding upon the views of Commissioners who were not only English lawyers but were members of the Civil Services appointed in India, as mentioned in a foot-note at p. 90 of Ilbert's *Government of India*.

14. Regarding the drafts of the English Law Commissioners that I have referred to, I strongly urge that they ought to be taken into consideration. In *Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trademarks*<sup>(3)</sup> Lord Halsbury at pp. 574 and 575 considers the report of the Commissioners there referred to, not only in regard to the defects of the then Act but also in regard to the proposals that they made for its amendment. This includes the passage in the report—"We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale,"—and the further proposals that follow. I cannot see any

<sup>(1)</sup> [1893] A. C. 602 at p. 626.      <sup>(2)</sup> (1882) 7 App. Cas. 235.

<sup>(3)</sup> [1898] A. C. 571.

1926-27

HATIMBHAI  
HASSANALLYv.  
FRANROZ  
EJULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EPUJEE

substantial difference between a proposal made in that way in the report, and a proposal in an attached draft, except that the latter is in fact a more accurate expression of what is proposed. To shut one's eyes to what is a published historical fact, viz., that a statutory body of Commissioners made a certain proposal, which was the basis at any rate for consideration when a proposed enactment was before the Government, seems to me to be contrary to common sense; and although there may be a doubt as to the admissibility of such considerations in England, it does not follow that the law in India is the same. It is pointed out by Sir John Woodroffe in "*The Englishman*", *Ltd. v. Lajpat Rai*<sup>(1)</sup> that section 57 of the Indian Evidence Act in allowing reference to matters of public history is wider than the corresponding English law. It has no doubt been ruled by the Privy Council that the proceedings of the Indian Legislature should not be looked at as affording any guidance as to the meaning of an Indian enactment; but the considerations that have led to this view in regard to the proceedings of legislative bodies, such as that there are three estates of the realm, do not equally apply to the case of an enactment by the Crown, especially where the statement of intention is made by a statutory body of Commissioners. They were appointed to make proposals for the consideration of the Government and the actual proposals that they made are matters of public history, available by reference to Publications by Her Majesty's Printers, Messrs. Eyre and Spottiswoode, which were presented to both Houses of Parliament by command of Her Majesty. I submit that the drafts in question are admissible for consideration in connection with the construction of clause 12 of the Letters Patent and section 5 of the Code of 1859, though of course I do not

<sup>(1)</sup> (1910) 37 Cal. 760 at p. 787.

mean that they are conclusive evidence of the intention of the final enactments.

15. The fourth Report of the Commissioners was published in 1856. The first paragraph of this Report refers to their first Report, in which they had prepared and submitted to Her Majesty

“a plan for the amalgamation of the Supreme and Sudder Courts at Calcutta as well as a simple and uniform Code of Civil and Criminal Procedure applicable both to the High Court so formed and to all inferior Courts within the limits of its jurisdiction.”

Their third Report, as there mentioned, comprised similar proposals in regard to the North Western Provinces of the Presidency of Bengal. They then say :—

“We have received instructions from the Commissioners for the Affairs of India, directing us to apply ourselves to the preparation of a Report for Madras and Bombay similar to that which we have already submitted for Bengal, with such modifications as the difference in the existing systems of the Courts of those Presidencies may render necessary. As the measures we recommend for Madras are in all respects the same as those we recommend for Bombay, we consider it unnecessary to submit separate Reports for those Presidencies; and accordingly we now complete our Reports in regard to Judicatories, Jurisdictions and Procedure for the several Presidencies of India.

The same majority of the Commissioners which agreed in recommending that the High Court at Calcutta should be constituted in the manner proposed in our first Report think that the High Courts to be established at Madras and Bombay should also be constituted in that manner, except only as regards the number of Judges.”

They then deal with various minor questions connected with this subject. The last paragraph of the Report says :—

“For our views on various points, as well as for further information in regard to the existing systems of judicature and procedure in the Presidencies of Madras and Bombay, we refer to the notes and appendices of our first Report which we consider it unnecessary to add to our present Report.”

Then follow the proposals as to the High Courts at Madras and Bombay in the form of draft provisions in separate paragraphs, which were the basis of some of the provisions of the High Courts Act, 1861, and the Charters of the High Courts of Madras and Bombay

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

These are contained in pp. 11 to 15 of the Report. Paragraph 17 is the provision proposed as regards the original jurisdiction of the High Court as to suits. It runs as follows:—

“The High Court, in the exercise of its original jurisdiction, shall be empowered to receive, try and determine suits of every description, provided the landed or other real property to which the suit may relate shall be situated, or, provided in all other cases the cause of action shall have arisen, or the defendant at the time when the suit may be commenced shall dwell, or carry on business, or work for gain, within the local limits of the ordinary original jurisdiction of the said Court, except that it shall not have any jurisdiction in cases in which the debt, or damage, or value of the property sued for, does not exceed one hundred Rupees, and which fall within the jurisdiction of the Small Cause Court.”

It will be seen that the words there used correspond to those which were used in the Bengal Regulation of 1793 and the Madras Regulation II of 1802 and the Bombay Regulations of 1799 and 1800, to which I have already drawn attention. The similarity of the language employed is remarkable. The words “provided the landed or other real property to which the suit may relate shall be situated” are exactly the same as in those Regulations, except that the latter add after the words “the suit” the words “or complaint”. The subsequent words as to “all other cases” also are very similar; the only differences are the substitution of the word “dwell” for “reside as a fixed inhabitant”, and the insertion of the words “or carry on business or work for gain”. It is difficult to avoid the conclusion that the draft is based upon those provisions. Then follow the proposals as to the Civil Courts subordinate to the High Court in the two Presidencies. Pages 16 to 18 deal with the constitution of the different Courts and their jurisdiction. Paragraph 11 relates to the jurisdiction of the Moonsiffs, i.e., lowest grade of Civil Court. It says:—

“The Moonsiffs shall be empowered to receive, try, and determine suits of every description cognizable by the Civil Courts under the following pecuniary

limitations ; provided the lauded or other real property to which the suit may relate shall be situated, or provided in all other cases the cause of action shall have arisen, or the defendant, at the time when the suit may be commenced, shall dwell or carry on business, or work for gain, within the limits to which their respective jurisdictions may extend."

Here again it will be noticed that the provision is similar to the draft clause 17 regarding High Courts that I have already mentioned, and this provision, which had also been proposed in respect of the similar Courts in Bengal and the North Western Provinces (see for instance clause 11, at p. 15 of the Third Report of the Commissioners), is the evident basis for section 5 of the Civil Procedure Code, 1859, which was subsequently enacted. But it is to be noted that, instead of the expression "the landed or other real property to which the suit may relate", section 5 substituted the words "in the case of suits for land or other immoveable property such land or property". Some light on the genesis of this substitution is thrown by clause 17 of the Commissioners' draft proposals in this matter. This runs as follows:—

"A suit for land or other real property situate within the limits of a single Zillah, but within the jurisdiction of different Moonsiffs' Courts, may, with the previous sanction of Judge of such Zillah, be brought in any Court within the limits of which any portion of such property is situate, provided the entire claim in respect of the value of the property in suit be cognizable by such Court."

There, it is to be noted that the expression used is "a suit for land or other real property". This provision corresponds to section 11 of the Act of 1859, which begins as follows:—

"If the suit be for land or other immoveable property situate within the limits of the single district, but within the jurisdiction of different Courts, the suit may be brought in the Court", &c.

So far as the Commissioners' proposals are concerned, the fact that they considered the words "suit relating to land" as equivalent to "suit for land" seems fairly obvious from the juxtaposition of

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926 27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

the two provisions I have mentioned; and a similar construction in regard to section 33 of the Act of 1859 and section 3 of Act XXIII of 1859 has already been mentioned. The fact that the words "suits for land" were substituted for the phraseology about "suit relating to land" in clause 12 of the Letters Patent which were subsequently issued is, of course, one on which different views may be entertained. One view can be that it was clearly intended to avoid a wide phrase like "suit relating to land" and to substitute for it another which would be more restricted, such as "suit for land". But it seems to me that, having regard to the correlation of the two phrases in the proposals of the Commissioners and to the connection that was still maintained in the Code of 1859, as I have just mentioned, it is far more probable that the substitution was made with the idea that "a suit for land" was a better phrase to use in connection with the definition of jurisdiction, but without any intention of thereby narrowing the meaning much beyond what would be expressed by the words "a suit relating to land". And the close connection of the proposals in regard to the High Court with those for the jurisdiction and procedure of the subordinate Courts that appears from the Reports of the Commissioners shows a clear intention that the jurisdiction of the Court should be on a similar basis to the jurisdiction of the mofussil Court. In some cases (as stated in Maxwell on the Interpretation of Statutes, 5th Edition, p. 45) an inference can no doubt be drawn from comparing the language of the Act with the declared intention of its framers, that the difference between the two was not accidental but intentional: in this case, however, there are strong considerations *contra*.

16. Coming to the next stage of what was the intention in the final provisions contained in clause 12

of the Letters Patent, the question of the admissibility of the Despatch of the Secretary of State communicating the Letters Patent for the High Court of Calcutta to the Government of India falls for consideration. This Despatch, which is printed at pp. 1133. to 1141 of the 8th Edition of Mulla's Civil Procedure Code, is a well-known document that has for a long time been available to the public. Sir Charles Wood in paragraph 39 of the Despatch directed that a copy of the Despatch should be forwarded with the Letters Patent to the Judges of the High Court of Bengal, and no doubt a similar communication was made to the Judges of the High Courts of Madras and Bombay in forwarding the Letters Patent to those Courts. It is a document which was written by the person who had most authority to speak in the name of Her Majesty, by whom the Letters Patent of the Courts had to be granted under section 9 of the High Courts Act of 1861. Section 3 of the Government of India Act of 1858 provided that he should exercise the controlling power in regard to the affairs of India; and as remarked by their Lordships of the Privy Council in *Devchand v. Chhotamlal*<sup>(1)</sup> the sovereign power that had formerly been exercised by the East India Company was under that Act to be exercised in England through the Secretary of State. It may no doubt be objected that the observations of the Secretary of State in the Despatch are mere expressions of opinion and cannot be said to amount to rulings by those entitled to speak on behalf of the sovereign power, of the kind referred to at p. 252 of the case just cited as to the jurisdiction of the British authorities in Kathiawar. That is true; but obviously the opinion of the Secretary of State, who was the authority responsible for the issue of the Letters Patent on behalf of Her Majesty, and who must

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

(1) (1905) 33 Cal. 213 at p. 243.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

have had them under his consideration, is extremely weighty. Of course, if in law such an opinion is inadmissible, then it must be excluded from consideration; but I venture to submit that such an opinion falls under the provisions of clause (4) of section 32 of the Indian Evidence Act, which allows an opinion to be given in evidence as a relevant fact when it is that of a deceased person "as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen." It surely is a matter of public interest to know what was the intention of the Crown as to the extent of the jurisdiction of the High Court of India in regard to clause 12 of the Letters Patent. It is as much a matter of public interest as an opinion about the boundaries of a country, town, parish, manor or hamlet, which have been held to be matters of public or general interest falling within this rule of law. The distinction that this is not a case of physical boundaries but of the boundaries for an exercise of a legal power is surely immaterial. And this opinion was given by Sir Charles Wood long before any controversy had arisen on the question of jurisdiction.

17. Again this particular opinion is a matter of public history within the meaning of section 57 of the Indian Evidence Act. As a somewhat analogous precedent, I may refer again to *Devchand v. Chhotam-lal*<sup>(1)</sup>. Among other matters considered in that case by their Lordships of the Privy Council were certain rules issued by the Bombay Government in 1902. These are referred to at p. 251 of the report of the case in the I. L. R. Series. Their Lordships say:—

"A fresh set of rules was issued in 1902 in which express instructions are laid down as to what cases should be regarded as political. In this the rules

(1) (1905) 33 Cal. 219.

seem, on the face of them, to go beyond their predecessors. But in the Despatch of August 8, 1902, which communicated the new rules to the Secretary of State, the Government of Bombay said: 'The rules are simply an issue in authoritative form of existing orders, and contain no new matter,' except certain points not now material."

There the Despatch accompanying the new rules of the Bombay Government was not held to be entirely inadmissible in considering the scope or meaning of the rules. The Despatch has also been more than once referred to by Judges of this Court in construing the Letters Patent: see *Peshotam Hormasji Dustoor v. Meherbai*<sup>(1)</sup>; *Nusserwanjee Wadia v. Eleonora Wadia*<sup>(2)</sup>; and *Benjamin v. Benjamin*<sup>(3)</sup>. But even if the Secretary of State's Despatch be treated as inadmissible as an aid to the construction of clause 12, still from the considerations that I have already mentioned it is quite obvious that "the terms of clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859), and are intended to include every description of case over which the mofussil Courts have jurisdiction". That is what is said in paragraph 17 of the Despatch, and it corroborates what I have already endeavoured to point out and what Sir Lawrence Jenkins in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(4)</sup> treated as common knowledge.

18. Para. 16 of the Despatch is, however, of even more importance. This clearly shows that in the opinion of the Secretary of State, it was intended (1) to adopt the principle that "every suit should be instituted in the Court of the District in which the property forming the subject of dispute is situated", and (2) to take away "the jurisdiction hitherto exercised by the

(1) (1888) 13 Bom. 302 at p. 310.

(2) (1925) 50 Bom. 369 at p. 378.

(3) (1913) 38 Bom. 125 at p. 146.

(4) (1915) 42 Cal. 942 at p. 951.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency town, but within the limits of the Presidency or Division subject to the authority of the High Court". In the face of this, it seems to me the reasoning of Sir Charles Sargent in *Holkar v. Dadabhai*<sup>(1)</sup> cannot stand. It is argued, that this only shows an intention to take away the jurisdiction of the Supreme Court over British subjects residing in factories in the Bombay Presidency; but this ignores the wide words "or otherwise" after the words "constructive inhabitancy". So far at any rate as the Secretary of State was concerned, it seems clear that he had no intention of allowing any equitable jurisdiction of the Court of Chancery in England to be exercised by the High Court so as to override the principle that "every suit should be instituted in the Court of the District in which the property *forming the subject of dispute* is situated". It may be said that the words in italics are not as wide as the words "to which the suit relates", but they are certainly nearer the latter expression than the construction which the Advocate General asks us to put on the phrase "suit for land".

19. The next possible aid to construction is the subsequent legislation on the same subject contained in section 16 of the Civil Procedure Code, Act X of 1877, and the corresponding provisions in the subsequent Codes of 1882 and 1908. This section expands the words "suit for land" in section 5 of the Act of 1859 into a wide range of suits relating to land, which include suits for the determination practically of any right to or interest in immovable property. Now I fully appreciate that the cases in which light may be thrown upon the meaning of an Act by taking into consideration enactments contained in subsequent Acts are extremely

(1) (1890) 14 Bom. 353.

limited, as explained on p. 155 of the 3rd Edition of Hardcastle's Statutory Law. But in the present case I think it is important to bear in mind that the previous legislation of 1793 to 1844 that I have mentioned was all in the same direction, viz., that a Civil Court in the mofussil was not to exercise jurisdiction in suits relating to land, unless that land was situated in the local limits of its jurisdiction. Then we have Act VIII of 1859, which employs the ambiguous expression "suits for land". Difficulties had arisen with regard to the construction of that phrase. The Bombay High Court held in *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(1)</sup>, that a suit for the recovery of a mortgage debt by the sale of the mortgaged property was not a suit for land within the meaning of section 5 of the Code of 1859. In the case of *In the matter of the petition of S. J. Leslie*<sup>(2)</sup> the Calcutta High Court held the direct contrary, and there were previous decisions of that Court to the same effect in regard to mortgage suits, as pointed out in *Natum Lakshimikantham v. Krishnasawmy Mudaliar*<sup>(3)</sup>. The attention of the Legislature was presumably drawn to this difference of opinion, and this helps to explain the alteration that was made in the Code of 1877. The consideration naturally arises whether the Legislature did not intend to express the law more clearly, as it had been prior to the Code of 1859 and as it was intended to be enacted in section 5 of the latter Code. The preponderance of probability certainly seems to me to be in favour of such an intention and against a great and sudden change of policy (cf. the remarks of their Lordships of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai*<sup>(4)</sup>, that the construction there favoured "escapes the necessity of attributing to the Legislature a great and sudden change of policy"). All the considerations as to the history of the proposals,

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

(1) (1872) 9 Bom. H. C. 12.

(3) (1903) 27 Mad. 157 at p. 161.

(2) (1872) 9 Beng. L. R. 171.

(4) (1907) 30 Mad. 426 at p. 433.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE.

which led to the enactment of the Code of Civil Procedure and clause 12 of the Letters Patent tend in that direction. I do not mean to say that section 16 of Act X of 1877 may not have been intended to go beyond the limits of what could legitimately be brought under the head of "a suit for land", as for instance, in the clause (f) about suits for the recovery of moveable property actually under distraint or attachment. But I think that that section does afford further ground for holding that the Legislature had intended the words "suit for land" to have the wider sense that is clearly signified in clauses (a) to (e) of section 16. Sir Lawrence Jenkins in *Sudamdih Coal Company's case*<sup>(1)</sup> has referred to this point as showing that the construction he gave to the words "suit for land" was not opposed to the general trend of legal thought. The general trend of previous Indian legislation is entirely in the same direction.

20. Before leaving this subject of legislation subsequent to the Code of 1859 and the Letters Patents of 1862 and 1865, I think it is pertinent to observe that under clause 44 of the Letters Patent, the latter are subject to the legislative powers of the Governor-General in the Legislative Council, and that under clause 37 the High Court, in making rules and orders for the purpose of regulating all proceedings in civil cases before it, is to be guided as far as possible by the provisions of the Code of Civil Procedure, Act VIII of 1859, and the "provisions of any law which has been made amending or altering the same by competent legislative authority for India". The latter provision recognizes the special relations between the Code of Civil Procedure and the Letters Patent, and further points to the intention that there should be a uniform system of jurisdiction and procedure applicable to both the superior Courts of jurisdiction in Presidency towns and the inferior mofussil Courts. That intention is clearly

<sup>(1)</sup> (1915) 42 Cal. 942.

shown by the Reports of the Indian and English Law Commissioners that I have already referred to and by other historical records. Therefore there is the more reason for having regard to the provisions of the Code of 1877 in reference to clause 12 of the Letters Patent than there might be in an ordinary case. In fact it appears from the amendment of section 382 of Act VIII of 1859 by part II of the schedule to Act XIV of 1870 that the words "in any Court of Judicature established by Royal Charter" were repealed in that section, so that thereafter until 1877 the Code of 1859 would extend also to any suit instituted in a High Court, and section 3 of Act XXIII of 1861 about the Court returning a plaint in a suit relating to land if the land was not situate within the local limits of its jurisdiction would operate also in a High Court suit. In fact this section was resorted to even before 1870 by Macpherson J. of the Calcutta High Court, when sitting on its Original Side, in *Bibee Jain v. Meerza Mahommed Hadee*<sup>(1)</sup> where the Judge ordered the plaint to be returned. It would seem that section 5 of Act VIII of 1859 would from 1870 be of equal authority to clause 12 of the Letters Patent, and there would be all the more reason for not giving the words "suit for land" a different meaning in the one enactment to what it had in the other. The reason why the Act of 1859 was not at once applied to the High Courts is explained in *Jamuna Bhai v. Sadagopa*<sup>(2)</sup> as due to the inconvenience of a complete adoption of Act VIII of 1859; and when rules had been framed by the High Courts, to mitigate this inconvenience, the restriction in section 382 was removed. Under the Code of 1877, section 16 and the connected sections did not apply to the Chartered High Courts, so that afterwards this same consideration did not apply. But it clearly illustrates the trend of legal thought as

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

<sup>(1)</sup> (1865) 1 Ind. Jur. N. S. 40.

<sup>(2)</sup> (1883) 7 Mad. 56 at p. 59.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

to uniformity of jurisdiction in the period at any rate up to 1877; and the Legislature in India could hardly have expressed in a more emphatic manner its view that the jurisdiction conferred on a High Court by clause 12 of its Letters Patent was the same as that conferred on a mofussil Court by section 5 of the Code of 1859. This goes strongly against the view that it was not intended to proceed on parallel lines in both cases.

21. To sum up, all the indications to which I have referred, viz. (1) the legislation prior to 1859, (2) the draft of the English Law Commissioners in regard to both the jurisdiction of the High Court and that of the mofussil Courts, (3) the Code of 1859, especially section 33 of that Act and the similar section 3 of Act XXIII of 1861, (4) the Secretary of State's Despatch about the Letters Patent, (5) the amendment of section 382 of Act VIII of 1859 in 1870, and (6) the subsequent Codes of Civil Procedure of 1877, 1882 and 1908, all go in one and the same direction as indicating that a wide meaning such as "a suit relating to land" should be given to the words "a suit for land". In addition we have the fact that the wider expression had already been used in the case of mofussil Courts and that it is a case of one and the same expression "suit for land" being applied to the High Court and mofussil Courts, instead of a case of there having been some different provision for the High Court and a clear departure from that provision in the case of mofussil Courts. It may be added that the expression "relating to land" in connection with a "local" action, as opposed to a "transitory" action, was not a novelty at the time that Lord Cornwallis's Code of Regulations was enacted. Thus Vattel, a Swiss Jurist of about 1757, in a passage quoted in Story's Conflict of Laws, paragraph 553, which in turn is cited in Lord Herschell's judgment in *British South Africa Company v. Companhia de Mocambique*,<sup>(1)</sup> speaks of an action

<sup>(1)</sup> [1893] A. C. 602 at p. 623.

having to be brought where the defendant dwelt, "provided it does not *relate to* an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies *relating to* such property can only be decided in the state in which it depends". It has to be remembered that, as stated in the arguments for the defendants in the *Mocambique case* when heard in the Court of Appeal<sup>(1)</sup>, all actions were originally local, and an action which related in any way to land situate abroad was never entertained by the Courts of Common Law. In invading this principle, according to Story, the Court of Chancery had extended its jurisdiction further than was approved by jurists generally; and Willes J. agreed with that view (see p. 387). As stated in the same arguments, "it is difficult to draw the line exactly". In England it has been drawn for the present at the line indicated by the decision in the *Mocambique case*; but in my opinion it should not therefore be assumed that the same line applies in the case of India, especially having regard to the very different line drawn in 1793 to 1859.

22. I now come to a consideration of the decided cases on the subject, but I do not propose to go through the whole of these, as it is, I think, unnecessary to do so.

I first take up the case of *Holkar v. Dadabhai*<sup>(2)</sup> which is the main one for consideration. It has been contended before us by the Advocate General that in this case Sir Charles Sargent meant to rule that a suit for specific performance of an agreement, which involved the possibility of a final decree for sale of property outside the territorial jurisdiction of the Court,

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

<sup>(1)</sup> [1892] 2 Q. B. 358 at p. 386

<sup>(2)</sup> (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

was not a suit for land, whereas Mr. Setalvad contends that he merely meant that, whether or not it was a suit for land, the High Courts had the powers of a Court of Equity in England for enforcing a decree *in personam* and so could exercise jurisdiction in that case. Personally it seems to me that Sir Charles Sargent did not definitely rule that such a suit was not a suit for land, and I am supported in this by the view expressed by Sir Lawrence Jenkins in *Vaghoji v. Camaji*<sup>(1)</sup> as to Sir Charles Sargent's *ratio decidendi*, viz., "that it could not have been intended to exclude from the jurisdiction of the High Courts such suits *in personam* as would have been entertained by a Court of Equity in England in relation to land abroad". But whether I am right or wrong in this, it is clear that Sir Charles Sargent felt some doubt about the Court's jurisdiction covering directions for a sale of land outside jurisdiction by an officer of the High Court. The penultimate paragraph of his judgment in *Holkar v. Dadabhai*<sup>(2)</sup> at p. 360 says:—

"The present decree, it is true, is for sale of the land by the officer of the High Court. The practice, however, of making an order for sale in that form has been so long established that it ought not, we think, to be interfered with".

