
(1925) 08 BOM CK 0042
In the Bombay High Court
Case No : O.C.J. Appeal No. 16 of 1925

The India Spinning and Weaving Company Ltd.	APPELLANT
Vs	
The Climax Industrial Syndicate	RESPONDENT

Date of Decision : 21-08-1925

Acts Referred:

Letters Patent Act, 1865 — Clause 12

Citation : AIR 1926 Bom 1 : (1925) 27 BOMLR 1281 : (1926) ILR (Bom) 1

Hon'ble Judges : Norman Macleod, J;Crump, J;Coyajee, J

Bench : Full Bench

Judgement

Norman Macleod, Kt., C.J.—The contest in this appeal lies between the 2nd defendants (appellants) and the plaintiff's (respondents), and the facts material to this purpose may be shortly stated :-

2. In the month of December 1910, the plaintiffs, a syndicate, sold to the first defendants (the Sipra Cotton Spinning and Weaving Mills Ltd.) the machinery and buildings of the Adam-jeo Peerbhoy Mills at Bombay for Rs. 2,00,000. By an agreement dated October 14, 1920, the first defendant:- agreed to sell a moiety of the said machinery and buildings to the second defendants (the Indian Spinning and Weaving Co. Ltd.) for the sum of UH. 12,50,000 (Ex. A). On July 10, 1921, the second defendants mortgaged the whole of their Mills situated at Ahmedabad and also the moiety of the machinery etc., purchased from the first defendants, to the first defendants to secure payment of Rs 6,25,000, being part of the purchase-money of the said machinery and materials. The due date for payment of this mortgage debt was April 2, 1922 (Ex, B). On January 19,1921, the first defendants transferred this mortgage to the plaintiffs, who on the same day gave notice of the transfer to the second defendants On April 4, 1922, plaintiffs as such transferees called upon the second defendants to pay the amount due on the said mortgage The reply was that the mortgage was not binding on the second defendant this contention, however, was disallowed by the trial Court. On May 2, 1922, the second defendants mortgaged their Mills at

Ahmedabad and also the moiety of the said machinery to the fourth defendants (Ex. No. 42). The fifth defendants (Girdhardus & Sons) are the agents of the fourth defendants (the Industrial Bank of Western India Ltd.), and they were appointed agents of the second defendants on or about March 4, 1922. The third defendants were the previous agents of the second defendants.

3. On July 24, 1922, the plaintiffs brought this suit against the 1st, 2nd and 3rd defendants. They claimed that the : amount due to them from the first defendants for balance of the purchase money and interest up to April 2, 1922, was Rs. 9,41,103-0-4; and that the amount due from the second defendants under the said mortgage (Ex. .B) and transfer was Rs. 6,80,172-12-6. They prayed, inter alia, that the first defendants and the second defendants might be ordered to pay the said sums of money, respectively, and that the amount which might be recovered by them from the second defendants might be applied towards payment of the amount due from the first defendants, that in default of payment by the second defendants the mortgaged properties might be sold by and under the directions of the Court. Leave to sue was granted under Clause 12 of the Letters Patent.

4. It is important to note that both the said mortgages, namely Exh. B and Ex. No 42, were duly registered under the provisions of the Indian Registration Act, 1908. But as regards neither of them were the requirements of Section 109 of the Indian Companies Act, 1913, fulfilled. That section requires such mortgages to be filed with the Registrar of Joint Stock Companies for registration in the manner required by that Act, within twenty-one days after the date of their creation. On August 4, 1922, the fourth and fifth defendants applied to the District Court of Ahmedabad that the time for registration might be extended (section 120, Indian Companies Act, 1918), alleging that "the delay in registration was not of a nature to prejudice the position of creditors or shareholders of the India Spinning & Weaving Co. Ltd." (i. e., the second defendant company) "and in fact had not, prejudiced it" (Exh. II). The Court extended time, but " without prejudice to the rights of parties acquired prior to the time when the mortgage should be actually registered". The mortgage was accordingly registered by the Registrar of Companies on August 9, 1922. On September 22, 1922, the plaint was amended by bringing the fourth and fifth defendants on record. But no leave was obtained to sue these added defendants.

5. The plaintiffs themselves obtained a like extension of time for the registration of their mortgage from the said Court on December 2, 1922 (Ex. J.), and the defect was cured.

6. Various defences to the suit were raised by the different defendants and many issues were framed. But the only issues which need be referred to at present were :-

(1) Whether the mortgage dated January 10, 1921 (Ex. B.) by the second defendants to the first defendants was binding on the second defendants V

(2) Whether the Court had jurisdiction to entertain the plaintiffs' claim for sale of the mortgaged property so far as the same was land or attached to land attitude outside the jurisdiction.

(3) Whether the mortgage in favour of the fourth defendants was valid in law ?