This seems to base his decision on the principle of *stare decisis* rather than on its being a proper exercise of jurisdiction *in personam*. Mr. Latham, the then Advocate General, in his argument as reported at p. 356, also says:—

"The only real dispute here is as to the part of the decree which orders a sale of the land".

No doubt English authorities show that Courts of Equity did decree the sale of land outside jurisdiction and appoint Receivers for such property. But in my opinion the fact that such jurisdiction was exercised in England is not a good ground for holding that merely

<sup>(1)</sup> (1904) 29 Bom. 249 at p. 257.

<sup>(2)</sup> (1890) 14 Bom. 353.

on that account it can be exercised by a High Court in India. The assumption that is made by Sir Charles Sargent as to the intention of the framers of the Letters Patent is a mere surmise, which in my opinion is entirely contradicted by all the evidence afforded by the historical and other considerations that I have dealt with already. I also respectfully think that if there is room, as I hope there is, for the exercise of jurisdiction *in personam* by the High Courts in India, this must be looked for in and be based upon the wording of clause 12 of the Letters Patent. At any rate, if such jurisdiction involves the exercise of jurisdiction in a suit for land, then in my opinion it would be contrary to the provisions of the Letters Patent to recognize it. It can only be exercised if the suit comes within the words "all other cases" in that clause. As was said by Phear J. in *The East Indian Railway Co. v. The Bengal Coal Co.*<sup>(1)</sup> "the express words of clause 12 of the Letters Patent render the principles of the decision in *Paget v. Ede*<sup>(2)</sup> inapplicable". I have already mentioned my view that clause 14 of the Letters Patent can only apply in cases properly coming before the Court; and the exercise of any residuary powers of the Supreme Court that have descended to this Court can only be in cases where it is not opposed to the express or implied provisions of clause 12. For the reasons I have given I respectfully agree with the former Full Bench in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(3)</sup> that the decision in *Holkar's case*<sup>(4)</sup> was not justified, and that if a plaintiff in a suit relating to land asks for a relief not against the defendant only but against the property, he cannot claim that the suit is not a suit for land (see p. 26). As further evidence of the difficulties that arise from the decision of *Holkar v. Dadabhai*<sup>(4)</sup>, I may refer to the remark of

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE<sup>(1)</sup> (1875) 1 Cal. 95 at p. 100.<sup>(3)</sup> (1925) 50 Bom. 1.<sup>(2)</sup> (1874) L. R. 18 Eq. 118.<sup>(4)</sup> (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Strachey J. in *Sorabji v. Rattonji*<sup>(1)</sup> that in the absence of authority upon the point he would have had great difficulty in holding that the expression "suit for land" did not include a suit for foreclosure. I suppose there will eventually have to be another Full Bench to decide that question, though no doubt suits for foreclosure are rare in this Presidency. As regards "other cases", I have already indicated that I accept the qualification that a suit to be one "for land" should substantially relate to land and that this should primarily be judged by considering what is the nature of the relief sought by the plaintiff.

23. In regard to this question reference has been made to the decisions of the Privy Council in regard to the jurisdiction of the Courts to entertain administration suits, in which relief is sought in regard to lands outside jurisdiction. In *Nistarini Dassi v. Nundo Lall Bose*<sup>(2)</sup>, the judgment of Stanley J. at p. 921 clearly shows that the suit was merely to have the immoveable property "administered under the direction of the Court, and for this purpose, if it be found that the trustees or executors have been guilty of misappropriation of assets or mal-administration of the estate, to compel them personally to make amends". He goes on to say:—

"This does not turn the suit into one for the recovery of immoveable property. If the trustees had assigned some of the properties to a stranger, and recovery of the property from such stranger had been sought in the action, a question of jurisdiction might arise; but here it is the executors, in whom the property was vested by the will of the deceased, who are alone sought to be made responsible for an alleged act of mal-administration, namely, the granting of leases of part of the trust estate to themselves."

It is, I think, of importance to remember that the leases in question had been granted by the trustees to themselves. The relief sought for was purely of the nature of relief *in personam* and not in the nature of *in rem*. Consequently, there was clear ground for

(1) (1898) 22 Bom. 701 at p. 704.

(2) (1899) 26 Cal. 891.

holding that the suit was not a suit for land. In the same case on appeal to the Privy Council (*Benode Behary Bose v. Nistarini Dassi*<sup>(1)</sup>) the Privy Council approved of this view and held (p. 191):—

“The High Court of Calcutta, in its Ordinary Jurisdiction, had a right to order administration of this estate, and, as ancillary to such an order, to set aside deeds obtained by the fraud of the executor.”

Having regard to the limitations that I have mentioned, this ruling in no way seems to conflict with the view that I have taken. In the case from Madras, *Srinivasa Moorthy v. Venkata Varada Ayyangar*<sup>(2)</sup>, the remarks of the Privy Council in the same case on appeal, as reported in I. L. R. 34 Mad. 257, at p. 267, make it plain that the suit was only one in which the plaintiffs asked for administration of the estate with the usual accounts and for the removal of the defendant from office of the trustee. A preliminary decree was passed merely removing the surviving plaintiff and the defendant from their office as executors and trustees under the will and directing the usual accounts to be taken, with liberty to the beneficiaries to come in and prove their claim. Later on a final decree was made, appointing a Receiver and directing certain payments in accordance with the result of the accounts which had been taken. On appeal the Court ordered the appellant to pay into Court a certain sum with interest to answer the amounts found due from him, with directions to the Receiver in case of default to raise the required amount out of the estate and to execute the decree as if it were a decree in his favour for that sum. There is nothing to show that this was anything more than relief *in personam*, and the question of jurisdiction that was raised in that case had reference not to the particular point before us, so much as to the question whether the defendant in that case could be said to have been dwelling within the jurisdiction of the High

1926-27.

HATIMBHAJ  
HASSANALLY

v.

FRAMROZ  
EDULJEE<sup>(1)</sup> (1905) 33 Cal. 180.<sup>(2)</sup> (1906) 29 Mad. 239.

1926-27  
 HATMIBHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

Court of Madras. Neither of these two decisions, in my opinion, shows that the view of the Full Bench of 1925 is wrong, and in any case the exact question that is before us was not before their Lordships of the Privy Council. Reference has also been made to *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(1)</sup> where an administration suit affecting land outside the limits of the original civil jurisdiction of the Madras High Court was held to be not a "suit for land", but it will be seen from the judgment of the Chief Justice in that case that this was only after two reliefs sought had been given up, and this suit is described in the head-note as one merely for the accounts of the management of a trust and for the administration of a trust.

24. As regards *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*<sup>(2)</sup>, I think it is clear that both counsel agreed before their Lordships of the Privy Council that, if some part of the mortgage property was situate in Calcutta, the High Court there would have had jurisdiction to entertain the suit, and their Lordships went on what was common ground between the parties. The point in question was never in fact considered by them. As regards the case of *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(3)</sup>, I think this can best be considered when dealing with the other question—whether a suit by a mortgagee for sale is a suit for land.

25. The conclusion I have come to is that the words "suit for land" must be construed in the wider sense of substantially relating to land, and not in the narrower sense that is contended for by the learned Advocate General for the respondent.

26. The next question, therefore, is whether a suit like No. 1168 of 1925, which is before us in this appeal, was a suit for land within that wider meaning. In my opinion the answer must clearly be

<sup>(1)</sup> (1924) 49 M. L. J. 311.

<sup>(2)</sup> (1914) L. R. 41 I. A. 110.

<sup>(3)</sup> (1916) 26 Bom. L. R. 535 : 48 Bom. 629 *f. n.*

in the affirmative. I in no way question the view that the main thing that the mortgagee wants to recover is money and not land, and that the English Equity Courts have laid more stress upon the debt-aspect of a mortgage than upon its security-aspect affecting the mortgaged land. As I have already said, it is natural that the Chancery Courts in England emphasized the former aspect rather than the latter, and I may refer in this connection to the remarks of Mr. Ghose in his Law of Mortgage in India, 4th Edition, Vol. I, at pp. 24 to 27. But in my opinion the other aspect is clearly the one that has been emphasized in India from very early days. I have already mentioned that in the Limitation Act of 1859 the Legislature treated such suits as being suits for the recovery of an interest in land. This was in conformity with the system under which mortgages had to be registered from the time of Lord Cornwallis's Code of 1793. Regulation XXXVI of 1793, entitled "A Regulation for establishing a Registry for Wills and Deeds for the transfer or Mortgage of real property", was modelled on the lines of the Yorkshire Registry Act 2 & 3 Anne, c. 4; and similar enactments were introduced in Madras and Bombay. Under section 14 of Bombay Regulations III of 1799 and I of 1800, the Judge was prohibited decreeing the payment or satisfaction of any sum due on a mortgage bond entered into after January 1, 1800, unless the same was registered in his Court at the time of passing it. There were other similar enactments, which are all mentioned in Desai's Indian Registration Act, 6th Edition, pp. xxx ii to xli. The system of registration still continues under the existing Indian Registration Act of 1908 in regard to all mortgages of the value of Rs. 100 or over. The Transfer of Property Act, 1882, is now based upon the English law of mortgage; but at the same time section 58 of the Act, in defining what is a mortgage, undoubtedly

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

lays more stress upon the security-side of the mortgage than on its debt-side. It definitely says that a mortgage is "a transfer of interest in immoveable property". Further in this connection I may refer to the remarks of the Privy Council in *Sundar Koer v. Rai Sham Kishen*<sup>(1)</sup>. Their Lordships there say that the scheme and intention of the Transfer of Property Act was (p. 161):—

"That a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree."

27. The main consideration, in my opinion, is that under Order XXXIV, Rule 4, sub-rule (1), the Court is required to pass a decree that in default of the defendant paying the sum fixed the mortgaged property or a sufficient part thereof be sold, and under Rule 5, sub-rule (2), if the amount is not eventually paid, the Court has to pass a final decree that the mortgaged property or a sufficient part thereof be sold. The action of the Court is one by which the mortgagee has the sale carried out, not by any relief operating merely on the conscience of the defendant-mortgagor, but by the machinery the Civil Procedure Code provides for the execution of decrees for sale of land. Another important point to bear in mind is that under the Code it is the sale which transfers the title to the land. This is sufficiently shown by section 65 of the Code, read with Order XXI, Rule 94, and this is also what is laid down in Rule 552 of our Original Side Rules of 1922. This was a rule that was made under the authority of section 104 of the Transfer of Property Act. It runs as follows:—

"Where immoveable property is sold under Order XXXIV, Rule 4 of Civil Procedure Code or any subsequent rule the purchaser may, on application

(1) (1906) 34 Cal. 150.

to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor."

Any argument, therefore, that in a suit like the present the carrying out of the sale under the directions of the Court is merely relief analogous to getting the defendant-mortgagor to pass a conveyance which will vest the title in the purchaser at the sale, is opposed to that rule and the provisions of the Civil Procedure Code. I do not say that Order XXXIV cannot be altered under the powers conferred by section 122, and that rules may not be framed for cases on the Original Side of this Court, which might enable a mortgagee to obtain a relief of a kind that can be given properly in a suit *in personam*. I would even go so far as to say that possibly the Court might order the defendant to sell the property himself instead of the sale being under the directions of the Court, and if he did not might imprison him or attach his property; but that would be quite a different relief to what was sought and decreed in Suit No. 1168 of 1925. Moreover, in this connection the provisions of Order II, Rules 1 and 2, of the Civil Procedure Code, must be borne in mind. Those rules lay down that a suit should be framed so as to afford ground for final decision upon the subjects in dispute and prevent further litigation concerning them. Therefore, there is an obvious objection to a suit being so framed as merely to give the purchaser a right to have a conveyance executed in his favour, which cannot be enforced by putting him in possession except by separate litigation, whereas in an ordinary suit under Order XXXIV, he can obtain possession by execution under Order XXI, Rules 95 and 96. And such a suit is not in fact before us. In the present case the plaintiff directly asked the Court itself to order a sale of the mortgaged property by and under the

1926-27

HATIMBHAI  
HASSANALLYFRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

directions of the Court, and the suit was one falling under Order XXXIV of the Civil Procedure Code. In such a case it seems to me that the suit must be held to be a "suit for land" within the meaning that I put on that expression. I would, therefore, answer the first question in the affirmative, treating the words "a suit brought by a mortgagee of land to enforce his mortgage by sale" as a suit like the present which falls under Order XXXIV of the Civil Procedure Code.

28. In addition to the reasons I have already given, I would refer to the case of *Walsh v. The Queen*<sup>(1)</sup>, where their Lordships of the Privy Council point out that it is idle to say that a debt covered by a security is in the same position with one depending solely on the personal obligation of the debtor; and while abstaining from any attempt to define the relation in which a mortgagee stands to the subject of the security, they point out that the mortgagee has not merely a *jus ad rem* but a present interest in the pledge, which is preferable to the interest of the mortgagor. The sale does actually affect the disposal of an interest in the land and through the Court's officers, not through the defendants. In *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(2)</sup> Scott C. J. bases his contrary opinion on the ground that a suit by the mortgagee for sale (p. 536)—

"is [merely] a suit to realise and dispose of his and his debtor's interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realize the security which has been vested in him."

With great respect I think that, while this consideration may prevent a suit from being a suit for land, if you construe the expression in a narrow sense, it certainly does not suffice to except it from the wider meaning that I put upon the expression. Thus in

<sup>(1)</sup> [1894] A. C. 144.

<sup>(2)</sup> (1916) 26 Bom. L. R. 535 : 48 Bom. 629 *f. n.*

*Maha Prasad v. Ramani Mohan Singh*<sup>(1)</sup>, their Lordships of the Privy Council held that a suit to enforce a mortgage by sale of land fell within the words "suit...in regard to any land, any interest in or arising out of any land." And even as regards the narrow sense, there is an attempt to get control over land for the purpose of realizing money out of it, which makes it difficult, if not impossible, to say that such a suit is not a "suit for land." It seems to me that the view taken by Garth C. J. in *The Delhi and London Bank v. Wordie*<sup>(2)</sup> is sounder on this point. It is not a case where "no right to land or other immoveable property, or to any interest therein, will be in the slightest degree modified or affected by the result" of the suit, to use the language of Phear J. in *Khalut Chunder Ghose v. William Minto*<sup>(3)</sup>. If this view makes it difficult for this Court to exercise jurisdiction in partnership or administration suits, where land outside its jurisdiction has to be sold through the Court, then the remedy, in my opinion, is to amend clause 12 so as to except such cases. The same remark applies to the argument that the result will be that a High Court has less jurisdiction than a Subordinate Judge has under section 16 of the Civil Procedure Code, in view of the proviso to that section. *Boni judicis est jus dicere non jus dare.*

29. It has been argued that, if clause 12 of the Letters Patent and section 5 of Act VIII of 1859, meant the same thing when using the expression "suit for land", then clause 12 of the Letters Patent would also have been amended in 1877 so as to bring it into conformity with section 16 of the Civil Procedure Code of 1877. But this ignores the fact that until the enactment of sub-section (1A) of section 106 of the Government of

(1) (1914) L. R. 41 I. A. 197. (2) (1876) 1 Cal. 249 at p. 263.

(3) (1866) 1 Ind. Jur. N. S. 426 at p. 429.

1926-27  
HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

India Act in 1916, providing for the amendment of the existing Letters Patent by further Letters Patent, it was considered that there was no power to amend the Letters Patent that had issued under Parliamentary authority. The power to revoke the first Letters Patent of 1862 was expressly conferred by section 17 of the High Courts Act, 1861 (24 & 25 Vic., c. 104) and the High Courts Act, 1865 (28 & 29 Vic., c. 15), as is recited in the preamble of the Amended Letters Patent. Moreover, there was no conflict of reported decisions between any of the High Courts as to this expression "suit for land" until 1890. Again, though the Letters Patent are under clause 44 subject to the powers of the Government of India in Legislative Council, yet the Government of India would not ordinarily take up the question of legislating in the matter, unless some representation was made to them about it by any of the High Courts; and as there were no special inconvenient consequences involved in the matter, there is no reason to think this was ever done. Conflicting decisions of the High Courts do not ordinarily come under review except in the case of Codes or other Acts that undergo periodical revision.

30. One of the arguments of the Advocate General was that at the time of the enactment of the Act of 1859 and the Letters Patent of 1862 the Courts were obliged (in the absence of legislation on the subject of mortgages except to the limited extent of certain Bengal Regulations) to have regard to English principles of law, and that it would be natural therefore for the drafters of the Charter and section 5 of the Act of 1859 to contemplate that mortgage suits should be dealt with on the same principles as they were in Chancery Courts in England. This is a view which has no real foundation, for the mofussil Courts, as opposed to the Courts of the Presidency towns, applied the old

Common law rule of strict enforcement of agreements for mortgage by conditional sale, and allowed foreclosure as soon as the time limited in the agreement had expired without due payment. It was only in 1858 that in the Madras Presidency this practice was modified by a ruling of the Madras High Court and it was not till 1864 that, following the Madras ruling, the Bombay High Court applied the doctrine of English law with respect to the equity of redemption, of "once a mortgage always a mortgage". This innovation, so far as the Madras High Court was concerned, was overruled by the Privy Council in *Pattabhiramier v. Vencatarow Naicken*<sup>(1)</sup>. Lord Chelmsford pointed out that there was no basis of prior Indian law or course of decisions to justify this English equitable doctrine being introduced. Again in *Thumbusawmy Moodelly v. Hossain Rowthen*<sup>(2)</sup>, their Lordships severely condemned the rulings of the Madras and Bombay High Courts on the subject. It may be mentioned that this Court in *Shankarbai Gulabbhai v. Kassibhai Vithalbai*<sup>(3)</sup> had decided that the practice followed by the original ruling in *Ramji Tukaram v. Chinto Sakharam*<sup>(4)</sup> should be adhered to; and their Lordships condemn this view as practically amounting to legislation and entailing mischievous consequences in regard to titles already acquired. It was admitted in the judgment in *Bapuji Apaji v. Senavaraji Marvadi*<sup>(5)</sup> that *Chinto's case*<sup>(4)</sup> was a regrettable departure from the principle of *stare decisis*; but it was decided that the practice should be continued in regard to titles acquired since the decision in *Ramji v. Chinto*<sup>(4)</sup>; and of course the Transfer of Property Act has confirmed this state of the law. But this review of the matter shows

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

(1) (1870) 13 M. I. A. 560.

(3) (1872) 9 Bom. H. C. 69.

(2) (1875) 1 Mad 1

(4) (1864) 1 Bom. H. C. 199.

(5) (1877) 2 Bom. 231 at p 239.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

clearly that the Privy Council at any rate have lent no encouragement to the idea that the English law should be considered as the proper law applicable to the decision of mortgage cases, outside the Presidency towns in 1859 or 1862.

31. Section 59 of the Transfer of Property Act, no doubt, is not worded so as to exclude lands outside Bombay from the scope of an equitable mortgage by deposit of title deeds, though in *Behram Rashid v. Sorabji Rustomji*<sup>(1)</sup> Beaman J. doubted whether this was the real intention of the Legislature. But this does not affect the question of jurisdiction, for the section does not purport to say anything on that point. In *Behram Rashid v. Sorabji Rustomji*<sup>(1)</sup> the suit was brought in the Nasik District, where the mortgaged property was situate, though the deposit of title deeds and the loan were made in Bombay. In a case where the mortgaged property is situate within the jurisdiction of more than one Court, section 17 of the Civil Procedure Code allows a suit to be brought "in any Court within the local limits of whose jurisdiction any portion of the property is situate", so that no practical difficulty need arise, if this Court has no jurisdiction in such cases.

32. It has been contended that the principle of *stare decisis* should be applied in the present case. This contention was considered by the Full Bench in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup> and rejected. I can see no sufficient reason for differing from that conclusion, especially in view of my judgment in the connected case now under appeal that the Full Bench decision does not upset titles in consent decrees or in other cases where the point of jurisdiction was not raised. If the case goes to the Privy Council, it is quite obvious that the principle of *stare decisis* cannot be applied for the

(1) (1913) 38 Bom. 372 at p. 374.

(2) (1925) 50 Bcm. 1.

reasons which their Lordships have given in *Vasudeva Mudaliar v. Srinivasa Pillai*<sup>(1)</sup>. I see no reason, therefore, to alter my answer to the first question on account of the principle of *stare decisis*.

33. I would only add that, so far as anything I may have said in *Raja Kotakal v. Malabar Timber Co.*<sup>(2)</sup>, is opposed to what I have said in this judgment, I resile from the former. In that case I held myself bound by *Holkar v. Dadabhai*<sup>(3)</sup>, and that of course coloured my views. In the concluding part of my judgment I did my best to make the decision in *Holkar v. Dadabhai*<sup>(3)</sup> fit in with clause 12 of the Letters Patent by suggesting that the view of Sir Charles Sargent might be read as introducing a proviso to that clause. But, after the further arguments that have been put before us in this case and the further consideration I have given to the matter, I feel that this trenches rather on the sphere of legislation than on proper construction, and that the equity jurisdiction of this Court must be confined within the four corners of clause 12 as it at present stands. At the same time I hope that one result of this case may be to draw the attention of the authorities to the desirability of either applying sections 16, 17 and 20 of the Code of Civil Procedure to the High Court or amending clause 12 of the Letters Patent, so as to express more clearly what the exact jurisdiction of this Court is.

34. The second and third questions for this Full Bench would, on the view I have taken that a suit brought by a mortgagee of land to enforce his mortgage by sale is a "suit for land" within the meaning of clause 12 of the Letters Patent, necessarily have had to be answered in the negative, were it not for a point which was not put before us by the learned counsel at

(1) (1907) 30 Mad. 426 at p. 432. (2) (1924) 26 Bom. L. R. 541 : 48 Bom. 625.

(3) (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRANROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLYv.  
FRANROZ  
EDULJEE

the hearing, but which was raised by the learned Chief Justice shortly before our judgments were delivered on the first question. I quite agree that it is desirable that the doubt that has been raised as to the effect of the part of clause 12 about the defendant dwelling or carrying on business, or personally working for gain, should be considered by this Bench, so that, should this case go to the Privy Council, their Lordships will have the advantage of our conclusions; also it is, of course, a very important point.

35. The question is whether the words "or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits" are applicable to all cases including the case of a "suit for land", or are only applicable to the "all other cases" mentioned in this clause. In *Bālaram v. Ramchandra*<sup>(1)</sup> Mr. Justice Candy (*inter alia*) says that the uniform practice of the three High Courts of Bombay, Calcutta and Madras has apparently been to read clause 12 as if the part about the defendant's residence applied only to "all other cases", and at p. 926 he refers to the fact that "it has never been apparently contended that a defendant residing in Bombay could be sued in the Bombay High Court for land, say in Calcutta, simply because the defendant resided in Bombay". This statement is supported by there being no reported case of such a contention having been raised, except that of *Bibee Jāun v. Meerza Mahommed Hadee*<sup>(2)</sup>, referred to in Mr. Justice Candy's judgment. In that case the answer plainly was against such a contention, because clause 12 of the original Letters Patent was so worded as to make any other answer impossible. That case was decided in December 1865, whereas the Amended Letters Patent were not in force till they were published some time in

(1) (1898) 22 Bom. 922 at p. 925.

(2) (1865) 1 Ind. Jur. N. S. 40.

1866. The other case referred to by Mr. Justice Candy, viz., *Khalut Chunder Ghose v. William Minto*<sup>(1)</sup>, does not really deal with this point. It is a contention that would naturally have been raised if it had been thought that there was anything in it, because it could have covered many cases where the suit was held to be a "suit for land" and so unmaintainable, although the defendant resided within the local limits of the High Court's original civil jurisdiction. As an instance, reference may be made to the fact that in *Vaghoji v. Camaji*<sup>(2)</sup> the appellant's counsel, while admitting that the defendant at the time of the commencement of the suit was dwelling within such local limits, did not raise any contention of this kind. Again in *Balaram v. Ramchandra*<sup>(3)</sup> the parties all lived in Bombay, as stated by Mr. Justice Candy at the beginning of his judgment: yet no contention was raised that it was unnecessary to consider whether, the suit being one for land, it had been improperly brought, because part of the property sought to be partitioned lay outside the Court's jurisdiction, though it is obvious that the construction now suggested would have been a complete answer to the objection as to jurisdiction taken in that case. And I doubt whether Mr. Justice Candy intended to question the correctness of the construction in head (b) of his re-draft of the clause at p. 925. There are certainly the strongest grounds, in my opinion, for saying that part of re-draft has been the accepted construction of clause 12 in all the three High Courts ever since the Amended Letters Patent came into force. In these circumstances I think that we should apply in favour of that construction the general principle that an interpretation, which has long been acted on, will not be disregarded by a Court of law; nor will a construction long acquiesced in be lightly

<sup>(1)</sup> (1866) 1 Ind. Jur. N. S. 426.

<sup>(2)</sup> (1904) 29 Bom. 249.

<sup>(3)</sup> (1898) 22 Bom. 922.

1926-27

HATIMBHAI  
HASSANALLYv.  
FRANROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

overruled by a Court of review: see Halsbury's Laws of England, Vol. XXVII, Article 266, at p. 143. As further authority for hesitation in such a matter I may refer to the remarks of Sir Lawrence Jenkins in *Rodricks v. Secretary of State for India*<sup>(1)</sup>. In that case a Judge of the High Court had questioned a decision of a Bench of the Calcutta High Court in regard to a point of jurisdiction arising under the same part of clause 12 of the Letters Patent. But Sir Lawrence Jenkins pointed out that the Bench decision had been decided as far back as 1866, and that it had not been suggested that that decision had ever been questioned or doubted. He regarded it as important, that matters of that kind should have all the certainty possible, and that the Court should not lightly disregard a decision definitely settling a question of jurisdiction such as that which arose in that case. Accordingly, in my opinion, I think that this general acquiescence in the construction that Mr. Justice Candy affirmed in *Balaram v. Ramchandra*<sup>(2)</sup> is a strong point in favour of our not lightly disregarding it.

36. On the other hand, I certainly do not mean to question the power of this Bench to differ from that construction, if it appears on due consideration to be erroneous; and certainly if the plain meaning of the clause is that any suit, whether for land or not, can be brought against a defendant who dwells, or carries on business, or personally works for gain within the local limits of our jurisdiction at the time of the commencement of the suit, then effect must be given to that provision, however startling or inconvenient the consequences may be. No doubt, the clause is open to the construction that is now suggested; and that construction has in its favour the fact that grammatically one would expect the reference to "all other cases", like

(1) (1912) 40 Cal. 308 at p. 317.

(2) (1898) 22 Bom. 922 at p. 925.

the reference to "suits for land" to finish with the words "jurisdiction of the said High Court". But it seems to me important to observe that the clause runs "or in all other cases if" and not "or if in all other cases". If it had been intended that the part about "all other cases" was to finish with the words "jurisdiction of the said High Court", then I should expect the commencement to run "or if in all other cases", because that would be consistent with the sequence adopted in the preceding words "if, in the cases of suits for land". There would be no apparent reason why the sequence followed in regard to "suits for land" should not have been also adopted in regard to "all other cases". On the other hand, if the intention of the draftsman was that the category "in all other cases" was to govern the subsequent words, "or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits", then there is an obvious reason for his putting the word "if" after the words "in all other cases". It seems to me that this does indicate an intention that the words "or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits" should be governed by the words "in all other cases".

37. If one inserts lettering such as a modern draftsman would use, then the clause might have run as follows:—

"And we do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description—

(a) if in the case of suits for land or other immoveable property such land or property shall be situated, or

1926-27

HATIMBHAI  
HASSANALLY"  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

(b) in all other cases,

(i) if the cause of action shall have arisen,

X 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 said High Court, or

(ii) if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits".

No doubt, the fact that the part marked X applies to (a), though (b) is not then complete, is against ordinary grammar, and makes the drafting awkward and slovenly. But I do not think that merely on this account it should be held that the construction, favoured in *Balaram v. Ramchandra*<sup>(1)</sup>, is not correct. Thus Maxwell on the Interpretation of Statutes, 6th Edition, at pp. 148 and 149 says :—

" Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the Legislature is presumed not to intend ; and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary therefore to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature ; it being more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended."

38. It is important, therefore, to consider what was the object of the difference between clause 12, as it appeared in the Amended Letters Patent, and the corresponding clause in the original Letters Patent. A comparison between the two clauses shows that the words about "the defendant at the time of the

(1) (1898) 22 Bom. 922 at p. 925.

commencement of the suit", &c., have been removed from their immediate sequence to the words "the cause of action shall have arisen", so that the words "within the local limits, &c.", are expressed twice instead of once. The main reason for the change seems clearly to have been the introduction of the words "either wholly, or, in case the leave of the Court shall have been first obtained, in part" which now appear after the words "the cause of action shall have arisen". There was no provision for the particular case of part of the land being situated, or part of the cause of action having arisen, within the local limits, in the original clause 12. And in *Prasannamayi Dasi v. Kadambini Dasi*<sup>(1)</sup> Mr. Justice Norman gives, what seems to me to be, very cogent reasons for construing the words "either wholly, or, in case the leave of the Court shall have been first obtained, in part", not only as qualifying the words "the cause of action shall have arisen", but also the words "if such land be situated". He explains that difficulties had arisen in regard to suits for land situated partly within the jurisdiction of the High Court, and mentions that those difficulties were pointed out in several minutes by the Judges concerned. The difficulty was one about cases where either part of the land was situated, or part of the cause of action had arisen, within jurisdiction; and there would, therefore, be clear reason for amending the clause so as to provide for such cases. On the other hand no reason has been even suggested for Her Majesty intending to alter the original clause 12 to the extent that would result from the construction now suggested. This would entail the consequence that a plaintiff can sue to eject a resident defendant from land, wherever it may be situated; and it certainly would seem extraordinary that such an extensive jurisdiction should be conferred, especially

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

(1) (1868) 3 Beng. L. R. (O. C. J.) 85 at pp. 87, 88.

1926-27

HATIMBHAJ  
HASSANALLY  
v.  
FRANROZ  
EDULJEE

as clause 12 starts with saying that in such a suit the land, or at any rate part of it, should be situated within the local limits of the Court's jurisdiction. It would also go against the ordinary principles of English and International law. I do not imagine that any precedent for such jurisdiction can be cited. It was suggested, during the course of the arguments, that there was a similar jurisdiction in the case of County Courts in England. Halsbury's Laws of England, Vol. VIII, Article 939, at p. 435, and Article 943, at p. 437, show that County Courts can only exercise jurisdiction in an action of ejectment, or an action for recovery of possession, if the land or hereditaments are situated within the local limits of their jurisdiction. It seems to me that the suggestion is so startling that the strongest presumption arises against any such intention, in accordance with the ordinary rule that there is a presumption against a departure from International law or the Common law, unless clear reasons appear for holding the contrary: cf. Maxwell on the Interpretation of Statutes, 6th Edition, pp. 149 and 262.

39. If it had been intended to confer jurisdiction in all cases where "the defendant" dwelt, &c., within jurisdiction, some provision would, I think, have been made for cases where there are more than one defendant and some of them do not come under this part of the clause. Thus section 4 of Act XXIII of 1861 contained provisions to meet this case, and section 17 (c) of the Code of 1877 gives the Court jurisdiction, though all the defendants do not reside, &c., within local limits, if the others acquiesce in the institution of the suit, or the leave of the Court is given. Similar provisions are contained in the subsequent Codes of 1882 and 1908. Yet clause 12 apparently requires all the defendants to reside within the local limits, if jurisdiction is based entirely on residence, &c., as was ruled in *Hadjee Ismail*

*Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*<sup>(1)</sup>. This decision does not seem to be affected by *Shaw Wallace & Co. v. Gordhandas*<sup>(2)</sup> where the party outside jurisdiction was eventually allowed to be joined only by consent. (See p. 391.)

40. We were referred to the view taken in *Srinivasa Moorthy v. Venkata Varada Ayyangar*<sup>(3)</sup>, but I think it is clear that Sir Arnold White was there dealing with an action *in personam*, such as he held the suit in question to be. The reference he makes to Dicey's "Conflict of Laws" confirms this view.

*British South Africa Company v. Companhia de Mocambique*<sup>(4)</sup> clearly shows that the Courts in England would not exercise jurisdiction of that kind. This, I think, affords an obvious explanation of the universal acquiescence of legal practitioners and Judges in the construction of clause 12 stated by Mr. Justice Candy in *Balaram v. Ramchandra*<sup>(5)</sup>; and it seems to me that there is no sufficient reason to depart from the view which he took in that case. At the most it is only a case of there being an ellipsis between the words "or" and "if the defendant at the time of the commencement of the suit", e.g., some such words as "in the said other cases", which can be properly read in. In support of this I may refer to *Robertson v. Day*<sup>(6)</sup>, where their Lordships of the Privy Council held that certain words were slightly elliptical, and could be read as if that ellipsis was supplied.

41. I may mention that I have seen the manuscript Letters Patent that were issued to this Court in 1865, and find that this clause 12 contains no punctuation. Therefore our decision cannot properly be influenced by any supposed punctuation, cf. *Stephenson v. Taylor*<sup>(7)</sup>

(1) (1874) 13 Beng. L. R. 91.

(2) (1905) 30 Bom. 364.

(3) (1906) 29 Mad. 239 at pp. 253, 255.

(4) [1893] A. C. 602.

(5) (1898) 22 Bom. 922 at p. 925.

(6) (1879) 5 App. Cas. 63.

(7) (1861) 1 B. & S. 101 at p. 106.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

where Cockburn C. J. said:—"On the Parliament roll there is no punctuation, and we therefore are not bound by that in the printed copies". The mere fact that Mr. Justice Norman in *Prasannamayi Dasi v. Kadambini Dasi*<sup>(1)</sup> puts a semicolon after the words "the jurisdiction of the High Court" may indicate his opinion in the matter, but cannot be carried further.

42. That opinion is, however, opposed to the punctuation in the official copy of the Letters Patent, printed by her Majesty's Printers and authenticated by the signature of Sir Charles Romilly. I have seen the original copy which was sent out by the Secretary of State to the Bombay Government. This contains a comma between the words "said High Court" and "or if the defendant"; and there is no semicolon in the whole clause, except the one after the words "within such limits". The same is the case in the copy of the Amended Letters Patent that was published in *Bombay Government Gazette* of April 10, 1866, at pp. 771 to 779.

43. It is not really necessary for us to consider the view taken by Mr. Justice Norman about the words "either wholly", &c., covering also the case of "suits for land"; though Mr. Mulla for the appellant contended that that view was wrong. So far as the question before us is concerned, it does not seem to matter whether that view is or is not correct; in either case the reasoning that has influenced me applies. But at the same time I think that there are good grounds for the view taken by Mr. Justice Norman, which was followed by Mr. Justice Phear in *S. M. Jagadamba Dasi v. S. M. Padmamani Dasi*<sup>(2)</sup>, and that the decision in *Balaram v. Ramchandra*<sup>(3)</sup> should be sustained also on this point. It has in fact been followed in

<sup>(1)</sup> (1868) 3 Beng. L. R. (O. C. J.) 85 at p. 87.

<sup>(2)</sup> (1871) 6 Beng. L. R. 686.

<sup>(3)</sup> (1898) 22 Bom. 922 at p. 925.

*Govindlal v. Bansilal*<sup>(1)</sup>. Against this view there is, no doubt, the remark of Sir Lawrence Jenkins in *Vaghoji v. Camaji*<sup>(2)</sup> that the leave of the Court is not required where part of the land is situated within the local limits of the Court's jurisdiction. But this was purely *obiter*, and it is doubtful whether Mr. Justice Norman's decision had been considered by him. It may be mentioned that in *Srinath Roy v. Godadhur Das*<sup>(3)</sup> the same learned Judge passed a decree in a case where part only of the mortgaged property was within the local limits of the Court's jurisdiction.

44. The Despatch of the Secretary of State, dated January 31, 1866, which forwarded a copy of the Amended Letters Patent of the High Court of Calcutta to the Government of India, and a copy of which was sent to this Court in April 1866, makes it quite clear that Her Majesty's Government had no intention whatever of making the alteration that is now suggested. Otherwise the Secretary of State would scarcely have described the changes as "generally of no great importance", as he does in para. 3 of that Despatch. Nor would para. 6 have spoken of "the alteration in clause 12", in the singular instead of using the plural word "alterations". The alteration there referred to is clearly the insertion of the words "either wholly; or, in case the leave of the Court shall have been first obtained, in part", for the Secretary of State refers to its being made in deference to the views of some of the Judges of the Calcutta High Court, which (as Mr. Justice Norman's judgment in *Prasannamayi Dasi's case*<sup>(4)</sup> shows) had pointed out the difficulties that arose as to suits for land situate partly within the jurisdiction of the High Court.

45. This Despatch is referred to in Mr. Justice Norman's judgment as showing clearly "what the

(1) (1921) 23 Bom. L. R. 1049.

(2) (1897) 24 Cal. 348.

(3) (1904) 29 Bom. 249 at p. 253.

(4) (1868) 3 Beng. L. R. (O. C. J.) 85.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

intent of clause 12 of the Charter was". I respectfully agree with him; and, for the reasons I have already given (see paras. 16 and 17), I think that the Despatch may properly be looked at as an aid to the construction of the amended clause 12, in view of the doubt that arises as to its real meaning.

46. For these reasons I answer the second question in the negative, as regards a suit of the kind now before us, falling under Order XXXIV, Civil Procedure Code. It is, in my opinion, a "suit for land" within the meaning of clause 12 and, as such land is situated wholly outside the local limits of this Court's original civil jurisdiction, the suit cannot be maintained either under clause 12 or under any external equity jurisdiction of this Court.

For similar reasons I also answer the third question in the negative.

KEMP, J.:—The plaintiff's suit is for the amount due with interest under an equitable mortgage, dated November 26, 1923, by deposit of title deeds of an immoveable property situate at Poona and for sale of the property in default of payment. Mr. Justice Percival passed a preliminary decree for sale by consent of the parties on June 4, 1925. On December 10, 1925, the plaintiff took out a notice of motion for a final decree before Mr. Justice Taraporewala. The defendant contended on the authority of the recent judgment of the Full Bench in *India Spinning & Weaving Co., Ltd., v. Climax Industrial Syndicate*<sup>(1)</sup> that the preliminary decree passed by Mr. Justice Percival was without jurisdiction as the mortgage property was situated in Poona. "It appears that the judgment in that case was passed on August 21, 1925, after the preliminary decree passed by Mr. Justice Percival. Mr. Justice Taraporewala made the notice of motion absolute and passed

<sup>(1)</sup>-(1925) 50 Bom. 1.

a final decree in favour of the plaintiff. Against that decree the defendant appealed and on the hearing of that appeal before the learned Chief Justice and myself we framed certain issues for determination by a Full Bench. These issues involved a consideration of the decision in *India Spinning & Weaving Co., Ltd., v. Climax Industrial Syndicate*<sup>(1)</sup>. Clearly, if that decision were wrong, the main argument for the defendant would fall to the ground irrespective of any weight it might be sought to give to the consent decree. We also had in view the importance of this point and the far-reaching consequences of that decision which affected the High Court's jurisdiction and altered the law which the Courts had for many years laid down in this Presidency for the guidance of business men and vendors and purchasers of immoveable property.

The first question is whether a suit brought in the High Court in its ordinary original civil jurisdiction by a mortgagee of land to enforce his mortgage by sale is "a suit for land" within the meaning of clause 12 of the Letters Patent. The construction of the words "suit for land" in clause 12 of the Letters Patent has been the subject-matter of much divergence of judicial opinion in this country. Until the decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>, the authority which might be said to have settled the law in this Presidency was the case of *Holkar v. Dadabhai*<sup>(2)</sup>. That was a suit for specific performance of an agreement for a mortgage of land and for the sale of such land. Sir Charles Sargent there held that the framers of the Letters Patent in 1862 could not have intended when they framed that clause to deprive the High Court of Bombay of the equitable jurisdiction which in England was exercised by the Courts acting *in personam* with regard

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE<sup>(1)</sup> (1925) 50 Bom. 1.<sup>(2)</sup> (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLYP.  
FRAMROZ  
EDULJEE

to foreign land where the defendant was within the jurisdiction. He considered that if that had been the intention of the English lawyers who drafted clause 12 of the Letters Patent they would have worded that clause differently. He accordingly held that the suit before him which would have been a proper matter for the exercise in England of the jurisdiction of the Courts there *in personam* was not within the words "suit for land". The agreement in that case had been made within the jurisdiction, and he held—presumably under the second part of clause 12—that the Bombay High Court in the exercise of its ordinary original civil jurisdiction could entertain the suit. Reference was made in the judgment to the case of *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(1)</sup>, which was a decision on section 5 of the Code of 1859. The point came up again before the Appeal Court in *Vaghoji v. Camaji*<sup>(2)</sup> and Sir Lawrence Jenkins C. J. there held, applying the test laid down by Sargent C. J., that an English Court of Equity would not have exercised jurisdiction in that case as the suit was one for land. Speaking of the nature of the suit he went on to say at pp. 258 and 259 of the report :—

"Its leading purpose is to establish a title to possession of land and to secure that possession from molestation, and it is important to note that this claim is based not on any contract, trust or fraud, or any circumstance giving rise to privity between the parties, but is brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiffs."

Referring to *Yenkoba's case*<sup>(1)</sup> he pointed out that no interpretation of the expression "suit for land" in section 5 of the Civil Procedure Code of 1859 would assist in construing the similar words in clause 12 of the Letters Patent, for the Civil Procedure Code of 1859 was an Act to simplify the procedure of Courts of Civil Judicature not established by Royal Charter. I cite

<sup>(1)</sup> (1872) 9 Bom. H. C. 12.<sup>(2)</sup> (1904) 29 Bom. 249.

this passage because in a later case, *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(1)</sup>, the learned Chief Justice made a reference to the similarity of the words used in clause 12 of the Letters Patent and section 5 of the Code of 1859 and the conclusion that might be drawn as to the meaning attached by the Legislature to the words in section 5 when it amplified them in section 16 in the later Codes of 1877 and 1882. The learned Chief Justice was further of opinion that if the expression "suit for land" was intended to mean only a suit for delivery or recovery of land, the framers of clause 12 would have used the appropriate phrase of "a suit in ejectment". The decision merely established that the suit there which was in effect a suit for title to possession of land and to secure that possession from molestation was a suit for land under clause 12 of the Letters Patent.

In 1894 Mr. Justice Farran, afterwards Sir Charles Farran C. J., in an unreported judgment, dated March 19, 1894, (*Kessowji Damodhar v. Khimji Jairam*<sup>(2)</sup>) held, on the authority of *Holkar v. Dadabhai*<sup>(3)</sup>, that he was bound to hold that the Court had jurisdiction to entertain a foreclosure suit in respect of property outside the jurisdiction and that a decree for foreclosure was a decree *in personam*. This decision and the decision in *Holkar's case*<sup>(3)</sup> were given after the amplification of section 5 in the Codes of 1877 and 1882 and it is to be observed that Mr. Justice Farran notes that part of the cause of action in the case before him has arisen in Bombay and leave to sue has been obtained under the Letters Patent, which clearly shows that he regarded a suit for foreclosure as a suit *in personam* which could be filed in this Court under the second part of clause 12 of the Letters Patent. In *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(4)</sup>, which was a suit by a mortgagee

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE.<sup>(1)</sup> (1915) 42 Cal. 942.<sup>(3)</sup> (1890) 14 Bom. 353.<sup>(2)</sup> (1894) See *ante* p. 551 n.<sup>(4)</sup> (1916) 26 Bom. L. R. 535 : 48 Bom. 629 f. n.

1926 27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

to enforce by sale his rights under the mortgage in respect of land outside the jurisdiction, it was held by Sir Basil Scott C. J. and Heaton J. that the suit was not one for land within the meaning of clause 12. The Chief Justice [at p. 536 of the report] says :—

The decision in *Holkar v. Dadabhai*<sup>(1)</sup> has for many years been followed in this Court as establishing that suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of clause 12 of the Letters Patent. We are bound by that decision. Speaking for myself, it appears to me difficult to understand how a suit in which the mortgagee seeks to have the land vested in him under his mortgage sold to somebody else by the agency of the Court is a suit for land. It is a suit to realize and dispose of his and his debtor's interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realize the security which has been vested in him."

It would appear from this that the learned Chief Justice regarded suits for land under clause 12 as restricted to what are known in England as local actions regarding land. Apparently, the decree in that case was in the usual form of a preliminary decree for sale. Since that decision there have been various pronouncements of individual Judges on the point, some of whom have doubted the law laid down in *Holkar's case*<sup>(1)</sup>. I consider it unnecessary to refer to those cases in detail. They are referred to in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>. In my opinion the *ratio decidendi* in *Holkar's case*<sup>(1)</sup> appears, notwithstanding, to have been the accepted test in this Presidency until the recent decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>.

The Calcutta decisions may, I think, be classified under two heads: (1) those in which it has been held that the expression "suit for land" means for the purpose of acquiring title to or control over or

(1) (1890) 14 Bom. 353.

(2) (1925) 50 Bom. 1.

possession of or an interest in the property which is the subject-matter of the dispute; and (2) those in which the term has been extended to cover cases which might only be said to relate to land. Under the first heading is the case of the *The Delhi and London Bank v. Wordie*<sup>(1)</sup>, which was a suit by a creditor to enforce a trust deed giving the trustees power of sale of land in the mofussil and the title of the trustees was disputed by the defendants. There Garth C. J. says at p. 263 of the report that the case depends not so much upon the jurisdiction generally exercised by Courts of Equity as upon whether the suit was brought substantially for land, i.e., for the purpose of acquiring title to or control over the land within the meaning of a particular clause in the Charter and he held that it was. This would appear to lay down a different test to that in *Holkar v. Dadabhai*<sup>(2)</sup>. In *Kellie v. Fraser*<sup>(3)</sup> the same learned Chief Justice remarks that in almost all the cases in which the suit was held to be for land the suit was brought to acquire possession of or establish title to or an interest in the property which was the subject-matter of the dispute. In *Land Mortgage Bank v. Sudurudeen Ahmed*<sup>(4)</sup>, Trevelyan J. held that a vendor's suit for specific performance was not a suit for land under clause 12 not being a suit "to sell or acquire possession of or title to land in any sense". Then in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(5)</sup> Jenkins C. J. and Woodroffe J. held that clause 12 of the Letters Patent cannot be considered as limited to suits for the recovery of land in its strict sense but must be considered as extending at any rate to a suit for compensation for wrong to land where the substantial question is the right to the land.

(1) (1876) 1 Cal. 249.

(3) (1877) 2 Cal. 445 at p. 463.

(2) (1890) 14 Bom. 353.

(4) (1892) 19 Cal. 358.