(4) Whether the mortgage of May ii, 1922, was not entitled to priority over the mortgage in favour of the first defendants,

(5) Whether the Court had jurisdiction to try the suit as against the fourth and fifth defendants or either of them ?

7. The learned trial Judge held that:-

(1) He had jurisdiction to try the suit;

(2) The mortgage dated January 10, 1921, was binding on the second defendant company;

(3) The mortgage in favour of the fourth defendants was valid in law.

8. As regards the question of priority he held that " the mortgage of May 2, 1922, had priority over the mortgage of January 10, 1921, KO far as it related to Immovable property or any interest therein, but as under the latter mortgage machinery was also mortgaged, it would be necessary to order an inquiry as to which of the machinery was fixed to the land and went with the land, and what would be considered as moveables, unless the parties came to some arrangement. " He then passed a decree from which the plaintiffs filed Appeal No. 2 of 1925; the fourth and fifth defendants filed cross-objections. The plaintiff's did not make the second defendants a party to that appeal and when it came on for hearing, the Court was not informed that the second defendants had filed the present appeal No. 16 of 1925. Appeal No. 2 of 1925 was decided in favour of the plaintiffs, the Court holding that the mortgage on which the fourth and fifth defendants relied was not effective against the plaintiffs' mortgage, so that it was not necessary to deal with the question of jurisdiction,

9. When the present appeal came on for hearing it was apparent that the first issue to be decided was the issue relating to jurisdiction, and as the appellants contested the correctness of the decision of this Court in His Highness Skrimant Maharaj Yeah-vuntrav Holkar v Dadabhai Gursetji Ashburner ILR (1990) 14 Bom. 353 the Court directed that the appeal should be heard by u Full Bench. The issue relating to jurisdiction has now been fully argued before us, and it is necessary that we should give our decision upon it, since if the Court has no jurisdiction to entertain the plaintiffs' claim for the sale of the mortgaged property, the argument on the other points mentioned in the memorandum of appeal will be directly affected.

10. Clause 12 of the Letters Patent is 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 Immovable 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 the property sued for does not exceed one hundred rupees.

11. The question then is whether a suit based on a mortgage of land outside the local limits of the ordinary original jurisdiction of the High Court, claiming the usual mortgage decree for sale of the property in default of payment, is a suit for land within the meaning of that clause. Incidentally it may be mentioned that the whole of the property was outside the jurisdiction and the defendants resided outside the jurisdiction. 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* this Court has assumed jurisdiction to entertain suits on mortgages on land outside its jurisdiction. The High Courts of Calcutta and Madras have consistently refused to exercise jurisdiction in such suits. It will be necessary, therefore, to analyse the cases on the question decided by this Court and compare them with the cases decided by the High Courts of Calcutta and Madras. Then, even if we think that on a strict interpretation of Clause 12 a suit on a mortgage is a suit for land, we must determine whether we are entitled to place a different construction on that Clause to the one which for the last thirty-five years has been placed upon it by this Court. In *ITolkar v. Dadabhai*, the facts were as follows :-

12. At a sale held by the Commissioner for taking accounts under an order of the Court, the defendant became the purchaser of the Bhandup Estate in Salsette outside the ordinary original jurisdiction, for the sum of Rs. 2,03,000. He paid Rs. 30,000 and asked the plaintiff to lend him Rs. 1,60,000 which the plaintiff agreed to do on certain terms, The defendant was to get the sale confirmed to him and a proper conveyance executed; the defendant was then to mortgage the property to the plaintiffs as a security for the loan; the plaintiffs' agent was to reside on the estate and the net income was to be paid to him. If the net income was not sufficient to satisfy the interest the defendant should make good the deficiency and in default the plaintiff might enter with power to sell, The plaintiff prayed, inter alia, that the defendant might be ordered to pay Rs. 1,60,000 by a short date and that in default the Bhandup Estate might be sold by and under directions of the Court. The defendant pleaded that the Court had no jurisdiction, The trial Court held that there was jurisdiction and passed a decree. The defendant appealed. In giving judgment Sargent C. J. said (p. 358):-

The expression "suits for land " was considered as far back as 1872 with reference to the application of Section 5 of Act VIII of 1859 by a Division Bench of this Court...in *Yenkoba, B. Kasar v. Kambhaji valad Arjun* (1872) 9 B.H.C. 12 where the suit was on a bond, and asked for sale of the mortgaged land.

13. That was a decision in an appeal on the appellate side of the High Court from the decision of the Judge of Khandesh, The Court said (p. 18):-

We think that this is not a suit for land within the meaning of Section 5 of Act VIII. of 1859. Comparing that section with Sections 223 and 224 of the Code, we think that a "suit for land" is) a suit which asks for delivery of the land to the plaintiff. We may observe that the Court of Chancery, though it has no power directly to affect property situate out of the bounds of its jurisdiction, and will not therefore try the validity of a will of land in the Colonies though made in England...nor entertain a bill of partition...yet will order the sale of an estate in the Colonies, in order to realise a sum of money charged upon it. *Gassoigne v. Douglas* (1680) Dick 431, and *Noel v. Robinson* (1687) 1 Ver. 90 .