(5) (1915) 42 Cal. 942.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EJULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

The other class of cases is that in which the expression has been extended so as to cover cases in which the suit is not really for land but merely relates to the land. So in *Bibee Jaun v. Meerza Mahommed Hadee*<sup>(1)</sup> and *Sreemutty Lalmoney Dossee v. Juddoonauth Shaw*<sup>(2)</sup> it was held that suits for foreclosure and redemption respectively were suits for land. In *In the matter of the Petition of S. J. Leslie*<sup>(3)</sup> it was held that a suit for sale under a mortgage was a suit for land and in *Juggodumba Dossee v. Puddomoney Dossee*<sup>(4)</sup> suits for foreclosure were held to be suits for land. At p. 329 of the report, however, Markby J. says:—

“ But acknowledging that it is now settled that a suit for a foreclosure is a suit for land within the meaning of clause 12 of the Letters Patent, it does not necessarily follow that every suit which has any reference to land is therefore a suit for land within this section.”

And he refers to some such instances. Again in *Sreenath Roy v. Cally Doss Ghose*<sup>(5)</sup> Mr. Justice Pontifex held that a mortgagee's suit for specific performance was a suit for land under clause 12 of the Letters Patent and in *Ratanchand Dharamchand v. Gobind Lal Dutt*<sup>(6)</sup> Mr Justice Greaves held that a suit for specific performance of an agreement to mortgage land outside the jurisdiction was a suit for land under clause 12. These cases appear to show that there is by no means unanimity in the decisions of the Calcutta High Court as to the construction to be given to the term “suit for land”. The first class of cases seems to me to be limited very much to what would be known in England as local actions, i. e., actions for recovery of foreign land or determination of the title to foreign land or compensation for wrong or trespass to foreign land. The latter class of cases seems to me to cover cases in which the English Courts would exercise their

(1) (1865) 1 Ind. Jur. N. S. 40.

(4) (1875) 15 Beng. L. R. 318.

(2) (1866) 1 Ind. Jur. N. S. 319.

(5) (1879) 5 Cal. 82.

(3) (1872) 9 Beng. L. R. 171.

(6) (1921) 48 Cal. 882.

jurisdiction *in personam* provided the defendant was within the jurisdiction. That some of the Calcutta cases have given too extended a meaning to the words "suit for land" appears to be the opinion of the Judges who decided the most recent case in Calcutta on the point which has been brought to our notice. In *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(1)</sup> it was held by Sanderson C. J. and Richardson J. that a vendor's suit for specific performance was not a suit for land. Speaking of the Calcutta decisions the learned Chief Justice says (p. 678):—

"Some decisions, such as those referred to by the learned Chief Justice (Sir Lawrence Jenkins) in his judgment in the above-mentioned case, seem to have extended the operation of the clause in question beyond the natural meaning of the words 'suits for land', but I am not prepared to put an interpretation upon these words, which, as far as I know, has never been given to them hitherto and which, in my judgment, having regard to the natural meaning of the words, is not justified."

He then goes on to say (p. 678):—

"In my judgment, it cannot be too clearly laid down that in construing a statute it is necessary for the Court to give the natural meaning to the words which are used, and if it is thought advisable to include cases which are not covered by the words of the statute in their natural meaning, it is not for the Court to strain the language of the statute so as to include them, but it is the function of the Legislature to amend the statute, and the same principle applies to the construction of the Charter."

It would seem that the learned Chief Justice was referring more particularly to those cases under head (2) to which I have referred. The learned Chief Justice's judgment suggests that the wide construction adopted by some of the Calcutta decisions in construing the expression "suits for land" as in effect suits relating to land is one which does not meet with his approval.

Moreover, it may be remarked that if a vendor's suit for specific performance is not a suit for land it should logically follow that a purchaser's suit for specific performance is equally not a suit for land. Otherwise

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

(1) (1922) 49 Cal. 670.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANROZ  
EIJULJEE

a vendor of foreign land could bring his suit in the Calcutta High Court and his purchaser could not, viz., where the cause of action or, with the leave of the Court, part of it arose within the High Court's original civil jurisdiction. In neither case would an English Court acting *in personam* where the defendant was within the jurisdiction refuse to exercise jurisdiction. And indeed it seems in every way inconvenient that where in a suit for specific performance of a contract to sell land the cause of action accrues within the original civil jurisdiction of the High Court, the parties should, if the defendant does not reside or work for gain within the jurisdiction, be relegated to file the suit wherever the land may be situated. In most cases the actual situation of the land and the residence of the defendant at the venue will have no bearing whatever on the case. Most of the evidence will be at the place where the cause of action accrued.

The Madras decisions seem to have given to the expression "suits for land" the wider meaning of suits in which a decree is asked for operating directly upon the land and so to include suits brought to enforce a security upon land. So in *Nalum Lakshimikantham v. Krishnasawmy Mudaliar*<sup>(1)</sup>, Mr. Justice Moore held that a suit to enforce an equitable mortgage by sale of lands outside the jurisdiction was a suit for land. *Srinivasa Aiyangar v. Kannappa Chetty*<sup>(2)</sup> was a suit for damages for cutting and carrying away trees on land outside the local limits of the ordinary civil jurisdiction of the Madras High Court. It was held this was a suit for land. It is to be observed that the case involved a question of title to the land such as also arose in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(3)</sup> and *Vaghoji v. Camaji*.<sup>(4)</sup> In both cases the substantial

<sup>(1)</sup> (1903) 27 Mad. 157.

<sup>(3)</sup> (1915) 42 Cal. 942.

<sup>(2)</sup> (1915) 30 M. L. J. 120.

<sup>(4)</sup> (1904) 29 Bom. 249.

question was the right to the land. Such a suit would come within the class of actions in which the Courts in England would decline jurisdiction on the ground that the action was a local one triable at the place where the land was situated. In the recent case of *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(1)</sup>, which was a suit for the accounts of the management of a trust and for the administration of a trust, Srinivasa Aiyangar J. said (p. 312):—

“ Further, the preposition ‘for’ in the expression ‘suit for land’ would seem to indicate that the title to, or possession of, immoveable property must be the primary object of the action.”

In the same case Coutts-Trotter C. J. declined to indorse the line of argument which was adopted on the strength of the ruling in *Srinivasa Aiyangar v. Kannappa Chetty*<sup>(2)</sup> that the amended Civil Procedure Code could be looked at for the purpose of construing the words of the earlier statute, i.e., the Letters Patent.

In *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(3)</sup> a Full Bench consisting of Sir Norman Macleod C. J. and Crump and Coyajee JJ. decided that a suit for sale on a mortgage of land outside the jurisdiction was a suit for land. Sir Norman Macleod reviewed the authorities and came to the conclusion that a suit for sale must be described as a suit for land and that the previous Bombay rulings to the contrary were erroneous.

In these circumstances it is necessary to review the whole question *de novo*.

The Charter of 1823 conferred upon the Supreme Court all the powers exercised by the Court of Chancery in England. There can be no doubt that so far as land outside the jurisdiction was concerned the Court of Chancery exercised jurisdiction *in personam* where the obligation with reference to that land arose out of a contract, trust or fraud. So it was held in a suit for

<sup>(1)</sup> (1925) 49 M. L. J. 311.

<sup>(2)</sup> (1915) 20 M. L. J. 120.

<sup>(3)</sup> (1925) 50 Bom. 1.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27  
 HATIMEHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

foreclosure (*Paget v. Ede*<sup>(1)</sup>) and a suit for specific performance of an agreement relating to land (*Penn v. Lord Baltimore*<sup>(2)</sup>) the Court would act *in personam*, where the defendant was within the jurisdiction. It appears that in cases where the action was such as could be described as a local action, viz., for recovery of the land or determination of title to it or damages for wrong or trespass to it, the English Court regarded such actions as local actions and refused to exercise its jurisdiction *in personam*.

Reliance has been placed by the appellant on section 5 of the Civil Procedure Code of 1859. That section uses the words "suits for land" and the Secretary of State's Despatch, which was referred to by Sir Lawrence Jenkins in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(3)</sup>, alludes to the use of the similar expression in clause 12 of the Letters Patent of 1862. In the Codes of 1877 and 1882, section 5 is replaced by section 16 which is exactly the same as section 16 of the present Code of 1908 except that the earlier section 16 does not cover a suit for sale on a mortgage which is included in the Code of 1908. The appellant contends that the amplification of section 5 shows the meaning the Legislature intended to attach to the expression "suits for land" and that a similar meaning must be attached to that expression in clause 12. But one answer to this is that if the Legislature had intended to alter or amplify the meaning of the words for the High Courts it could have done so and as a matter of fact it has not done so. The inference is that the expanded meaning given to the expression "suits for land" by the enumeration in section 16 of the classes of suits which must be filed where the subject-matter is situate was only intended by the Legislature to attach to that term so far as suits

(1) (1874) L. R. 18 Eq. 118.

(2) (1750) 1 Ves. Sen. 444.

(3) (1915) 42 Cal. 942.

in the mofussil are concerned. There seems good reason why the Legislature should extend the meaning of the term in the case of the mofussil Courts and not in the case of the High Court. If the expression "suits for land" in the Code were not to cover, for instance, a suit for sale under a mortgage of land outside the jurisdiction, such a suit could not be brought in the mofussil Court where the land was but would have to be brought in the mofussil Court where the cause of action accrued or the defendant resided. Where it might be considered inadvisable for a mofussil Court to be invested with this jurisdiction there could be no objection to the High Court exercising it, whilst at the same time under section 16, Civil Procedure Code, the mofussil Court where the land was situated could also exercise jurisdiction.

Clause 19 of the Letters Patent, it is to be observed, merely refers to the equity to be exercised by the High Court in cases coming before it, which I presume would mean in cases properly coming before it in which it has jurisdiction.

Furthermore, it is impossible to construe the expression in clause 12 by a reference to the Civil Procedure Code, section 16; for clause (f) of section 16 clearly gives an instance in that section which does not cover suits for land at all. Section 5, Civil Procedure Code, 1859, which uses words "suits for land" is replaced in section 16, Civil Procedure Code, 1882, by a direction that certain suits shall be instituted where the subject-matter is situate. I do not see why, this should be called a definition of the expression "suits for land". As I say, there seems no reason why, if the Legislature intended to give a similar construction to clause 12 of the Letters Patent to that given in section 16, it did not do so. This suggests that clause 12 of the Letters Patent cannot be considered with reference to section 16

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27  
 HATIMBHAI  
 HASSANALLY  
 v.  
 FRANROZ  
 EDULJEE

of the Civil Procedure Code, and on this point I entirely agree with the observations of the Coutts-Trotter C. J. in *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(1)</sup> at pp. 311-12 and am unable to agree with Moore J. in *Nalum Lakshimikantham v. Krishnasawmy Mudaliar*<sup>(2)</sup> at p. 161.

We are to follow the terms of clause 12 of the Letters Patent. In England where the suit relates to contracts or trusts relating to foreign land the Court will compel specific performance if the defendant is within the jurisdiction. The jurisdiction *in personam* will not be exercised when the suit is a local action. I think clause 12 of our Letters Patent is different. We have to construe it as it stands. A suit for land grammatically means a suit for possession of the land. There is authority—*Vaghoji v. Camaji*<sup>(3)</sup>; *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(4)</sup>—for saying that it covers at any rate suits for title to or compensation for wrong or trespass to land which are properly “local actions” to be brought ordinarily where the land is situated. I am prepared to extend the term to this extent. The Calcutta decisions which I have classified under the second head are against this view, but the authority of them has been much shaken by the observations of the Judges in *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(5)</sup>. The Madras decisions are mainly based on a comparison of section 16 of the Code with clause 12 of the Letters Patent, and this line of argument has received the disapproval of the present Chief Justice of the Madras High Court in *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(6)</sup>. The expression, therefore, “suit for land” would not apply to the case of a mortgagee’s suit for sale of land

(1) (1924) 49 M. L. J. 311.

(2) (1903) 27 Mad. 157.

(3) (1904) 29 Bom. 249.

(4) (1915) 42 Cal. 942.

(5) (1922) 49 Cal. 670.

(6) (1924) 49 M. L. J. 311.

outside the jurisdiction. It may be contended that this construction gives to the High Court a wider equity jurisdiction *in personam* than it does to the Courts in England because the High Court in Bombay can under the second part of clause 12 of the Letters Patent exercise this jurisdiction where the cause of action, or with leave of the Court a part of it, has accrued in Bombay as well as when the defendant resides within the jurisdiction. In England the jurisdiction *in personam* is only exercised where the defendant or a defendant properly on the record is within the jurisdiction. This, however, is not a serious objection because the Courts in England are dealing with foreign land or land in the colonies and obedience to the Court's order could not be obtained except when the defendant was present within the jurisdiction. Here, except in the case of foreign land outside British India, the High Court can send its decree for execution to the Court in any other Presidency.

Nor do I think that a mortgagee's suit for sale of land situated outside the jurisdiction can be called a suit for land. The primary object of such a suit is to recover the mortgage debt, if necessary, out of the sale proceeds of the security. The mortgagee does not claim the land. He admits it is the mortgagor's land and asks that it may be sold. To say that such a suit is a suit for land or for a declaration of title to land or for damages for injury to land is in my opinion as misleading as to say that a suit for a debt, where the plaintiff attaches immoveable property belonging to the defendant before judgment, is a suit for land. In both cases the land is made security for the debt.

Reliance was placed by the respondent on the Privy Council case of *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*<sup>(1)</sup>, but in the view I take of that decision the

<sup>(1)</sup> (1914) L. R. 41 I. A. 110.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMEHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

question of jurisdiction was not argued and the case turned on the fact that as all the immoveable property was outside the jurisdiction the transaction could not be registered in Calcutta.

In the course of the arguments a point arose as to the admissibility of the Report of the Commissioners appointed in 1850 to make suggestions for the amalgamation of the Supreme Court and Sudder Dewani Adawlat. The words used in the Report are "land to which the suit may relate". I think that the Report is inadmissible for the purpose of construing the words "suits for land" because the Report of the Commissioners in clause 17 was merely a recommendation and it is not shown what the Commissioners intended by suits relating to land or that the Commissioners' recommendations were accepted. Indeed, it might with some force be argued that by using the words "suits for land" the framers of the Letters Patent deliberately restricted the wider expression used by the Commissioners if indeed any distinction between the two expressions was present to the minds of both the Commissioners and the framers of the Letters Patent.

I do not think that the statement in the Secretary of State's Despatch carries the appellant's case any further; for, even assuming that the words "suits for land" in section 5 of the Civil Procedure Code of 1859 and clause 12 of the Letters Patent were originally intended to apply to the same class of suits, the fact that section 5 has been amplified into section 16 of the Civil Procedure Code of 1908 without any corresponding alteration of clause 12, and the impossibility, to my mind, of reading into clause 12 of the Letters Patent sub-clause (f) and the proviso in section 16, suggest that the course of legislation with regard to the old section 5 was not intended to run on parallel

lines with the meaning to be attached to clause 12. Nor can an enactment relating to the High Court, viz., the Letters Patent, be construed by subsequent amendments in an enactment relating to subordinate Courts. In my opinion, the words "suits for land" must be given their natural meaning and I do not think a mortgagee's suit for sale of the mortgaged land comes within this meaning.

I am further of opinion that the decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> is open to objection on another ground. For over fifty years the law as stated in *Holkar v. Dadabhai*<sup>(2)</sup> has been followed in this Presidency. I consider that the Bombay High Court should hesitate to reverse a law affecting land which has for so long been followed by business men and others in this city. Any one acquainted with commercial transactions in Bombay will easily realize the confusion a change in the law on this point will involve.

Mortgages of immoveable property whether by deposit of title deeds or otherwise form perhaps the commonest way in which mercantile transactions in this city are financed. I can well understand the consternation with which Banks and other financing corporations here who have acted on the law laid down in this Presidency before *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> will regard a decision which compels them in order to realize their securities of immoveable property to file suits in the mofussil with all the inconvenience and delay attendant on the disposal of such suits there.

The question of the meaning to be attached to the words "suits for land" is not such a simple one as to justify sweeping away all the long-established case-law on the subject in this Presidency. It can scarcely have

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

<sup>(1)</sup> (1925) 50 Bom. 1.

<sup>(2)</sup> (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRANROZ  
EDULJEE

been intended when equitable mortgages by deposit of title deeds in the Presidency towns were recognized by section 59 of the Transfer of Property Act, that this easy and convenient way of raising money in a big commercial town should be restricted to immoveable property within the original civil jurisdiction of the High Court.

I would, therefore, answer question (1) in the negative.

A further point was raised by the learned Chief Justice at the hearing of this reference whether, even assuming that a suit by a mortgagee of land outside the jurisdiction to enforce his mortgage by sale was a suit for land, the High Court in which such a suit was brought would have jurisdiction if the defendant dwelt or carried on business or personally worked for gain at the commencement of the suit within the limits of the original civil jurisdiction of the High Court. This entails the further consideration of the clause relating to defendant's residence or place of business in clause 12 of the Letters Patent.

The uniform practice of the Courts in British India in construing clause 12 has been that, to give jurisdiction, so far as suits for land or other immoveable property were concerned, the land had to be within the jurisdiction or, if only part of it were within the jurisdiction, the leave of the Court had to be obtained; and, so far as all other suits were concerned, the cause of action had to accrue wholly within the jurisdiction or, where part of the cause of action arose within the jurisdiction, the leave of the Court had to be obtained, or, where no part of the cause of action accrued within the jurisdiction, it had to be shown that the defendant at the date of the suit dwelt or carried on business or personally worked for gain within the jurisdiction. In other words, the clause relating to the defendant's residence or place of business was construed as giving another ground of

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

jurisdiction only where the suit was not one for land or other immoveable property. So in *Balaram v. Ramchandra*<sup>(1)</sup>, Candy J. cites the authorities in favour of both propositions, viz., that a suit for land partly outside the jurisdiction can be brought in this High Court with leave and, secondly, that the condition of the defendant's residence, &c., applies solely to all other suits than those for land or other immoveable property. I do not propose to go through the authorities which he cites but I observe that in commenting on this uniform practice of the three High Courts he remarks that were the matter *res integra* he would be inclined to doubt the correctness of the above construction. He goes on to say that there are obvious difficulties in whatever way we regard clause 12 and concludes by saying that he is not prepared after this lapse of time to question the uniform practice of all the Courts. With reference to the construction giving jurisdiction where part of the land is situated outside the jurisdiction and leave to sue has been obtained, I note that in *S. M. Jagadamba Dasi v. S. M. Padmamani Dasi*<sup>(2)</sup> Phear J. admits that originally he used to regard the portion of clause 12 which he describes as the enlarging clause as applicable only to the cause of action in all other suits than those for land or other immoveable property. But he goes on to say that the construction put by Norman J., the Officiating Chief Justice, in *Prasannamayi Dasi v. Kadambini Dasi*<sup>(3)</sup>, appears to him "certainly not incorrect" and concludes by saying that had that construction been wrong and been present to the minds of the Legislature it might well have been rendered impossible by legislation and he suggests the proper method of doing so would have been by inserting the enlarging passage after the word "shall" instead of after the word "arisen". Phear J. was,

(1) (1898) 22 Bom. 922 at p. 925. (2) (1871) 6 Beng. L. R. 686 at p. 687.

(3) (1868) 3 Beng. L. R. (O. C. J.) 85.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

however, inclined to think that there were more reasons in favour of holding the decision of Norman J. to be a correct one than there were on the other side. In *Vaghoji v. Camaji*<sup>(1)</sup>, Jenkins C. J. seems to have been of opinion that the enlarging clause only applied where the cause of action arose in part within the local limits of the ordinary original jurisdiction. Nevertheless, although it is difficult to avoid a discussion as to the construction of the first part of clause 12 in considering the question of the application of that portion of it which relates to the jurisdiction given by the defendant's residence or place of business, the real point before us is whether that clause commencing "or if the defendant at the time" down to "within such limits" gives jurisdiction in suits for land or other immoveable property. The uniform practice, as Candy J. points out, was that the clause was restricted to suits other than those for land or immoveable property, but I may observe that Norman J., in the case referred to in *Prasannamayi Dasi v. Kadambini Dasi*<sup>(2)</sup>, in setting out clause 12 of the Letters Patent of 1862, places a semi-colon after the words "shall have arisen" in that clause, which would have the effect of making the residence or place of business of the defendant a separate ground of jurisdiction both in regard to suits for land and all other suits. No such punctuation mark appears in the Letters Patent. Clause 12 of the Letters Patent of 1865 was apparently drafted to meet the difficulties the Judges experienced in construing clause 12 of the Letters Patent of 1862. After a careful perusal of clause 12 of the Amended Letters Patent, I am of opinion that a strict interpretation of the clause shows that it confers jurisdiction in three cases (1) in the case of suits for land or other immoveable property, a jurisdiction depending on the situation of the land

(1) (1904) 29 Bom. 249, 253-4.

(2) (1868) 3 Beng. L. R. (O.C.J.) 85.

within the jurisdiction or, if the decisions are correct, of a part of it within the jurisdiction where leave to sue has been obtained; (2) in all other suits, a jurisdiction depending on the cause of action or, with the leave of the Court, part of it arising within the jurisdiction; and (3) in any suit, a jurisdiction depending on the defendant dwelling or carrying on business within the limits of the original civil jurisdiction. A comparison of clause 12 in the Charters of 1862 and 1865 shows that in the earlier clause 12 two jurisdictions are conferred, differentiated by the introduction of the word "if" before each. That the alternative jurisdiction dependent on defendant's residence or place of business refers only to all other cases than suits for land is suggested by the use of the word "or" after the words "shall have arisen" which makes the alternative part of the jurisdiction conferred under the second "if". Clause 12 of the Letters Patent of 1865 as it reads really lays down three separate grounds of jurisdiction each beginning with the use of the word "if" and it will be noted that the word "if" has been introduced after the word "or" in dealing with the jurisdiction conferred by the defendant's residence or place of business. This last "if" which really suggests a further general ground of jurisdiction in all suits including suits for land is not to be found in the old clause 12 of the Letters Patent of 1862. I am, therefore, driven to the construction that defendant's residence or place of business within the jurisdiction furnishes a separate ground in every kind of suit entertainable by the High Court. I, however, appreciate the weight of the objection that can be urged against this construction that it gives to the High Court a jurisdiction in excess of that possessed by the English Courts; for it enables the High Court to entertain a suit for land merely on the ground of the defendant's residence

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

within the jurisdiction and this is going beyond the jurisdiction which the English Courts would exercise. Except where it can act *in personam*, an English Court will not entertain a suit relating to foreign land. Thus the High Court here would have jurisdiction in what I may call "local actions" in regard to land which should only be brought in the place where the land is. Such a jurisdiction is contrary to the principles of International law. It can only be said in mitigation of the consequences of construing the clause in this way that, after all, a decree for land outside the jurisdiction passed against a defendant residing within the jurisdiction can be executed anywhere in British India by transferring it to the place where the land is and it would be in rare cases that any plaintiff would seek a decree against a defendant within the jurisdiction for land situated outside British India; for he would know that there are no means by which any order relating to it could be enforced without the assistance of the foreign Court even by the personal obedience of the defendant. There seems, however, no reason why the Crown should suddenly decide to confer this jurisdiction in the Letters Patent of 1865 when it was not conferred by the Letters Patent of 1862. There was apparently between 1862 and 1865 no divergence of judicial opinion on the question whether a suit for land could be brought within the jurisdiction of the original civil jurisdiction of the High Court merely because the defendant resided within such jurisdiction.

It is true that the Charter of 1823 gives the Court jurisdiction to determine all suits whatsoever against the inhabitants of Bombay, but it is, I think, not to be disputed that this Court in exercise of this jurisdiction would not have exceeded the limits assigned by the Courts in England to the exercise of their jurisdiction

*in personam* in suits relating to land. The equitable jurisdiction conferred by the Charter on the Supreme Court was similar to that of the Court of Chancery. Is it to be expected, then, that in drafting clause 12 of the Letters Patent of 1865 the framers of the clause intended to confer on the High Court and expected it to exercise a jurisdiction in what I may call "local actions" with regard to foreign land that the English Courts themselves would decline to exercise? If the language of a legislative enactment unambiguously and without reasonably admitting of any other meaning is in conflict with any principle of International law, the Court must obey and administer it as it stands whatever may be the responsibility incurred by the nation to foreign powers in executing such a law, for the Courts cannot question the authority of Parliament or assign any limits to its power. I think this is equally applicable to the duty of this Court in construing clause 12 of the Letters Patent of 1865. Nevertheless, if the language is ambiguous—and on this point I note that the current of authority up to the present suggests that it is—it would be the duty of the Court to read the clause so as to presume that the Legislature did not intend to violate any rule of International law or comity. To give a jurisdiction in a local action with regard to foreign land would, in my opinion, constitute such a violation where the land is situated, e. g., in France or any other European country.

But whatever may be the correct construction of clause 12, I am of opinion that an interpretation which has for so long been adopted and acted upon up to the present is not one which can be lightly disregarded (Halsbury, Vol. XXVII, p. 143, para. 266.) In *Rodricks v. Secretary of State for India*<sup>(1)</sup>, Jenkins C. J. remarked (p. 317):—

"I regard it as important that matters of this kind should have all the certainty possible and that the Court should not lightly disregard a

(1) (1912) 40 Cal. 308.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

decision definitely settling a question of jurisdiction such as that which arises in this case."

In *Balaram v. Ramchandra*<sup>(1)</sup> Candy J. remarks that the uniform practice of the three High Courts at Bombay, Calcutta and Madras has been to read the clause in question here as referring solely to all other cases than those for land or other immoveable property. I am not prepared under the circumstances to now adopt a new construction.

Nor do I think it desirable that this High Court should now adopt a construction on such a point at variance with that accepted by the High Courts of Calcutta and Madras. To do so might lead to a weakening of that good understanding which prevails between the different High Courts in this country. If the High Courts at Calcutta and Madras were to decline to execute decrees passed by this High Court for the possession of land within their original civil jurisdiction (as to which see *Gora Chand Haldar v. Prafulla Kumar Roy*<sup>(2)</sup>) it would, I think, affect the dignity of this Court which it is our duty to uphold. The judgments on which such decrees would be passed would not be "foreign judgments"; and if it were contended that by virtue of Order XXI, Rule 7, of the Code, the executing Court cannot go into the question of the jurisdiction of the Court which passed the decree a case can be imagined where the question of jurisdiction might be inquired into under section 10 or 11 of the Code. I think the conflict of views might affect future titles to land in Calcutta or Madras. For instance, A might obtain in the Bombay High Court a declaration of his title to land in Calcutta and the High Court in Calcutta might in a suit between the same parties then declare that A had no title to the land and in such a suit the Calcutta High Court would not be

(1) (1898) 22 Bom. 922 at p. 925.

(2) (1925) 53 Cal. 166.

debarred from passing such a declaration by section 11 of the Code.

The same consideration does not apply with regard to the decision of the majority of this Court on the question whether a suit for sale by a mortgagee of land outside the jurisdiction is a suit for land or not because, as I have endeavoured to point out in my judgment on that point, the latest pronouncements of the Judges of the High Courts in Calcutta and Madras seem to incline to the view that such a suit is not a suit for land under clause 12 of the Letters Patent.

MIRZA, J.:—I am respectfully of opinion that the question submitted to this Full Bench should be answered as proposed by my brother Fawcett. It is not necessary for me to go over the ground which he has covered in his able and scholarly judgment with which I am in substantial agreement.

The expression "suits for land or other immoveable property" appearing in clause 12 of the amended Letters Patent, 1865, has nowhere been defined in the Letters Patent. In the absence of such a definition it is necessary for us to consider not only what would be the natural meaning to attach to that expression, but also the provisions of the law which relate to the general exercise of its jurisdiction by this High Court on its Original Side.

Broadly speaking, the expression may be regarded as conveying one or other of the following meanings:—

- (1) that a suit for land is a suit which asks for delivery of the land to the plaintiff,
- (2) that it is a suit the subject-matter of which is similar to that of local or real actions under the English law, and
- (3) that it is a suit substantially for land, that is, for the purpose of acquiring title to or control over land—that it is a suit in which a decree is asked for operating

1926-27.

HATIMBHAI  
HASSANALLY  
v.  
FRAMRÖZ  
EDULJEE.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

directly on the land—that it is a suit relating to or concerning land.

1. It would appear that the expression “a suit for land” would at first sight suggest the meaning that it is a suit which asks for the delivery of the land. Some judicial authority is to be found for ascribing this meaning to that expression in the judgment of Gibbs and Melvill JJ. in *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(1)</sup>. The learned Judges had there to construe section 5 of the Civil Procedure Code of 1859 (Act VIII of 1859), which section was similar to and the precursor of clause 12 of the Letters Patent. They held that the expression “a suit for land” would only apply to suits which ask for delivery of the land to the plaintiff, in other words, suits in ejectment. The case before them had come up in appeal in certain execution proceedings. The plaintiff had sued on a mortgage bond and obtained a decree against the defendant from the Erandol Court, within whose jurisdiction the defendant resided, for the sale of the property mortgaged to him under a bond, which property was situated at Amalner, outside the jurisdiction of the Court, which had passed the decree. The plaintiff had applied to the Amalner Court for execution of the decree against the property. The Amalner Court had refused to execute the decree on the ground that the Erandol Court had no jurisdiction to order a sale of immoveable property not situated within the limits of its jurisdiction. The appellate Court held that a suit for the recovery of a mortgage debt by the sale of the mortgaged property was not a suit for land and the Court could decree the sale of the immoveable property although it may be situated outside the limits of its jurisdiction. The learned Judges relied upon the practice of the Chancery Court of ordering the sale of properties in

<sup>(1)</sup> (1872) 9 Bom. H. C. 12.

the colonies in order to realize the sums charged upon them.

In *Holkar v. Dadabhai*<sup>(1)</sup> Sargent C. J. seems to have approved of the construction placed upon the expression "suits for land" in *Yenkoba's case*<sup>(2)</sup>. But, as pointed out by Jenkins C. J. in *Vaghoji v. Camaji*<sup>(3)</sup>, the passage from *Yenkoba's case* relating to what a suit for land is as quoted by Sargent C. J. in *Holkar's case*<sup>(1)</sup> forms no part of its *ratio decidendi*, which is to be found in the concluding paragraphs of the judgment, where the learned Chief Justice seems to hold that the Bombay High Court on its Original Side could entertain even in the case of land outside the limits of its jurisdiction all such suits as the Court of Equity in England could.

The view taken in *Yenkoba's case*<sup>(2)</sup> of the meaning of this expression appears to be too narrow. If it were the correct view to adopt, the High Court on its Original Side would have jurisdiction to entertain all actions relating to land except actions in ejectment.

Had it been the intention of the Legislature that this expression should apply only to suits in ejectment, one would expect that the appropriate technical phrase would be used for the purpose.

In *Nagendra Nath Chôwdhuri v. Eraligool Company, Ltd.*<sup>(4)</sup>, Sanderson C. J., in considering the meaning to be put on this expression, is reported to have said that the natural meaning of a "suit for land" was that it was a suit for the recovery of land. He put the question to counsel (p. 672): "If anything more than recovery of land was meant, why did not the Legislature say 'suit in respect of or concerning land'?" With great respect I am unable to agree with that expression of opinion.

2. The learned Advocate General relies strongly upon the alternative meaning which may be put on the

(1) (1904) 29 Bom. 249.

(3) (1890) 14 Bom. 353.

(2) (1872) 9 Bom. H. C. 12.

(4) (1922) 49 Cal. 670.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27  
 HATIMBHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

expression "suits for land", viz., suits which would correspond to local or real actions under the English law. The Courts of Equity in England would seem to entertain all suits in respect of land outside their local jurisdiction, if they are not in the nature of local or real actions. *Holkar's case*<sup>(1)</sup> was an authority on this point, until it was overruled by the Full Bench decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>. In *Holkar's case*<sup>(1)</sup> the property, the subject-matter of the mortgage, was situated outside the local limits of the Original Side jurisdiction. The defendant himself resided outside the jurisdiction and the only cause of action which had arisen within the jurisdiction was that the mortgage had been created in Bombay.

The principle on which Courts of Equity in England act in such cases has been well expressed by Dicey in his *Conflict of Laws*, 4th Edition, at p. 32, as follows:—

"The basis of interference by Courts of equity has, mainly at least, been the possibility of acting in England directly upon the owner of the land, and of thus indirectly dealing with foreign land without doing any act within the limits of a foreign country."

Similarly, Westlake in his *Private International Law*, 5th Edition, p. 230, states:—

"A proprietor of foreign immoveables, or person interested in such, may be compelled by the English Court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort."

Referring to the redemption or foreclosure of mortgages of foreign lands Westlake states at p. 233:—

"The fact that a debt is secured by such a mortgage can be no objection to taking the accounts between a debtor and creditor, and decreeing payment by the former of the balance found due from him, in any Court having personal jurisdiction over him...But that foreclosure should be decreed on the debtor's failure to pay would appear to be contrary to section 173 (that is perhaps an international comity) and it can hardly be supposed that the *forum situs* of

(1) (1890) 14 Bom. 353.

(2) (1925) 50 Bom. 1.

the security would allow any authority to such a decree, if by the *lex situs* the mortgage was still redeemable, and proceedings were taken to redeem it. Nevertheless, the practice in England is to decree foreclosure of mortgages of foreign lands."

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

- In England, the jurisdiction of the Courts of Equity is necessarily restricted where the defendant is not to be found within the limits, where the King's Writ holds good. The Court of Equity will not entertain actions where they would be powerless to enforce their orders *in personam* against the defendant. The local limits of the Original Side of our High Court are restricted to the Town and the Island itself and do not extend to the whole of the Presidency, whereas in England the jurisdiction of the Supreme Court extends beyond London to the whole of England. The English Courts enjoy powers within that large area of enforcing decrees and orders *in personam* against persons to be found within the area. The scheme of our law Courts in the Presidency appears to be different from that of the Courts in England. The old Supreme Court of which the High Court is the successor did exercise powers over the whole Presidency similar to what the English Courts do with reference to England.

The scheme of our High Court appears to be that on its Appellate Side it is the Supreme Court exercising jurisdiction over the District and other Subordinate Courts of the Presidency. So far as the Original Side is concerned its jurisdiction, in my opinion, is limited in a manner similar to that of Courts of first instance in the mofussil.

I am of opinion that our High Court on its Original Side does not possess the machinery for enforcing any decree *in personam* relating to immoveable property situated outside its local limits except in the limited instances comprised under Order XXI, Rule 32, which do not cover mortgages. The execution of the Court's

1926-27

HATIMBHAJ  
HASSANALLY

v.

FRANROZ  
EDULJEE

decrees and orders is to be carried out by the Sheriff whose powers are confined to the local limits of the Town and Island of Bombay.

If a mortgage decree is to be regarded as a decree *in personam*, I fail to see how our Court can give effect to the decree ordering the mortgagor or the mortgagee as the case may be, should he be residing outside the local limits of its jurisdiction, to deliver over possession of the mortgaged property where it is situated outside the local limits of the High Court. The provision in the Code of Civil Procedure relating to decrees *in personam* is under Order XXI, Rule 32. A mortgage decree cannot be regarded as a decree for specific performance or an injunction. In such a case the decree of the Court would become nugatory. It is suggested that should the person against whom the order *in personam* has been made happen to be within the local limits of the Court's jurisdiction the Court would then arrest his person and commit him to gaol for contempt and not release him therefrom until he has purged his contempt by carrying out the orders *in personam*. With great respect it seems to me that the scheme of Order XXXIV of the Code of Civil Procedure relating to mortgage suits does not justify the suggestion that decrees in these suits are to be made effective by invoking the Court's inherent jurisdiction in contempt proceedings. Those proceedings, as I understand them, are to be sparingly used in this country and on exceptional occasions only. It is suggested that in the case of a Court sale in a mortgage action the Court may by its order vest the property in its Commissioner for signing the conveyance in favour of the purchaser at such sale. In my opinion, the question would still remain how the purchaser is to obtain possession of the property which he has so purchased, if that property is situated outside the jurisdiction of the Court and the

Court by its officer is not already in possession of it. To get possession he will have to file a suit in the Court within whose jurisdiction the property is situated and execute the decree of that Court. Such a multiplicity of proceedings does not appear to me to be contemplated by the Code for the execution of a decree for sale in a mortgage action.

The meaning here sought to be put on the expression "suits for land" by the Advocate General appears to me to be untenable having regard to the provisions of our adjective law on the subject. Even granting that the Court has an inherent jurisdiction to entertain such actions following the example of the Courts of Chancery in England it could not and, in my opinion, it should not endeavour to exercise a jurisdiction where the results of its action are apt to be nugatory.

3. A suit for land has been construed by the High Court of Calcutta as meaning a suit which is substantially for land, that is, for the purpose of acquiring title to or control over land. It includes according to the High Courts of Calcutta and Madras any suit in which a decree is asked for operating directly upon the land and would therefore include any suit brought to enforce a security upon land. In *Sundara Bai Sahiba v. Tirumal Rao Sahib*<sup>(1)</sup>, Benson Ag. C. J. and Sankaran-Nair J. held that a suit which prays for any relief with reference to any specific immoveable property is a suit for land.

In my judgment the above is the correct interpretation to be put on the expression "suits for land". The rules of limitation both here and in England seem to place mortgage suits on the same footing as suits for the recovery of land. If a mortgage action were regarded by the Legislature as an action in debt only the period of limitation should have been three years

<sup>(1)</sup> (1909) 33 Mad. 131.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
ELULJEE

and not twelve. The Courts of Equity in England have naturally laid stress upon that aspect of a mortgage which relates to its being a personal debt, for the reason that they emphasize the equity of redemption of the mortgagor in the mortgage. Section 58 of the Transfer of Property Act, as I read it, seems to lay the emphasis more on that aspect of a mortgage which relates to the security part of it rather than on the element of personal debt. In a mortgage decree no doubt an opportunity is given to the mortgagor to pay up the debt within a certain time, but the main object of a mortgage decree is to operate on the mortgaged property itself. The preliminary decree is a kind of notice or intimation to the mortgagor, that should he fail to redeem the property within the time specified by the decree the mortgagee would be entitled to ask the Court for a final decree for foreclosure or for sale as the case may be, which relief the Court would, subject to any just exceptions, proceed to grant. The ultimate object of the decree is either to acquire the property by foreclosure or to have it sold through the Court. In either case the Court's intervention is sought for to seize the property and to hand it over to the mortgagor, mortgagee or purchaser as the case may be.

With great respect I am unable to agree with the view taken by the majority of my colleagues, and would answer the first question in the affirmative.

I shall first deal with questions Nos. 2 and 3 in the light of the fuller discussion which has now taken place. It is contended that the last part of clause 12 of the Amended Letters Patent, 1865, viz., "or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits" stands by itself and is not governed by the previous clause "in all other cases". In that view of the matter the last part of clause 12 would confer

on the Court a jurisdiction *in personam* irrespective of the land being situate within the Court's local jurisdiction.

Clause 12 of the Letters Patent appears to me to be capable on this point of two constructions each of which would, grammatically speaking, be more or less appropriate. The one construction would be as contended for by the Advocate General that the clause "in all other cases" govern only what immediately follows it, viz., "if the cause of action shall have arisen, 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 said High Court". The other construction would be that the clause "in all other cases" further governs, though in a slovenly way, what later follows, viz., "or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits".

In *Prasannamayi Dasi v. Kadambini Dasi*<sup>(1)</sup>, Norman J. separated the last clause "or if the defendant..," in clause 12 from what preceded it by a semicolon thus indicating that in his view clause 12 should be read as expressing the first meaning put upon it above. In the original Charter to which our attention has been called no semicolons or commas appear in clause 12. We may take it, therefore, that the semicolon expresses the opinion only of Norman J. as to the proper reading of clause 12, and is not necessarily ascribable to the Legislature. In fact the semi-colon does not appear even in the authorized print. If this interpretation were to be accepted as correct our Chartered High Courts in India would be capable of exercising a jurisdiction in respect of land abroad wider than that of the English Courts of Equity. We must, therefore, consider whether the Legislature

(1) (1868) 3 Beng. L.R. (O. C. J.) 85.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

intended such an extravagant result to follow. According to recognized rules of construction of statutes the Legislature is presumed not to enact anything contrary to international law or the common law of the realm. Unless, therefore, the intention to do so is clearly expressed in the enactment, the Courts would incline to favour an interpretation which would bring the enactment into consonance with those principles rather than accept a grammatical interpretation the result of which would be startling or unusual.

In *Balaram v. Ramchandra*<sup>(1)</sup> Candy J. stated (p. 925) that the uniform practice of the three High Courts at Bombay, Calcutta and Madras had been to read clause 12 as if it bore the second meaning put upon it above. The learned Judge confessed that were the matter *res integra* he would be inclined to doubt the correctness of that construction but there were obvious difficulties in whatever way the clause was to be regarded and he was not prepared after such a lapse of time to question the uniform practice of those Courts.

The uniform practice of the three Courts to which Candy J. refers is entitled, in my opinion, to great weight. In ascertaining the meaning to be put on clause 12 it would be permissible in my opinion to consider the views of those responsible for its enactment at the time it was to be put into force. I would not base my construction of clause 12 either on this point or on the point as to what "a suit for land" is intended to mean on the Secretary of State for India's Despatch which accompanied the original Letters Patent of 1862. The opinion expressed by the Secretary of State in that Despatch as to the policy and intention underlying clause 12 of the Letters Patent of 1862 cannot, however, be lightly treated, but is entitled to

(1) (1898) 22 Bom. 922.

due weight. It stands on a higher plane than a statement of objects and reasons of an Act.

The Act of 1861 (24 & 25 Vic., c. 104) conferred on the Queen the right to establish by Letters Patent High Courts at Calcutta, Madras and Bombay which she proceeded to do under the advice of her Secretary of State. The Secretary of State is not a judicial authority whose views on the construction of clause 12 could be binding on any Court of law. But a consideration of the Despatch from the Secretary of State is permissible as throwing some light on the policy and scheme of the Letters Patent. In para. 16 of the Despatch the Secretary of State writes:—

“As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated or in which the cause of action has its origin or in which the defendant resides or carries on business;...”

From the language here used it would appear to have been the intention of the Secretary of State that the Letters Patent framed under his supervision should confer jurisdiction on the High Court in all cases, irrespective of their being suits for land or not, when “the defendant resides or carries on business” within the local limits of the Courts. This meaning, however, is not borne out by clause 12 of the Letters Patent of 1862 which on this point is clear and unambiguous. The latter part of the clause runs thus:—

“or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court.”

In such a case the Court would not be entitled to put the Secretary of State's meaning on the words of clause 12 but must construe the clause in accordance with its obvious and natural meaning.

It appears from the judgment of Norman J. in *Pra-sannamayī Dasi v. Kadambini Dasi* <sup>(1)</sup> that the

<sup>(1)</sup> (1868) 3 Beng. L. R. (O. C. J.) 85.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

language of clause 12 of the amended Letters Patent of 1865 " was altered as expressed in the 6th paragraph of the letter of the Secretary of State accompanying the Charter, in deference to the views of some of the Judges of the High Court". What the views here referred to were is nowhere stated. Is it possible that some of the Judges whose opinions on the Letters Patent were invited pointed out that the jurisdiction conferred by clause 12 of the Letters Patent was not in accordance with the earlier part of para. 16 of the Secretary of State's Despatch? Does the amended clause 12 of the Letters Patent of 1865 in consequence of such representations embody in its amended form the intention of the Legislature to confer on the High Court the widest jurisdiction in cases where the defendant at the time of the commencement of the suit dwelt or carried on business or personally worked for gain within the local limits? It may be said in favour of such a theory that the Legislature has not considered it necessary to amend clause 12 of the Letters Patent of 1865 to bring it into conformity with the proviso to section 16 of the Code of Civil Procedure, possibly because the High Courts are deemed to possess a much wider jurisdiction under clause 12 of their respective Charters. The anomaly on any other supposition would be that the Legislature has deliberately excluded the High Courts from the extended jurisdiction which it has conferred on the Courts in the mofussil by the proviso to section 16. The Legislature could have, if it wished, superseded clause 12 of the Letters Patent by section 16 of the Code.

The Chartered High Courts are governed by clause 12 of the Letters Patent. We cannot read into that clause any proviso of the kind we find in section 16 of the Code. The proviso to section 16 of the Code of Civil Procedure confers on the mofussil Courts jurisdiction in suits to

obtain relief respecting or compensation for wrong to immoveable property held by or on behalf of the defendant where the relief sought can be entirely obtained through his personal obedience where the defendant actually and voluntarily resides or carries on business or personally works for gain within its local limits. The proviso contemplates the ability of the Court to enforce its decrees *in personam* against a party who is actually and voluntarily residing or carrying on business or personally working for gain within its local jurisdiction. The last part of clause 12 of the Letters Patent does not, in my opinion, even on the wider interpretation to be given to it, contemplate the exercise of the equity jurisdiction *in personam*. It would apply to defendants who after the commencement of the suit cease to dwell, carry on business, or work for gain within the jurisdiction of the Court. Had it been the intention of the Legislature to confer on the High Court an equity jurisdiction *in personam* in respect of "suits for land" outside its jurisdiction, one would expect to find language used with reference to the defendant's residence, business or work for gain similar to that of the proviso to section 16 of the Code of Civil Procedure. It does not appear from para. 16 taken as a whole of the Secretary of State's Despatch that it was intended to confer such a wide jurisdiction on the High Court. The later parts of the paragraph clearly state that the jurisdiction exercised by the Supreme Court over persons and property beyond the local limits of the Presidency town had not been vested in the High Court. Para. 17 of the Despatch further makes it clear that the intention was to place the Courts of first instance in the Presidency towns and in the interior of the country in respect of their several jurisdictions as nearly as may be on the same footing. It would appear, therefore, that what is stated in the earlier part of

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

para. 16 of the Secretary of State's Despatch is not to be taken literally, for, as expanded and explained by what follows, it leaves no room for doubt that clause 12 of the Letters Patent, 1862, correctly represented the policy and intention of the Home Government as expressed in the Despatch. In the absence of the actual representations made by some of the Judges regarding the original clause 12 to which Norman J. refers it would not be permissible to surmise that the representations had reference to the enlargement of the Court's jurisdiction in cases where at the commencement of the action the defendant dwelt, carried on business or worked for gain within the local limits. It is more likely as the facts in the case before Norman J. indicate that the representations related to cases where only a part of the land or cause of action was within the local limits and a part outside such limits. The original clause 12 had made no provision for such cases. The amended clause 12 does provide for them.

In my judgment the matter is not so clear from doubt as to enable me to say that the Legislature deliberately conferred a jurisdiction on the Chartered High Courts of India wider than that of the Courts of Chancery in England. I am inclined to accept the more sober view on the subject which has hitherto prevailed in all the High Courts exercising original civil jurisdiction.

Equity jurisdiction cannot be effectively exercised unless the defendant's property or person is within the local jurisdiction. Should both be withdrawn from the local jurisdiction of the Court the decree *in personam* would become nugatory unless it could be transferred for execution to the proper Court where the property or person is. Section 39 (a) and (c) of the Code of Civil Procedure provide for the transfer for execution to the proper Court of a decree which directs

the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed the decree. A mortgage decree for sale under the provisions of Order XXXIV in my judgment cannot be regarded as a decree *in personam* whereby the defendant is ordered to convey the property and put the purchaser at a Court sale in possession of it. A mortgage decree for sale would not fall within Order XXI, Rule 32, which deals with decrees for restitution of conjugal rights, for specific performance and for injunction. A mortgage decree for sale is not a decree for specific performance nor for an injunction. A decree for an injunction is confined to a relief consequential upon an infringement of a legal right. It cannot be said that the mortgagor who withholds payment from the mortgagee under his personal covenant to pay has committed an infringement of the mortgagee's rights so as to entitle the mortgagee to a decree for an injunction in respect of the mortgaged property. Similarly, where the mortgagor withholds possession of the mortgaged property from the mortgagee after the right to enter has accrued to him under the mortgage deed it cannot be said that he has infringed a right of the mortgagee so as to entitle the mortgagee to obtain an injunction against the mortgagor (see *Muhammad Inamullah Khan v. Narain Das*<sup>(1)</sup>).

Order XXXIV, Rules 4 and 5, do not contemplate a decree *in personam*. The preliminary decree in a suit for sale under Order XXXIV, Rule 4, also directs that in default of the mortgagor paying the mortgage amount by a certain date the mortgaged property or a sufficient part thereof be sold. The order is not *in personam* on the defendant to sell but the Court itself has to sell the property. If, for purposes of

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

(1) (1915) 37 All. 423.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

giving a proper title to the purchaser at the Court sale, the Court has framed rules whereby the purchaser is enabled at his own cost to obtain a conveyance signed by the mortgagor or in a proper case by the Commissioner of the Court in the name and on behalf of the mortgagor, it does not follow that a decree which is *in rem* against the mortgaged property is thereby converted into one which is *in personam* against the mortgagor. Similarly Order XXXIV, Rule 5, provides that where the payment is not made by a specific date the Court shall on application made in that behalf by the mortgagee pass a decree that the mortgaged property or a sufficient part thereof be sold. In my judgment Order XXXIV does not contemplate a resort to contempt proceedings for enforcing the decrees made thereunder. In my opinion so far as a mortgage decree for sale is concerned, whether preliminary or final, the residence of the defendant mortgagor within the jurisdiction would make no difference. The Court has to deal ultimately with the mortgaged property and not with the mortgagor. It has to carry out the decree for sale against the property and not to order the defendant mortgagor to do or abstain from doing certain acts with reference to the mortgaged property the subject-matter of the suit.

In the view that in a mortgage decree for sale the Court merely executes a decree *in personam* the inconvenience of a Court sale of immoveable property outside the Court's local jurisdiction would be that the Court would be unable to put the purchaser at the Court sale in possession of the property. What the Court sells under a mortgage decree for sale is not only the interest of the mortgagee in the property but the interest both of the mortgagee and the mortgagor, in other words, the property itself. Order XXXIV, Rule 1, provides that all persons having an interest

either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. The object of the rule evidently is that all parties interested in the mortgage security or in the right of redemption should be before the Court so that the Court may finally deal with all such interests in the property. Order XXXIV does not contemplate that in order to obtain possession of the property sold to him at the Court sale, the purchaser should file a suit against the mortgagor or whoever may be in possession of the property through him in the Court within the limits of whose jurisdiction the property is situate. The scheme of Order XXXIV in my judgment is against such a multiplicity of proceedings. To entertain a mortgage suit for the sale of immoveable property the Court should be able to seize the property and give possession of it to the purchaser at the Court sale. The Court could do this only if the property is situated within the limits of its local jurisdiction.

I would answer question No. 2 under both heads in the negative.

Strictly speaking question No. 3 does not arise in this appeal. From the opinion I have formed on question No. 2, it must follow that question No. 3 should also be answered in the negative.

If the question here propounded were answered in the affirmative clause 12 of the *Letters Patent* would be deemed to confer an equity jurisdiction on this Court wider than that exercised by the Court of Chancery in England. The Court of Chancery proceeded on the maxim "*Equity acts in personam*". The basis of its jurisdiction was that the defendant was within its reach. It had jurisdiction over the whole of England. The Chartered High Courts in India exercise ordinary original civil jurisdiction over their

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDUIJEE

respective Presidency towns only. Our High Court executes its Original Side decrees through the Sheriff whose powers are confined to the Island of Bombay and certain islands in the harbour. If the Court were to entertain mortgage suits for sale where both the immoveable property and the defendant are outside its local jurisdiction, it would be powerless to enforce its decree either against the property or against the defendant-mortgagor even on the supposition that the decree is a decree *in personam* against the defendant.

*Holkar v. Dadabhai*<sup>(1)</sup> until it was overruled by *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(2)</sup>, was an authority in our Courts for the contrary opinion. I agree with Jenkins C. J. in *Vaghoji v. Camaji*<sup>(3)</sup> that the *ratio decidendi* of Sargent C. J.'s judgment in *Holkar's case*<sup>(4)</sup> is to be found only in the concluding paragraphs of the judgment which lay down that the Bombay High Court could entertain even in the case of land-outside the limits of its jurisdiction all such suits as the Courts of Equity in England could. In applying that principle to the case before him Sargent C. J. omitted to notice that the defendant there did not dwell, carry on business or personally work for gain within the local jurisdiction of the Court and the only part of the cause of action relied on was that the mortgage was created in Bombay. The Court of Chancery would not have entertained an action such as this where both the land and the defendant were outside its reach. Sargent C. J. was virtually claiming for the Bombay High Court a jurisdiction which would be wider than that of the Court of Chancery. In *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(5)</sup> Scott C. J. in following Sargent C. J.'s judgment stated that the Court would have jurisdiction *in personam* over the

(1) (1890) 14 Bom. 353.

(3) (1904) 29 Bom. 249.

(2) (1925) 50 Bom. 1.

(4) (1916) 48 Bom. 629 f. n.

defendant if he had been lawfully caused to appear upon summons. The argument would come to this: that if the land and the defendant are both in foreign territory, but a part of the cause of action has arisen in Bombay the Court would have jurisdiction with leave under clause 12 to entertain a suit for such land and pass a decree in it to operate on the land if the plaintiff can show that he has served the writ of summons on the defendant, say by registered post or by one or other of the recognized modes of substituted service. I fail to see how a service of the summons in this manner on a defendant who in fact is outside the Court's local jurisdiction can confer a jurisdiction *in personam* against him. With great respect such a doctrine would take the case beyond any hitherto formulated by the Courts of Equity in England. In such a case, as we are here considering, the Court would be powerless to execute its orders and decrees except by contempt proceedings, if such were open to it, should the defendant happen to return to Bombay or possess property here. In my opinion, the Legislature never intended that the High Court should exercise such an extravagant jurisdiction.

I would answer the third question, if necessary, in the negative.

An argument was advanced by the Advocate General on the principle of *stare decisis*. In my judgment the opinion expressed by Macleod C. J. on this subject in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> is correct. Like my brother Fawcett, I have held that previous decrees already made in mortgage suits are binding on the parties to them and their representatives in interest and operate as *res judicata*. As at present advised, I am not inclined to attach much weight to the argument based on *stare decisis*.

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

(1) (1925) 50 Bom. 1.

1926-27

HATIMDHAI  
HASSANALLY  
2.  
FRAMROZ  
EDULJEE

BLACKWELL, J.:—The first question submitted in this appeal for the consideration of this Full Bench is whether a suit brought by a mortgagee of land to enforce his mortgage by sale is “a suit for land” within the meaning of clause 12 of the Letters Patent. The second and third questions submitted involve (*inter alia*) a further consideration, namely, whether this Court has an equity jurisdiction arising independently of clause 12 of the Letters Patent.

Clause 12 of the Letters Patent is in the following terms:—

“And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, 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 civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Causes Court at Bombay, in which the debt, or damage, or value of property sued for does not exceed one hundred rupees.”

It is important to observe that this is the only clause in the Letters Patent which confers jurisdiction upon the High Court in the exercise of its ordinary original civil jurisdiction.

Clause 19 of the Letters Patent is in the following terms:—

“And We do further ordain that with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Bombay in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.”

This clause directs that the law or equity to be applied is to be the law or equity which would have been applied by the High Court if the Letters Patent had not issued. The clause no doubt empowers the

High Court to apply the powers of a Court of Equity in England. For, as was pointed out by Sargent C. J. in *Holkar v. Dadabhai*<sup>(1)</sup> (p. 359): "The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees *in personam*". But clause 19 in terms states that such "law or equity" is only "to be applied to each case coming before the said High Court of Judicature at Bombay in the exercise of its ordinary original civil jurisdiction". It seems, therefore, clear that unless jurisdiction is first acquired under clause 12, there is no room for the application of the equity doctrines of the English Courts.

The failure to observe that the equity doctrines of the English Courts can only be applied to any case properly before the Court under the jurisdiction conferred upon it by clause 12 of the Letters Patent appears to me to have given rise to a certain amount of confusion in some of the decisions in the Indian Courts where the question of jurisdiction has been discussed. Thus in *Holkar v. Dadabhai*<sup>(1)</sup> (p. 359), Sargent C. J., in discussing the construction which the Courts of Calcutta have placed on clause 12 of the Letters Patent, says that that construction

"would exclude from the jurisdiction of the High Courts the large class of cases in which English Courts of Equity exercise jurisdiction, although the lands are in the colonies or even in foreign states. Those cases are set out in detail by Kay, J., in *In re Hawthorne: Graham v. Massey*<sup>(2)</sup>; and the principle on which they proceed is stated by the Earl of Selborne, L. C., in *Ewing v. Orr Ewing*<sup>(3)</sup>."

Again Sir Norman Macleod in the judgment of the Full Bench in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(4)</sup> says (p. 26):—

"I do not for a moment dispute the powers of this Court to pass a decree *in personam* in spite of the fact that the suit relates to land outside the

(1) (1890) 14 Bom. 353.

(3) (1883) L. R. 9 App. Cas. 34 at p. 40.

(2) (1883) 23 Ch. D. 743 at p. 748.

(4) (1925) 50 Bom. 1.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

jurisdiction... If the plaintiff asks for relief against the defendant only, the Court has jurisdiction though the suit relates to property outside the jurisdiction. But he cannot, when asking for relief against the property, claim that the suit is not a suit for land, because he is also asking or may be entitled to ask for an order which can be enforced personally against the defendant."

The above passages cited from those judgments seem to me to imply that there exists in the High Court an equity jurisdiction independent of the jurisdiction conferred by clause 12. In my opinion there is no such independent equity jurisdiction, and unless a suit is brought within the four corners of clause 12, this Court has no jurisdiction to entertain it by seeking to apply the equity powers of the Courts in England, or any other powers.

The question as to what is "a suit for land" has given rise to a considerable difference of opinion in the Indian Courts. One view has been that a suit for land means a suit to obtain or recover land; a second view taken is that a suit for land is a suit "substantially" for land, such as a suit in which the question of title to land is involved; and a third view has been that a suit for land is a suit relating to land. An instance of the first view is to be found in *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(1)</sup>, a case arising under the corresponding words "suit for land" in section 5 of Act VIII of 1859, where it was held that a suit for land is a suit which asked for delivery of the land to the plaintiff. An illustration of the second view appears in the case of *Vaghoji v. Camaji*<sup>(2)</sup>, where a question of title to a *talao* situated outside the jurisdiction of the Court arose, and in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(3)</sup>, a suit for compensation for wrong to land in which the substantial question arising was the right to the land. An illustration of

(1872) 9 Bom. H. C. 12.

(2) (1904) 29 Bom. 249.

(3) (1915) 42 Cal. 942.

the third view is to be found in *Sreenath Roy v. Cally Doss Ghose*<sup>(1)</sup>, a suit for specific performance of an agreement relating to land.

Having regard to this difference of opinion, the question of the meaning of "a suit for land" falls to be decided by this Full Bench afresh.

In considering this question, I propose to apply the test laid down by Lord Herschell in *Bank of England v. Vagliano Brothers*<sup>(2)</sup>. In that case at p. 144 Lord Herschell says:—

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law."

I ask myself therefore whether the words "suit for land" have a natural, ordinary, and unambiguous meaning. If they have, I am bound to give the words that meaning regardless of consequences. If the consequences are unfortunate, it is for the Legislature to intervene. It is not for a Court of law to refrain from giving the words their natural and ordinary meaning because the Court may think that unfortunate consequences may result.

The Advocate General in the course of his argument submitted that the natural and ordinary meaning of "a suit for land" is a suit to obtain land. In considering whether this submission is a right one, I ask myself: what is the natural and ordinary meaning of similar expressions? For instance, what is a suit for an injunction? It is not a suit relating to an injunction, neither is it a suit substantially for an injunction; it is a suit to obtain an injunction. So, too, a suit for possession is neither a suit substantially for possession nor relating to possession; it is a suit to obtain possession. Again, a suit for damages is not a suit substantially for damages or a suit relating to damages; it is a suit to obtain damages. To take another illustration, a suit

<sup>(1)</sup> (1879) 5 Cal. 82.

<sup>(2)</sup> [1891] A. C. 107.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

for libel at first sight might be regarded as a suit relating to libel; but having regard to the relief actually claimed, the words "suit for libel" are really a compendious expression for "a suit for damages for libel" that is, a suit to obtain damages for libel. Such illustrations might be multiplied indefinitely. A consideration of these similar expressions seems to me to lead conclusively to the view that the words "suit for" mean "suit to obtain". In my opinion, therefore, the submission of the Advocate General that the expression "suit for land" means "a suit to obtain land" is correct.

I am not unmindful of the fact that this opinion involves an obligation upon this Court to entertain a suit relating to land wherever the land may be situate, as was pointed out by Jenkins C. J. in discussing the arguments of Mr. Lowndes in the case of *Vaghoji v. Camaji*<sup>(1)</sup>. It will involve an obligation to try even a question of title to land outside the jurisdiction, provided that possession of the land is not sought to be obtained, or a question of damages for trespass to land, where a question of title may be involved. This may be an inconvenient consequence of the construction placed by me upon the expression "suit for land", but holding as I do that that is the proper construction, I cannot allow myself to be influenced by any consideration of inconvenience. It was pointed out by Jenkins C. J. in the last-mentioned case at p. 238 that "though it is a general principle that the title to land should ordinarily be determined by the Court within the limits of whose jurisdiction it lies, it no doubt is open to the Legislature to disregard that principle"; and in my opinion by reason of the expression "suit for land" in clause 12 of the Charter which I take to bear an ordinary, natural, and plain meaning, that general

<sup>(1)</sup> (1904) 29 Bom. 249 at p. 257.

principle is in effect disregarded. I cannot therefore hold that the meaning of the expression "suit for land" can be extended so as to include a suit "substantially" for land where a question of title to the land may be involved.

I am fortified in my opinion by a recent decision of the Calcutta High Court in the case of *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(1)</sup>, where it was held that a vendor's suit for specific performance of an agreement to sell a tea-estate in Assam was not "a suit for land" within the meaning of clause 12 of the Letters Patent, and that the Calcutta High Court on its Original Side had jurisdiction to entertain the suit. In the course of the argument at p. 672 Sanderson C. J. said with regard to the expression "suit for land": "If anything more than recovery of land was meant, why did not the Legislature say 'suit in respect of or concerning land'". It is clear to me from his judgment that he was of opinion that the expression "suit for land" meant in its natural and ordinary meaning, "suit to obtain land". As a result of this decision, it appears to me very doubtful whether the Calcutta High Court would now hold that "a suit for land" means either a suit "substantially" for land or a suit relating to land.

It was argued before us that in construing the expression "suits for land" in clause 12 of the Letters Patent we ought to have regard to certain sections of Act VIII of 1859. In view of the opinion which I have formed that the words "suits for land" in clause 12 of the Letters Patent bear an ordinary and natural meaning, I hold that it is inadmissible to seek to construe that clause in the light of various sections in an earlier Act. Moreover, Act VIII of 1859 was an Act for simplifying the procedure of the Courts of Civil

<sup>(1)</sup> (1922) 49 Cal. 670.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

Judicature not established by Royal Charter, and would in my judgment afford no proper guide for construing a clause in the Amended Letters Patent constituting the High Court. If I had thought it permissible to look at those sections, I should nevertheless have rejected the argument. The argument was, that although section 5 of the Act, which defined the jurisdiction of the Civil Courts, contained the words "suits for land" those words must be construed as meaning suits "relating to land" because a subsidiary section, namely, section 33, contained the expression, "if the claim related to land", and because section 26(5) contained the expression "when the claim is for land or for any interest in land". But other sections, namely, 10, 190, 223 and 224 indicate that a suit for land means a suit for obtaining or recovering land. In this conflict of words in subsidiary sections, I think that the only course open to the Court is to construe section 5, which is the main jurisdiction section, according to its plain and natural meaning, and to hold that it means a suit to obtain or recover land, and not a suit relating to land. The fact that section 33 of the Act of 1859 was re-enacted in section 3 of Act XXIII of 1861 does not appear to me to carry the argument any further.

I am also of opinion that for the purpose of construing words which I hold to have an ordinary and natural meaning, it is not permissible to look at the Reports of the Commissioners who were appointed in 1845 to consider the possible amalgamation of the Supreme Courts and the Company's Courts. If I thought it permissible to look at those Reports, as the words in clause 12 of the Letters Patent are "suits for land", and not "suits relating to or concerning land", I should draw the inference that the recommendation of the Commissioners as to the language to be employed was rejected, and that a different expression, bearing a

different meaning, was designedly used in framing the Letters Patent.

In the course of the argument it was submitted that the Court ought to look at the terms of the Despatch of the Secretary of State which accompanied the Letters Patent of 1862 for the purpose of construing clause 12 of the Amended Letters Patent of 1865. In addition to the reason given by me above for refusing to look at extraneous documents for the purpose of construing words which, in my view, have a natural, plain, and ordinary meaning, it seems to me that it is not open to the Court to have regard to any expression of opinion by an Officer of Government as to what was intended to be conveyed by words used in the Charter. It is for a Court of law, and not for a Government Official, to construe the meaning of the Charter.

The next question arising in this appeal is, what is the true nature of a suit to enforce a mortgage by sale? In regard to this question, I have had the advantage of reading the judgment of the learned Chief Justice. If I may say so, he has dealt with the matter so fully, and so admirably, that I feel that I could not usefully add one word. I, therefore, content myself by saying that I agree with his judgment upon this part of the case.

It is not necessary for me to express any opinion upon the argument based upon the doctrine of *stare decisis* which was submitted to us by the Advocate General, having regard to the opinion which I have already expressed upon this case. I desire, however, to say that I am in entire agreement with the view expressed upon this matter by the learned Chief Justice in his judgment.

I answer the first question submitted to us in the negative.

In view of my answer to question No. 1, my answer to questions Nos. 2 and 3 is:—"Yes, under clause 12 of the Letters Patent."

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

The second question has given rise to a discussion as to what is the proper construction to be placed upon the words "or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits". Do these words fall within the ambit of "all other cases", or do they confer jurisdiction upon the High Court in any class of case, even if the case be a suit for land or other immoveable property? So to hold would undoubtedly be startling, for if this be the true construction the High Court would have jurisdiction in suits for land or other immoveable property wherever the land or property was situated if the defendant at the time of the commencement of the suit dwelt or carried on business or personally worked for gain within the limits of the ordinary original jurisdiction. As far as I can ascertain it has never been contended hitherto in any of the High Courts in India that such a construction should be placed upon these words, and the point falls to be decided now for the first time.

The question was referred to by Candy J. in *Balaran v. Ramchandra*<sup>(1)</sup>. The learned Judge 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 :—

'The said High Court in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description if

(a) in the case of suits for land or other immoveable property, such land or property shall be 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 said High Court, or if

(b) in all other cases the cause of action shall have arisen 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 said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits.'

(1) (1898) 22 Bom. 922.

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."

In dealing with the question now arising the learned Judge said (p. 926) :—

"As authorities for the proposition that the condition as to defendant's residence or carrying on business relate solely to all other cases, and not to suits for land or other immovable property, I may refer to the judgment of Macpherson J., in *Bibee Jaun v. Meerza Mahommed Hadee*<sup>(1)</sup>, where it was held that as the land was not within the local jurisdiction, the suit could not be entertained by the Court merely on the ground that defendant was personally dwelling in Calcutta; and to the judgment of Phear J., in *Khalut Chunder Ghose v. William Minto*<sup>(2)</sup>, where it was held that as defendant dwelt within the local limits the Court had jurisdiction unless it was a suit for land not within the local limits. Further support for this proposition may be obtained from the fact that it has never been apparently contended that a defendant residing in Bombay could be sued in the Bombay High Court for land, say in Calcutta, simply because the defendant resided in Bombay."

It is to be observed that the first authority cited by the learned Judge, namely, *Bibee Jaun v. Meerza Mahommed Hadee*<sup>(1)</sup>, was a case arising under the original Letters Patent, and not under the Amended Letters Patent of 1865, which did not become operative until some time in 1866, and were not in force at the time that case was decided, namely, December 1865; and having regard to the wording of the original Letters Patent, presently referred to, it could not have been contended that if, as was held, the suit was one for land outside the jurisdiction, the suit would lie upon the ground that the defendant resided within the jurisdiction. The second case cited by the learned Judge, namely, *Khalut Chunder Ghose v. William Minto*<sup>(2)</sup>, was a case under the Letters Patent of 1865, but it was not contended by the Advocate General for the plaintiff that, if the suit was one for land, the Court would have jurisdiction, although the defendant

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE<sup>(1)</sup> (1865) 1 Ind. Jur. N. S. 40.<sup>(2)</sup> (1866) 1 Ind. Jur. N. S. 426.

1926-27

HATIMBHAJ  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

resided within the jurisdiction. These authorities, therefore, do not seem to afford any assistance in answering a point which is now argued apparently for the first time under the Letters Patent of 1865. Moreover, it is to be observed that in support of the proposition that the condition as to defendant's residence or carrying on business relates solely to all other cases, and not to suits for land or other immoveable property, the learned Judge himself relies upon (p. 926) "the fact that it has never been apparently contended that a defendant residing in Bombay could be sued in the Bombay High Court for land, say in Calcutta, simply because the defendant resided in Bombay". The fact that such a contention has never been raised may no doubt afford strong ground for supposing that it is ill-founded, but now that it has been raised and argued it seems to be that it would be quite wrong to refuse to give effect to the contention, if it be sound, merely because it has never been raised before, and because in the absence of argument in support of the contention the High Courts in India have construed the clause in another manner.

The material part of clause 12 of the Letters Patent of 1862 was in the following terms:—

"And We do further ordain, that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court."

It is clear from the wording of this clause that the words "or, the defendant...personally work for gain within", &c., fall within the ambit of "all other cases".

In the Letters Patent of 1865 the wording of the clause is very materially altered. The sentence beginning "if in the case of suits for land" is not complete

until the words "within the local limits of the ordinary original jurisdiction of the High Court" are reached. The words which follow that completed sentence are "or *if* the defendant", and not "or the defendant", as in clause 12 of the Letters Patent of 1862. On the plain and natural grammatical construction of the clause the sentence beginning with the words "or if the defendant" is in my judgment clearly an alternative to the preceding sentence beginning with the words "if in the case of suits for land". If this be the plain and natural grammatical construction of the words, as I hold it is, I do not feel myself at liberty to speculate as to the intention of the draftsman, however startling the result may be.

It was contended by the Advocate General that the draftsman of the new clause 12 has made a distinction between (1) the subject-matter of the suit, which may be either land or all other cases except land, and (2) residence. He submitted that if the grammatical construction is clear, that construction must be accepted, even if it involves jurisdiction over foreign land. I think he is right. It is no doubt true that if the High Court in Bombay passed a decree for possession of land, say, in France, the High Court could not give effect to its decree, and this may be a ground for supposing that the draftsman did not intend to confer such a jurisdiction. But if the draftsman has in fact, by the language which he has used, conferred such a jurisdiction, it is not, as it seems to me, open to a Court to assign limits to the jurisdiction conferred by Letters Patent made in accordance with the authority of the Legislature. If the jurisdiction conferred is too wide, it is for the Legislature to intervene. Nor, as it seems to me, is there anything inherently absurd in the conferring of such a jurisdiction, for though the Court might not be able to give effect to its decree, it

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

would be open to the plaintiff, if so advised, as was submitted by the Advocate General, to sue upon the decree in the foreign country; and, as presently pointed out, the new clause 12 has conferred upon the Courts in India, according to the decisions of these Courts, jurisdiction over land abroad if part of the land is within the jurisdiction, and the leave of the Court is obtained.

It was contended by Mr. Mulla, that nothing had happened between 1862 and 1865 which would justify the assumption that it was intended to confer upon the Courts in India a jurisdiction in relation to land abroad which was not possessed by the Courts in England. But it was pointed out in the course of the argument that in construing the new clause 12 the Courts in India have held that provided part of the land is within the jurisdiction a suit will lie, with the leave of the Court, in respect of land which is outside the jurisdiction: (see the cases cited by Candy J. in *Balaram v. Ramchandra*<sup>(1)</sup>, above referred to, at the bottom of p. 925, and *Govindlal Bansilal v. Bansilal Motilal*<sup>(2)</sup>). Mr. Mulla contended that these decisions were wrong, and that the Court had no jurisdiction unless the whole of the land was within the jurisdiction. If, however, these decisions are right, the supposition that it was intended to confer jurisdiction in relation to land wholly outside the jurisdiction if the defendant resided or carried on business within the jurisdiction is not so startling as at first appears.

On the other hand, it is said that the construction contended for is so startling that it ought to be presumed that it could not have been intended, that the clause is drafted in a slovenly manner, that the strict grammatical meaning of the clause should be disregarded, and that it is legitimate to read into the

(1) (1898) 22 Bom. 922.

(2) (1921) 46 Bom. 249.

clause some such words as "in such other cases" between the words "or" and "if", so that the sentence would read "or in such other cases if the defendant", &c. If in point of grammar a sentence is reasonably capable of two possible constructions, it may no doubt be legitimate and proper to construe the sentence in one alternative manner which will avoid placing upon it a meaning which, apart from plain and unambiguous language, either the history, or the cause of the enactment, or the context, or the consequences which would result, indicate that the other possible construction does not express the real intention of the Legislature or the draftsman. But if in point of grammar the sentence is reasonably capable only of one construction, it seems to me that there is no room for the applicability of this principle. In the present case the sentence in question is in my opinion capable only of the grammatical construction which I have placed upon it. In these circumstances, even if I strongly suspected that the draftsman may have intended something different from what he has said, I apprehend that, remembering that what a man intends to say is one thing, but that what he actually says may be quite another, it would be my duty to put aside speculation, and to construe the words in their plain and grammatical meaning.

It has been suggested by my brother Fawcett since the conclusion of the arguments that we ought to look at a copy of the Despatch which accompanied the Letters Patent of 1865 and that if we do so it will be plain that the construction now contended for is erroneous. Speaking for myself, I do not consider it permissible to construe any clause in the Letters Patent in the light of another document which accompanied it, if the clause so sought to be construed bears a plain grammatical meaning. Holding as I do, that

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRANROZ  
EDULJEE

the clause in question bears a plain grammatical meaning, and is incapable of any other grammatical meaning, I do not feel myself at liberty to look at the *Despatch for the purpose of assisting me in construing the clause.*

PATKAR, J. :—In view of the importance of the questions submitted for decision to the Full Bench and in deference to the lengthy arguments at the bar I would make a few observations. The first question to be decided is “Whether a suit brought by a mortgagee of land to enforce his mortgage by sale is a ‘suit for land’ within the meaning of clause 12 of the Letters Patent”. It would, therefore, be necessary to determine the intrinsic nature of the suit brought by a mortgagee of land to enforce his mortgage by sale. The mortgagee’s interest in such a suit comprises (1) the right to sue the mortgagor personally for the mortgage debt, and (2) the right to realize the debt by sale of the mortgaged property. In *Halsbury’s Laws of England*, Vol. XXI, para. 124, a mortgage is said to consist of two things: “It is a personal contract for a debt and an estate pledged as a security for the debt. Every mortgage implies a debt and a personal obligation by the mortgagor to pay it”. For the purposes of the Civil Procedure Code mortgage debt according to the trend of judicial opinion in the different High Courts is considered to be a *debt* within the meaning of Order XXI, Rule 46, and not immovable property within the meaning of Order XXI, Rule 54. See *Tarvadi Bholanath v. Bai Kashi*<sup>(1)</sup>; *Karim-un-nissa v. Phul Chand*<sup>(2)</sup>; *Kasinath Das v. Sadasiv Patnaik*<sup>(3)</sup>; *Nataraja Iyer v. The South Indian Bank of Tinnevely*<sup>(4)</sup>. When the mortgagee’s rights are attached as debt under Order XXI, Rule 46, and

(1) (1901) 26 Bom. 305.

(2) (1893) 20 Cal. 805

(3) (1893) 15 All. 134.

(4) (1911) 37 Mad. 51.

eventually sold, the rights of the auction-purchaser of the mortgage debt in execution of a decree against the mortgagee are the same as those of the judgment-debtor mortgagee, viz., the right to sue the mortgagor for a personal decree against him and also the right to realize the debt by sale of the mortgaged property. What then was the conception of a mortgage suit when clause 12 of the Letters Patent was enacted? Regulation IV of 1827, section 26, says: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, *justice, equity, and good conscience*". Macpherson in his Law of Mortgage, 7th Edition, at pp. 1 and 3, has referred to the several authorities and laid down that the Mahomedan law and Hindu law recognized no distinction between mortgages of land and pledges of other property. The principles of justice, equity and good conscience are interpreted to mean principles of English law applicable to a similar state of circumstances: *Waghela Rajsanji v. Shekh Mashudin*<sup>(1)</sup>; *Shivrao v. Pundlik*<sup>(2)</sup>; *Kripa Sindhu Mukerjee v. Annada Sundari Debi*<sup>(3)</sup>; *Maharaja of Jeyapore v. Rukmini Pattamahadevi*<sup>(4)</sup>. At the time of the enactment of clause 12 of the Letters Patent, the principles of English law would apply, and if the principles of English law applied it is clear that the right of a mortgagee is not a right *in rem* but can be enforced by the personal obedience of the mortgagor. A mortgagee may in England sue for possession simpliciter. But normally that would be a common

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

(1) (1887) L. R. 14 I. A. 89 at p. 96. (3) (1907) 35 Cal. 34 at p. 58, F.B.

(2) (1902) 26 Bom. 437 at p. 441. (4) (1919) 21 Bom. L. R. 655 at p. 663

1926-27

HATIMBUAT  
HASSANAILY  
v.  
FRAMROZ  
EDULJEE

law action. The mortgagee in the suit for foreclosure may, after decree absolute is made, get the land; but in a suit for sale, with which we are concerned in this case, he has to apply to the Court for leave to bid which may be refused, his right to bring the property to sale may be defeated by payment by the mortgagor, and generally it is the stranger auction-purchaser who gets the land. The mortgagee gets his money and the surplus is paid to the mortgagor. Their Lordships of the Privy Council in the case of *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee*<sup>(1)</sup> thus described the effect of the decree for sale (p. 109):—

"This...was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Supreme Court at Calcutta had no effect whatever *in rem*, as it had no effect whatever over the property in the *Mofussil*. The decree for sale was merely a decree, in substance, that the parties to the suit should concur in conveying and selling the property to a Purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the *Mofussil* who were not parties to the suit."

Regulation V of 1827, section 15, refers to the character of a mortgage as security for a debt and property to be applied to the liquidation of the debt. Section 15 of Regulation V of 1827 runs as follows:—

"*First*.—When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.

"*Second*.—If the property yield profit, and no stipulation has been made respecting the disposal of the said profit, or payment of interest on the debt, the profit shall be considered as equivalent for the interest.

"*Third*.—In the absence of any special agreement, or recognized law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner."

No distinction is made as to recovery of mortgage debt and money debt in Act VIII of 1859, and as stated

(1) (1871) 14 M. I. A. 191 at p. 109.

above the mortgage debt is moveable and not immoveable property for the purposes of the Civil Procedure Code.

The Transfer of Property Act was enacted in 1882 and applied to the Bombay Presidency in 1893. Though, according to the definition of mortgage in section 58, it is difficult to say that the transfer of an interest in specific immoveable property is not a benefit to arise out of land within the meaning of section 3, clause (25), of the General Clauses Act, X of 1897, section 8 of the Transfer of Property Act enacts that a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and the legal incidents thereof, and such incidents include, where the property is a debt or other actionable claim, the securities thereof. The mortgage creates a personal obligation but the right which is created in immoveable property or land is only an accessory right intended merely to secure due payment of the debt. If the interest created by mortgage be immoveable property, the Courts would have enforced specific performance of a contract to effect a mortgage, but specific performance is refused on the ground that the intending lender cannot be compelled to make nor the intending borrower to take the loan.

In Suit No. 1163 of 1925 before us the mortgage was effected on November 26, 1923, by deposit of title deeds of immoveable property situate at Poona to secure a sum of Rs. 30,000. The mortgage was not effected by a registered deed. It was an equitable mortgage by deposit of title deeds. The property is situate at Poona outside the local limits of the jurisdiction of the Original Side of the Bombay High Court. Section 59 of the Transfer of Property Act, which requires a mortgage to be registered where the principal money

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

1926-27  
 HATIMBHAI  
 HASSANALLY  
 v.  
 FRAMROZ  
 EDULJEE

secured is more than one hundred rupees, expressly says that nothing shall be deemed to render invalid a mortgage made in the town of Bombay by delivery to a creditor of documents of title to immoveable property with intent to create security thereon. Generally, in an equitable mortgage by deposit of title deeds, there is a promissory note and handing over of the title deeds. It is doubtful if such a transaction creates any interest in land. It is not disputed that an equitable mortgage by deposit of title deeds with regard to property situate in the mofussil outside the Original Jurisdiction of the High Court of Bombay, e.g., Poona in this case, cannot be effected where the property is situate, but can, under section 59, be effected only in the Presidency town of Bombay. See *Madho Das v. Ram Kishen*<sup>(1)</sup>; *Srinath Rōy v. Godadhur Das*<sup>(2)</sup>; *Manekji Framji v. Rustomji Naserwanji Mistry*<sup>(3)</sup>; *Behram Rashid v. Sorabji Rustomji*<sup>(4)</sup>.

In 1862 the Privy Council in the case of *Varden Seth Sam v. Luckpathy Royjee Lallah*<sup>(5)</sup> held, with reference to a case from Madras (in the absence of any agreement that the transaction was to be governed by any particular local law), that under Madras Regulation II of 1802, section 17, the principles of English law respecting equitable mortgages applied. Williams on Real Property (24th Edition), p. 686, says that an equitable mortgagee seeking to realize his security has, generally speaking, the same rights as a legal mortgagee, subject, however, to important qualifications arising from the fact that he does not possess the *legal estate*; and at p. 687 says with regard to foreclosure, that it is a remedy which is not available to the owner of merely an equitable charge or lien, and his proper remedy is to

(1) (1892) 14 All. 238.

(3) (1889) 14 Bom. 269.

(2) (1897) 24 Cal. 348.

(4) (1913) 38 Bom. 372 at p. 376.

(5) (1862) 9 Moo. I. A. 303.

apply to the Court for the realization of his charge by sale. The question in this reference is, however, not confined to an equitable mortgage by deposit of title deeds. The real nature of a mortgage suit has been described by Scott C. J. in *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(1)</sup> as follows (p. 536):—

“It is a suit to realize and dispose of his and his debtors' interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realize the security which has been vested in him.”

Sir John Stanley in the Full Bench case of *Sham Sundar v. Muhammad Ihtisham Ali*<sup>(2)</sup> says (p. 503):—

“The question involved appears to me to be one of principle, which can best be solved by keeping in view the true nature of a mortgage security and the remedies for the enforcement of that security which are provided by law. A mortgage in equity is a debt, the payment of which is secured upon land.”

This being in my view the true concept of a mortgage and mortgagee's suit for sale, the next question that arises is whether a mortgagee's suit for sale is a “suit for land” within the meaning of clause 12 of the Letters Patent. If the words “suit for land” be strictly construed, they would mean suit for obtaining or recovering possession of the land. But it is conceded that a “suit for land” would be not merely a suit to obtain land or obtain a declaration of title to land but would also include a suit to obtain damages for interference with land. If, however, the words are liberally construed, they would mean suits *relating to land*. It is also conceded on the other hand that administration suits and partnership suits in which immoveable property is involved though they may be “relating to land”, are not suits for land. These extreme definitions have been rejected by the highest judicial tribunal. Suit for damages for trespass on land would be suit for land according to the view of the House of Lords in

<sup>(1)</sup> (1916) 26 Bom. L. R. 535 : 48 Bom. 629 *f. n.*    <sup>(2)</sup> (1905) 27 All. 501.

1926-27

HATIMBHAJ  
HASSANALLY  
v.  
FRAMROZ  
EGULJEE

*British South Africa Company v. Companhia de Mocambique*<sup>(1)</sup> and accepted by Jenkins C. J. in *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(2)</sup>. On the other hand in a suit brought by three of the executors against the fourth executor for his removal from office of trustee and executor and for accounts of the assets of the deceased and for administration of his estate, it was held by the Privy Council in *Srinivasa Moorthy v. Venkatvarada Iyengar*<sup>(3)</sup> that the suit was not for land and the High Court of Madras had jurisdiction to entertain the suit though the property was outside its jurisdiction. This view is accepted by the High Court of Calcutta in *Nistarini Dassi v. Nundo Lal Bose*<sup>(4)</sup>. In *Land Mortgage Bank v. Sudurudeen Ahmed*<sup>(5)</sup> Trevelyan J. said (p. 367): "I decline to hold that wherever land has anything to do with a suit it is therefore a 'suit for land'". The Calcutta High Court in *Kellie v. Fraser*<sup>(6)</sup> held that a suit for an account for dissolution of partnership was not a suit for land because one asset of the partnership was a tea garden in the mofussil. The two extreme definitions have therefore to be rejected. I think a reasonable interpretation ought to be put on the words "suit for land" and in my opinion they mean a suit in which the substantial question is the right to land. I think that there is now consensus of opinion of the three High Courts on this point. In *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(7)</sup>, Sir Lawrence Jenkins held that a suit for land was one in which the substantial question was the right to land. This test was accepted by Richardson J. in *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(8)</sup>. That also appears

(1) [1893] A. C. 602.

(5) (1892) 19 Cal. 358.

(2) (1915) 42 Cal. 942.

(6) (1877) 2 Cal. 445 at p. 464.

(3) (1911) L. R. 38 I. A. 129.

(7) (1915) 42 Cal. 942 at p. 952.

(4) (1902) 30 Cal. 369 at p. 383.

(8) (1922) 49 Cal. 670 at p. 681.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

to be the view of Sir Lawrence Jenkins in *Vaghoji v. Camaji*<sup>(1)</sup>. In *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayandoss*<sup>(2)</sup>, the Madras High Court held that the expression "suit for land" in clause 12 of the Letters Patent must be construed as an action the primary object of which is to establish claims regarding title to property or possession of property. Having regard to the true nature of mortgagee's suit for sale adverted to above, I think it is neither a suit in which the substantial question is the right to land nor a suit the primary object of which is to establish claims regarding title to or possession of immovable property. The primary object is to realize the mortgage money and the ancillary relief is to get the money by sale of property. There is no dispute between the mortgagor and the mortgagee as to the right to land. If the mortgagor pays the money the question of sale does not arise. Even if the property is brought to sale, the mortgagee cannot bid at the auction sale without permission of the Court (Order XXI, Rule 72), and the sale may be avoided under Order XXI, Rule 69, by payment of the amount due and costs at any time before sale. If the property is sold in execution of the mortgage decree, it is the highest bidder that would get the land. The auction-purchaser would be a person quite different from the mortgagee. The mortgagee gets his money and the surplus if any is paid to the mortgagor. Even if the property is purchased by a stranger at the auction, the mortgagor can set aside the sale by depositing under Order XXI, Rule 89, a sum equal to five per cent. of the purchase money for payment to the purchaser and the amount for which the property was ordered to be sold, to the mortgagee. Rules 94 and 95 of Order XXI, relating to certificate of sale and delivery of possession to the auction-purchaser, apply

(1) (1904) 29 Bom. 249 at p. 258. (2) (1924) 49 M. L. J. 311.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE.

to decrees for money as well as mortgage decrees and they would not necessarily have any bearing on the question whether the mortgagee's suit is a suit for land. Even if a mortgagee has obtained a decree *nisi* for sale, a second suit for redemption would lie according to the view of the Full Bench in *Ramji v Pandharinath*<sup>(1)</sup>. A mortgagor who obtains a redemption decree may bring another suit for redemption if the first decree is not made absolute, and, as held in *Hanmant Anant v. Shidu Shambhu*<sup>(2)</sup>, the relation of mortgagor or mortgagee continues to exist between the parties, only the mortgage amount which had been previously in dispute is settled. The primary object therefore of the mortgagee's suit for sale is to ascertain the amount due on the mortgage and the ancillary relief is to recover the amount by sale of the property which is given as security for the debt. I think, therefore, that such a suit is not a suit for land within the meaning of clause 12 of the Letters Patent. As regards the case of *Harendra Lal Roy Chowdhury v. Hari Dasi Debi*<sup>(3)</sup>, it appears that the decision of the Privy Council proceeded on a ground which was common between the parties as counsel on both sides agreed that if some part of the mortgaged property was situate in Calcutta, the High Court would have jurisdiction to entertain the suit.

There is considerable force in the argument that if regard be had to the historical considerations bearing on the intention of the framers of the Act of 1859 and the Letters Patent, viz., the draft of the English Commissioners in regard to both the jurisdiction of the High Court and that of the mofussil Court, and section 33 of the Code of 1859 and the Despatch of the Secretary of State about the Letters Patent, a wide meaning, i.e., "a suit relating to land" might have been intended to be

(1) (1918) 43 Bom. 334.

(2) (1923) 47 Bom. 692.

(3) (1914) L. R. 41 I. A. 110.

given to the words "suit for land". But, having regard to the decision of the Privy Council in *Srinivasa Moorthy v. Venkatavarada Iyengar*<sup>(1)</sup>, and the Calcutta decisions referred to above, this extensive meaning which would include administration suits and partnership suits relating to immovable property cannot be accepted. As was observed by Lord Watson in *Salomon v. Salomon & Co.*<sup>(2)</sup> (p. 38):—

" 'Intention of the Legislature' is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

The Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi*<sup>(3)</sup> has laid down, following *Bank of England v. Vagliano Brothers*<sup>(4)</sup>, that the language of the enactment must receive its natural meaning without any assumption as to its having probably been the intention to leave unaltered the law as it existed before.

*Contemporanea expositio* as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. See *Raghojirao Saheb v. Lakshmanrao Saheb*<sup>(5)</sup>. In the case of *Administrator-General of Bengal v. Prem Lal Mullick*<sup>(6)</sup>, the Privy Council held that proceedings of the Indian Legislature cannot be referred to as legitimate aids to the construction of the Act in which they result; nor can a section of a later Act be traced to its source in a corresponding section of the previous Act, and then be construed according to the circumstances

(1) (1911) L. R. 38 I. A. 129.

(4) [1891] A. C. 107 at p. 144.

(2) [1897] A. C. 22.

(5) (1912) L. R. 39 I. A. 202 at p. 211.

(3) (1896) 23 Cal. 563.

(6) (1895) L. R. 22 I. A. 107.

1926-27

HATIMBHAI

HASSANALLY

v.

FRAMROZ

EDULJEE

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

existing at the date of the earlier Act. In *Krishna Ayyangar v. Nallaperumal Pillai*<sup>(1)</sup>, Viscount Finlay said (p. 576) :—

“If the Explanation has this effect it must be carried out, and the fact that the enactment was passed in consequence of what the subsequent decision of the House of Lords showed to be a misconception of the English law would be quite irrelevant. The question is, What does the Explanation mean? No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.”

There is a conflict of judicial opinion on this point. But I may refer to the opinion of Couch C. J. in *Tarucknath Sircar v. Prosono Coomar Ghose*<sup>(2)</sup> (p. 53) : “You cannot interpret Acts by reports of Commissioners”. With respect, I think that having regard to the decisions of the Privy Council we have to consider what is the meaning of the words “suit for land” and we cannot look to the draft of the English Commissioners or the Despatch of the Secretary of State as legitimate aids to the construction of the words “suit for land”. But assuming that the Despatch can be looked to for construing the words of clause 12, according to para. 17 of the Despatch from the Secretary of State, the terms of clause 12 defining the original jurisdiction of the High Court as to suits are nearly similar to those in section 5 of the Code of Civil Procedure, Act VIII of 1859. But this Despatch accompanied the Letters Patent of 1862. There is considerable difference in the language of clause 37 of the Letters Patent of 1862 and clause 37 of the Amended Letters Patent of 1865; the proceedings in the High Court under the previous clause 37 were to be regulated by the Code of Civil Procedure, whereas under the later clause 37 of 1865 the High Court was to be guided in making rules and orders *as far as possible* by the Code of Civil Procedure, Act VIII of 1859. In *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(3)</sup>, it was held that a suit for recovery of a

<sup>(1)</sup> (1919) 22 Bom. L. R. 568.

<sup>(2)</sup> (1873) 19 W. R. 48.

<sup>(3)</sup> (1872) 9 Bom. H. C. 12.

mortgage debt by sale of the mortgaged property is not a suit for land within the meaning of section 5 of Act VIII of 1859. Reference is made in the judgment to sections 223 and 224 of Act VIII of 1859 which showed that a suit for land was a suit which asked for delivery of land to the plaintiff. Section 190 of Act VIII of 1859 would also support the same conclusion. Though section 33 of Act VIII of 1859, which, according to Stokes (Anglo-Indian Codes, Vol. II, p. 386), is badly drafted, refers to a suit relating to land, there is no distinction made in Act VIII of 1859 as to the procedure to recover ordinary money debt and mortgagee's suit to recover mortgage money by sale. It is however suggested that the meaning of the words "suit for land" in section 5 of Act VIII of 1859 is explained by section 16 of the later Civil Procedure Codes, X of 1877, XIV of 1882 and V of 1908, and the words "suits for land" in clause 12 of the Letters Patent must be interpreted by reference to the later Codes of Civil Procedure. If the Legislature wanted to enumerate the different descriptions of suits for land by enacting section 16 of the later Codes, there was nothing to prevent the Legislature from applying section 16 of the later Civil Procedure Codes to the Original Side of the High Court. Besides section 16, clause (f), could not be suggested as relating to a suit for land. Again if the extended meaning, i.e., suits relating to land is given to suits for land in clause 12 of the Letters Patent, the Original Side of the High Court will not have the jurisdiction of acting as a Court of Equity *in personam* though the mofussil Courts will have the jurisdiction under proviso to clause 16 of the Civil Procedure Code. The extended meaning cannot be given in view of the Privy Council decision in *Srinivasa Moorthy v. Venkatavarada Iyengar*<sup>(1)</sup>, in

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDELJEE

(1) (1911) L. R. 38 I. A. 129.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

connection with an administration suit relating to land. Lastly, under the Civil Procedure Code, a mortgage debt is now held to be a debt within the meaning of Order XXI, Rule 46, and not immoveable property within the meaning of Order XXI, Rule 54, according to the later decisions of all the High Courts. In *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(1)</sup> Sir Victor Coutts-Trotter held that the amended Civil Procedure Code cannot be looked at for the purpose of construing the words of the earlier statute, viz., the Letters Patent.

Coming to the decisions under clause 12 of the Letters Patent the High Court of Bombay has consistently taken the view that the mortgagee's suit for sale is not a suit for land till the decision of the Full Bench in *India Spinning & Weaving Co., Ltd., v. Climax Industrial Syndicate*<sup>(2)</sup>. See *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(3)</sup> (suit for recovery of a mortgage debt by sale of the mortgaged property); *Holkar v. Dadabhai*<sup>(4)</sup> (specific performance of an agreement to sell land outside jurisdiction and to realize a mortgage-debt by sale of the said land); *Sorabji v. Rattoji*<sup>(5)</sup> (suit for foreclosure with respect to land outside the town of Bombay); *Hunsraj v. Rinchordas*<sup>(6)</sup> (specific performance of an agreement to sell land outside jurisdiction); *Venkatrao Sethupathy v. Khimji Assur Virji*<sup>(7)</sup> (suit by a mortgagee to enforce his rights under the mortgage); *Jasraj v. Akubai*<sup>(8)</sup> (suit by a mortgagee to enforce the mortgage against property outside the local limits of ordinary original jurisdiction and against mortgagors living outside); *Rajah Kotakal v. Malabar Timber Co., Ltd.*<sup>(9)</sup> (suit by a vendor of forest land outside

<sup>(1)</sup> (1924) 49 M. L. J. 311.      <sup>(5)</sup> (1898) 22 Bom. 701.

<sup>(2)</sup> (1925) 50 Bom. 1.      <sup>(6)</sup> (1905) 7 Bom. L. R. 319.

<sup>(3)</sup> (1872) 9 Bom. H. C. 12.      <sup>(7)</sup> (1916) 26 Bom. L. R. 535 : 48 Bom. 629 *f. n.*

<sup>(4)</sup> (1890) 14 Bom. 353.      <sup>(8)</sup> (1922) 26 Bom. L. R. 539.

<sup>(9)</sup> (1924) 48 Bom. 625.

jurisdiction against a purchaser resident within limits for a declaration that he had a charge thereon for the amount of the purchase-money). The case of *Vaghoji v. Camaji*<sup>(1)</sup> can be distinguished on the ground that the suit was for a declaration that the plaintiffs were entitled to exclusive possession and enjoyment of a *talao* outside jurisdiction of the Court and that the defendants had no right, and for an injunction and declaration of title to the *talao*. Such a suit would be a suit for land, for the substantial question was a right to the land, and title to or possession of immoveable property was the primary object of the suit. In *Vithalrao v. Vaghoji*<sup>(2)</sup>, where a Subordinate Judge in the mofussil entertained a suit by a mortgagee to recover mortgage-debt by sale of property outside his jurisdiction relying on *Yenkoba's case*, Parsons J. made a distinction between section 5 of Act VIII of 1859 and section 16 of the Civil Procedure Code of 1882. In *Puttangowda v. Nilkanth Kalo Deshpande*<sup>(3)</sup> it was held by the Full Bench that a Court of Small Causes could entertain a suit, the principal purpose of which was to determine a right to immoveable property, provided the suit in form did not ask for that relief but for payment of a sum of money. I am content, however, to accept the interpretation put by the different High Courts in later decisions on the words "suit for land," viz., that the substantial question in the suit must be a right to the land—see *Kanti Chunder Pal Chaudhry v. Kissory Mohun Roy*<sup>(4)</sup>; *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*<sup>(5)</sup>; *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*<sup>(6)</sup>—or that title to or possession of immoveable property must be the primary object of the action—see *Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss*<sup>(7)</sup>. I do

1926-27

HATIMBHAI  
HASSANALLYv.  
FRANROZ  
EDLJEE

(1) (1904) 29 Bom. 249.

(4) (1887) 19 Cal. 361 at p. 365, n.

(2) (1892) 17 Bom. 570.

(5) (1915) 42 Cal. 942 at p. 952.

(3) (1913) 37 Bom. 675.

(6) (1922) 49 Cal. 670 at p. 681.

(7) (1924) 49 M. L. J. 311.

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

not propose to discuss in detail the decisions of this Court and other High Courts. For the above reasons, I am sorry I feel myself unable to agree with the view taken in the Full Bench decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>, and respectfully dissent from it.

The chain of decisions commencing from 1872, the date of the decision in *Yenkoba's case*, having been broken by the Full Bench decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>, it is doubtful if the principle of *stare decisis* to which the learned Advocate General referred really has any application specially having regard to the conflict of judicial opinion not only in this High Court but also in the different High Courts. There is no doubt that the current of decisions running in one direction for nearly fifty-three years has been diverted by the Full Bench decision in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup>. In this connection reference has been made to the case of *Bourne v. Keane*<sup>(2)</sup>. Lord Wrenbury remarks (p. 924):—

“The cases to which I have referred seem to me fully to bear out my statement that the principle of maintaining a view of the law based upon authoritative opinion or judicial decision of long standing is not confined to cases in which titles would be affected by its review. The principle is one of general application to all cases in which the Court which has power to overrule finds that mankind have for many years conducted their affairs upon the footing of a certain recognized state of the law. It is a principle which recognizes the importance of certainty and finality—and which, under circumstances, refuses to disturb after a certain lapse of time a doctrine ‘whether’, to use Lord Herschell’s words, ‘it rests upon any sound basis or not’.”

In cases of equitable mortgages by deposit of title deeds which cannot be effected in the mofussil but only in the Presidency town of Bombay, money is advanced by the banks on the faith of the previous state of law that they can bring suits to enforce the mortgages in the Bombay High Court. In such cases

<sup>(1)</sup> (1925) 50 Bom. 1.

<sup>(2)</sup> [1919] A. C. 815 at pp. 857, 874, 914, 923, 924.

and also in the cases of other mortgages, the mortgagees or strangers have purchased in execution of the decrees on the faith of the view of this Court that the Court had jurisdiction to pass them. There is, therefore, considerable force in the contention of the learned Advocate General that the view thus accepted and acted upon for fifty-three years should not be departed from. I may refer to the dictum of Lord Loreburn in *West Ham Union v. Edmonton Union*<sup>(1)</sup> (p. 4): "Great importance is to be attached to old authorities; on the strength of which many transactions may have been adjusted and rights determined". It may be that where the terms of a statute or ordinance are clear, even a long course of judicial interpretation of it may be overruled if it is contrary to the meaning of the enactment. See *Tricomdas Cooverji Bhoja v. Sri Sri Gopinath Jiu Thakur*<sup>(2)</sup> and *Pate v. Pate*<sup>(3)</sup>. But such is not the case here. The meaning of the words "suit for land" though in one sense clear and obvious has become so difficult of interpretation by virtue of the conflict of judicial opinion that recourse is had to the adventitious aid of the Report of Law Commissioners and the Despatch of the Secretary of State and the state of law prior to and subsequent to the enactment of clause 12 of the Letters Patent. I think, therefore, that, if the principle of *stare decisis* applies, the old view which was accepted for fifty-three years should prevail till it is set aside by the higher judicial tribunal or by legislation.

For these reasons I agree with the conclusion of my Lord the Chief Justice and my answer to the first question is in the negative.

The first question having been answered in the negative it follows that the present suit is not a suit

<sup>(1)</sup> [1908] A. C. 1.

<sup>(2)</sup> (1916) 19 Bom. L. R. 450 at p. 455.

<sup>(3)</sup> [1915] A. C. 1100 at p. 1108.

1926-27  
 HATIMBIAI  
 HASSANALLY  
 P.  
 FRAMRIZ  
 EDULJEE

for land but falls under the description of suits "in all other cases". The questions Nos. 2 and 3 will have to be answered in the affirmative, that the suit can be maintained under clause 12 of the Letters Patent because a part of the cause of action, viz., the effecting of the equitable mortgage by deposit of title deeds arose within the local limits of the ordinary original jurisdiction of the High Court and the leave of the Court has been first obtained.

It is suggested that the Court has jurisdiction, first, either under the general equity jurisdiction to act *in personam*, and, secondly, that the residence of the defendant within the local limits affords a distinct and separate ground for the exercise of jurisdiction under clause 12. Clause 12 of the Letters Patent would therefore read as follows:—

The said High Court, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description if,

- (1) in the case of suits for land or other immoveable property such land or property shall be situated within the local limits of the ordinary original jurisdiction or,
- (2) in all other cases if the cause of action shall have arisen 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 said High Court, or

- (3) if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits.

This seems to be the plain grammatical construction of clause 12. But the uniform practice of the High Courts of Bombay, Calcutta and Madras has been to read a portion of sub-clause (2) mentioned above relating to part of the cause of action not only to apply to suits of the description "in all other cases" that is,

suits other than suits for land, but also to apply to suits for land or immoveable property in sub-clause (1), and to allocate the third sub-clause as to residence solely to suits "in all other cases" in sub-clause (2). The clause 12 of the Letters Patent, therefore, is read according to uniform practice in the manner set out by Candy J. in *Balaram v. Ramchandra*<sup>(1)</sup>. Clause 12 of the Letters Patent read according to the interpretation put on it by uniform practice excludes the equity jurisdiction to act *in personam* which devolved upon the High Court from the Supreme Court, though under the proviso to section 16 of the Civil Procedure Code of 1859 the Courts are invested with that jurisdiction.

In the case of *Prasannamayi Dasi v. Kadambini Dasi*<sup>(2)</sup> it was held that the last clause "within the local limits of the ordinary original civil jurisdiction" in clause 12 of the Letters Patent of 1862 applied as an adverbial sentence to each of the branches of the preceding sentence and the sentence "either wholly or in case the leave of the Court shall have been first obtained in part within the local limits, &c.," in clause 12 of the Letters Patent of 1865 was entire and applied to the verbs *situated* and *arisen* in the prior branches of the sentence respectively. This view was followed by Phear J. in *S. M. Jagadamba Dasi v. S. M. Padmani Dasi*<sup>(3)</sup>. These decisions support the uniform practice that where a part of the land or immoveable property is situate within jurisdiction, the Court would have jurisdiction under clause 12 of the Letters Patent if leave of the Court is obtained. On the point of residence within jurisdiction affording a separate and independent ground for exercise of jurisdiction, it appears from the judgment of the Full Bench in *India*

1926-27

HATIMBHAJ  
HASSANALLY  
v.  
FRAMRIZ  
EDUIJEE

<sup>(1)</sup> (1898) 22 Bom. 922 at p. 925.

<sup>(2)</sup> (1868) 3 Beng. L. R. (O. C. J.)  
85 at p. 87.

<sup>(3)</sup> (1871) 6 Beng. L. R. 686.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRANROZ  
EDULJEE

*Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> that the decision of *Holkar v. Dadabhai*<sup>(2)</sup> was held to be wrong on two grounds: (1) the defendant in *Holkar v. Dadabhai*<sup>(2)</sup> neither resided nor carried on business within the jurisdiction, and (2) that a suit on a mortgage was a suit for land within the meaning of clause 12 of the Charter. See the remarks at pp. 1293 and 1296 of *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*<sup>(1)</sup> and also Fawcett J.'s remarks in *Rajaram Tukaram v. The Central Bank of India*<sup>(3)</sup>.

As regards the residence of the defendant affording a distinct and separate ground for the exercise of jurisdiction, Sir Arnold White in *Srinivasa Moorthy v. Venakta Varada Ayyangar*<sup>(4)</sup> seems inclined to take the view that presence within the local limits at the time of the commencement of the suit is sufficient to give the High Court jurisdiction under clause 12, and Candy J. in *Balaram v. Ramchandra*<sup>(5)</sup> recognizes that such a construction was a possible construction but was precluded by uniformity of decisions on the point. Clause 12 of the Charter of 1862 does not present any difficulty as residence of the defendant within local limits is confined to "in all other cases". The copy of the Despatch accompanying the Letters Patent of 1865 is, in my opinion, inadmissible as an aid to the construction of clause 12. It is said that clause 12 was amended to give effect to the recommendations of the several High Courts. The opinions of the different High Courts which led to the amendment of clause 12 are not before us. Any discussion on that point would open a wide field of inquiry which in my view is irrelevant. I am inclined to agree with my Lord the Chief Justice in the construction of clause 12, but there

(1) (1925) 27 Bom. L. R. 1281 : 50 Bom. 1. (2) (1926) See post p. 711.

(2) (1890) 14 Bom. 353

(4) (1906) 29 Mad. 239 at p. 253.

(5) (1898) 22 Bom. 922 at p. 925.

are difficulties in the way of giving a definite decision on the point in this case. Firstly, residence of the defendant alone within jurisdiction has never been accepted by any Court as affording a ground for the exercise of jurisdiction. The uniform practice of the three High Courts is to the contrary. It would give the High Court wider jurisdiction than that possessed by any Court except under the Dekkhan Agriculturists' Relief Act. Secondly, if that view is accepted the decree of the High Court proceeding on the residence alone as the ground for exercise of jurisdiction in respect of land situate, say, at Madras or Calcutta, may not be capable of execution. The question of jurisdiction may be raised in the Court where the property is situate, and the executing Court to which a decree is sent for execution under sections 38 and 39, Civil Procedure Code, may refuse to execute it on the ground that in its view the Court passing the decree had no jurisdiction. In *Bhagwantappa v. Vishwanath*<sup>(1)</sup> it was held that the executing Court is entitled to go into the question whether the Court sending the decree for execution had jurisdiction to pass it. The view is supported by the cases of *Haji Musa Haji Ahmed v. Purmanand Nursey*<sup>(2)</sup> and *Imdad Ali v. Jagan Lal*<sup>(3)</sup>. But these cases were decided under section 225, Civil Procedure Code, Act XIV of 1882. There is, however, a material change in the Code of 1908 by the omission of the words "or of the jurisdiction of the Court which passed it" in Order XXI, Rule 7. It was accordingly held in *Hari Govind v. Narsingrao Konherra*<sup>(4)</sup> that the executing Court had no power under Order XXI, Rule 7, of the Civil Procedure Code, to question the jurisdiction of the Court which passed the decree under execution. This view is accepted by the Madras High Court in *Zamindar of*

1926-27

HATIMBEAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

(1) (1904) 28 Bom. 378.

(2) (1895) 17 All. 478.

(3) (1890) 15 Bom. 216 at p. 219.

(4) (1913) 38 Bom. 194.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

*Ettiapuram v. Chidambaram Chetty*<sup>(1)</sup>. But the Full Bench of Calcutta High Court has taken a different view in *Gora Chand Haldar v. Prafulla Kumar Roy*<sup>(2)</sup>. Having regard to the fact that the uniform practice of the Court, as stated by Candy J in *Balaram v. Ramchandra*<sup>(3)</sup>, is opposed to the plain and grammatical construction of the section and that there may be conflict between the decision of the Court passing the decree and the Court executing it, say in Calcutta or Madras, I think, this point need not be decided in this case. The question referred to the Full Bench is whether a mortgage suit is a suit for land. In my view it is not a suit for land, but falls within the category of suits "in all other cases" and the Court has jurisdiction under clause 12 of the Letters Patent as part of the cause of action has arisen within jurisdiction and leave of the Court has been obtained. I do not think it necessary to assume either that such a suit is a suit for land or that no part of the cause of action has arisen within jurisdiction, and then consider whether residence of the defendant within jurisdiction would be a separate and independent ground for the exercise of jurisdiction. I think, however, that the fact that it is a legitimate construction to read clause 12 of the Letters Patent as providing residence within limits as a separate and distinct ground for the exercise of jurisdiction, is an additional ground for an early amendment of clause 12 of the Letters Patent.

TALEYARKHAN, J.:—I have had the advantage of perusing—if I may say so—the able and exhaustive judgment of my Lord the Chief Justice, and I agree with him in answering the first question referred to the Full Bench in the negative.

But, though I hold that a suit for sale of mortgaged property is not a suit for land within the meaning of

<sup>(1)</sup> (1920) 43 Mad. 675 at pp. 687, 688.

<sup>(2)</sup> (1925) 53 Cal. 166.

<sup>(3)</sup> (1898) 22 Bom. 922 at p. 925.

clause 12 of the Letters Patent, I do not do so on either of the two grounds on which that conclusion was based in *Holkar v. Dadabhai*<sup>(1)</sup>. The first ground of decision in that case seems to be that it was held by the High Court of Bombay in *Yenkoba B. Kasar v. Rambhaji valad Arjun*<sup>(2)</sup>, so far back as the year 1872, that a suit for the sale of mortgaged property was not a suit for land, the implication being that suits to enforce a mortgage by the sale of the mortgaged property were regarded by the High Court of Bombay as suits other than suits for land, for a period of eighteen years prior to *Holkar's case*<sup>(1)</sup>. But that was a decision under section 5 of the Code of 1859, and the judgment proceeded on a comparison of the language of section 5 with that of sections 223 and 224, which correspond in the main with the provisions of Order XXI, Rules 35 and 36, of the Code of 1908. The second ground of decision in *Holkar's case*<sup>(1)</sup> was that a suit for the sale of mortgaged property was one which the Court of Equity in England would entertain even in the case of land situate outside the limits of its jurisdiction, and that as the High Courts in India had all the powers of a Court of Equity in England for enforcing their decrees *in personam*, different language would have been employed had it been intended to exclude from the jurisdiction of the Courts suits *in personam* as well as suits *in rem*. But the Courts in England do not assume jurisdiction in relation to land abroad though there may be privity between the litigants on the ground of contract, trust or fraud, unless the defendant is within jurisdiction. The defendant in *Holkar v. Dadabhai*<sup>(1)</sup> did not reside or carry on business in Bombay and that fact appears to have escaped the notice of Sir Charles Sargent, when the learned Judge applied the principles of the equity cases to the case before him.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

<sup>(1)</sup> (1890) 14 Bom. 353.<sup>(2)</sup> (1872) 9 Bom. H. C. 12.

1926-27

HATIMBHAI  
HASSANALLY  
v.  
FRAMROZ  
EDULJEE

I may observe that what I have stated above to be the first ground of decision in *Holkar's case* was not regarded by Sir Lawrence Jenkins as a part of the *ratio decidendi* of the case; the only *ratio decidendi* according to the view taken by that learned Judge being the second of the two grounds mentioned above: see *Vaghoji v. Camaji*<sup>(a)</sup>.

I prefer to rest my opinion on the broad ground that a suit by a mortgagee for the realization of the moneys advanced by him to the mortgagor by the sale of the mortgaged property is substantially a suit for the recovery of the mortgage debt, and as such it is not a suit for land within the meaning of clause 12 of the Letters Patent.

I may add that on the question of the applicability of the principle of *stare decisis* also I agree with the view of the learned Chief Justice.

It follows from my answer to question No. 1, namely, that a suit brought by a mortgagee of land to enforce his mortgage by sale is not a suit for land within the meaning of clause 12 of the Letters Patent, that questions Nos. 2 and 3 should be answered in the affirmative.

But a further point based on the grammatical construction of clause 12 of the Letters Patent has been raised as to whether the High Court has jurisdiction to try suits of the description mentioned when the mortgage land is situated wholly outside the limits of the ordinary original civil jurisdiction but the defendant dwells or carries on business or personally works for gain within the limits of such jurisdiction. After a careful consideration, I have come to the conclusion that the High Court has jurisdiction to try such suits. As pointed out by Fawcett J. in his judgment, of which I have had the benefit of a perusal, in the amended Letters Patent there is no punctuation, and no argument

<sup>(a)</sup> (1904) 29 Bom. 249 at pp. 254, 255.

can be based on the punctuation in the printed copies. Taken by itself, the clause can be divided into sub-clauses and read as suggested by Fawcett J., and it then bears out the construction that the later two cases are totally exclusive of suits for land or other immoveable property. But the clause can also be divided as follows:—

“The High Court in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description,

(a) if, in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, 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, or

(b) if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits.”

Thus read, it supports the contention that the High Court has jurisdiction to try suits of every description when the defendant dwells, &c., within the limits of the ordinary original jurisdiction of the High Court. Untrammelled by the previous decisions, there is no reason why this construction should not be accepted as correct. Under the Letters Patent establishing the Supreme Court of 1823, the Supreme Court had full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay. Clause 12 of the Letters Patent of the High Court was intended to divest only such jurisdiction as was exercised by the Supreme Court on the ground of constructive inhabitancy or otherwise over persons and property beyond the limits of the Presidency town but within the limits of the Presidency or division subject to the High Court. But it was not the

1926-27

HATIMBHAI  
HASSANALLYv.  
FRAMROZ  
EDULJEE

1926-27

HATIMBHAI  
HASSANALLY

v.

FRAMROZ  
EDULJEE

intention to deprive the Court of the jurisdiction over the inhabitants within the limits of the ordinary original jurisdiction, and, on principle, there seems to be no ground why the High Court should not exercise its jurisdiction over persons residing within such limits.

[AFTER the expression of the opinion by the Full Bench on the questions referred to, the Appeal Court delivered the following judgment, on January 31, 1927, in disposing of the appeal :—]

MARTEN, C. J.—Having regard to the decision by the Full Bench, it follows that this appeal must be dismissed, because the suit can be maintained under clause 12 of the Letters Patent inasmuch as it is not a suit for land, and the cause of action has arisen partly within the limits of the ordinary original civil jurisdiction, and the leave of the Court under clause 12 has been obtained.

On the question of costs the appellant has pointed out to us the heavy burden that lies on him having regard to the prolonged arguments before the Full Bench. In particular he asked us to exercise our discretion and not to oblige him to pay the costs of the hearing which, so to speak, were thrown away by reason of the death of my brother Shah. He also asks that he may be excused from paying the costs of the further hearing on December 21, on the question as to residence on which the Full Bench was equally divided in opinion.

On the whole, having regard to the exceptional nature of this case and the course which it has taken, we think that this application should be acceded to. Accordingly, in dismissing this appeal with costs, we direct that those costs should not include the costs of the original hearing before the first Full Bench, nor the costs of the hearing on the further arguments as to residence, and that as regards those latter costs, each

party should bear his own costs. On the other hand, having regard to the great importance and difficulty of the case, we accede to the application of the Advocate General for the respondent, that although this case was originally started as a short cause (in which case only one counsel would normally be allowed), we should in this case certify for two counsel. We, accordingly, certify that this is a proper case for the employment of two counsel in the appeal. Liberty to the mortgagee to add the costs to his security.

Attorneys for appellant: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Attorneys for respondent: Messrs. *Payne & Co.*

*Appeal dismissed.*

J. S. K.

In *Rajaram Tukaram v. The Central Bank of India* (O. C. J. Appeal No. 56 of 1926, Suit No. 393 of 1926) the judgment of Fawcett J. delivered on March 15, 1926 and the judgment by the Appeal Court (Marten C. J. and Kemp J.) delivered on January 31, 1927, are as follows:—

FAWCETT, J. :—In this suit the defendant bank in their written statement admit that paras. 1 to 3 of the plaint are correct; and the point at issue is a purely legal one, which has been argued without the necessity of taking any evidence. The defendant bank brought a Suit No. 3965 of 1924 against the plaintiff trading in the name of S. Narayen & Co. to enforce an equitable mortgage created by the plaintiff in their favour, and, on December 9, 1924, by consent, a preliminary decree was passed in favour of the bank. That decree was superseded by a final decree for sale on July 16, 1925. The mortgaged property was situated at Andheri, which admittedly is outside the local limits of the ordinary original civil jurisdiction of this Court. But, at that time, according to the ruling in *Holkar v. Dadabhai*<sup>(1)</sup> the Court had jurisdiction, both because according to that ruling a suit on a mortgage was not a suit for land within the meaning of clause 12 of the Letters Patent of this Court, and also because the mortgagor, the present plaintiff, carried on business in Bombay within the limits of this Court's original jurisdiction.

<sup>(1)</sup> (1890) 14 Bom. 353.

1926-27

HATIMBHAI  
HASSANALLY

v.  
FRAMROZ  
EDULJEE

1927

RAJARAM  
TUKARAM

v.  
THE  
CENTRAL  
BANK OF  
INDIA