14. The terms of Clause 12 of the Letters Patent were in the main similar to those employed in Section 5 of Act VIII of 1859 and were intended to include every description of case over which the mofussil Courts had jurisdiction, but it may well be doubted whether the mofussil Courts had the powers of the Court of Chancery, and in any event the reference to such powers was unnecessary if the term "suits for land" was to be confined to a suit for the delivery of possession of land to the plaintiff, A suit on a mortgage would then come within the category of " all other cases. " *Sargent C. J.* adopted this limitation imposed on the term " suits for land " by the Court in *Yenkoba, v. Hainbhaji*. He referred to the decision in *The Delhi and London Sank v. Wordie* I.L.R.(1876) Cal. 249 in which the Court appeared inclined to construe " suits for land " in the Letters Patent as meaning suits " substantially for land," that is, for the purpose of acquiring title to or control over land, though they decided the case on another ground, and to the decision in *Sreenath Hoy v. Cally Doss Ghose* ILR (1879) Cal. 82 that the High Court had no jurisdiction to decree specific performance of an agreement to execute a mortgage of land beyond the jurisdiction of the High Court, which his lordship considered would exclude the jurisdiction of the High Court in the large class of cases in which English Courts of Equity exercised jurisdiction although the lands were in the Colonies or even in foreign States. Reference was made to the principle on which they proceed, as stated by the Earl of Selborne L. C., in *Ewiny v. Orr Ewing* (1883) 9 App. Cas. 34 .

The Courts of Equity in England are, and have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts (is to matters which were not either locally or ratione domicilii within their jurisdiction).

15. His lordship accordingly held that the suit, whether it could be regarded as a

suit for specific performance or to enforce an equitable mortgage by deposit of title deeds, was clearly one which a Court of Equity in England would entertain (*Paget v. Ede*) (1874) L.R. 18 and in which they would, if the lands were in the Colonies where it was the practice in mortgage suits to enforce the security by sale, make an order for sale instead of one for foreclosure, and concluded that if it had been intended to exclude suits *in personam* as well as suits *in rem*, from the jurisdiction of the High Court, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

16. A decree for the sale of the land by the officer of the High Court was, therefore, confirmed. With all due respect it appears to me that the learned Chief Justice omitted to notice that the essential conditions on which the jurisdiction of the Courts in Equity in England rests in these cases, is that they have a person within their jurisdiction against whom they can exercise their authority. He must either reside within the limits of the jurisdiction or carry on business within those limits. His obedience to the order of the Court can then be secured either by the arrest of his person or the attachment of his goods: *Pern v. Lord Baltimore* (1750) 1 Ves Sen. 444. The Advocate General argued that a "person within the jurisdiction" means a person brought within the jurisdiction, but he did not find any ease in which the Court of Chancery has allowed a suit *in personam* to be prosecuted against a person beyond the jurisdiction. If, however, a suit has been rightly instituted against a person within the jurisdiction and it is found that a person outside the jurisdiction is a necessary party leave will be given to serve that party outside the jurisdiction: *Bawtree v. The Great North-West Central Railway Company* (1898) 14 T.L.R. 448. The defendant in *Holkar v. Dndalthai* neither resided nor carried on business within the jurisdiction, so it is difficult to see how the Court could have enforced its decree either by arresting his person or by attaching his goods. On that ground alone, in my opinion, the decision in *Holkar v. Dadabhai* was wrong.

17. In *Sorabji v. Rattonji* I.L.R (1898). 22 Bom. 701 the plaintiff brought a suit for fore-closure in default of payment of the amount due on two mortgages executed in Bombay by the defendant of certain properties situated outside the jurisdiction. The defendant also resided outside the jurisdiction. Leave was granted under Clause 12 of the Letters Patent. The defendant contended that the Court had no jurisdiction to try a suit for land outside the jurisdiction. Strachey J., felt great difficulty in holding that the expression "suits for land," did not include a suit for foreclosure and doubted whether the decision in *Holkar v. Dadabhai* was binding on him, but, on examination of the ratio decidendi in that case he held that it was, since it decided that (p. 705) "in using the expression "suits for land," the framers of Clause 12 of the Letters Patent had in view the doctrines of the Court of Chancery in reference to suits relating to land situate out of England, and intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would have refused to entertain on the ground that the land was situate abroad." The learned Judge then referred to the rule in England as stated in Dicey's⁸ Conflict of Laws and to

the exception to the rule that the Courts have "jurisdiction to entertain an action against a person who is in England respecting land situate out of England on the ground of a contract or an equity between the parties with reference to such land." The italics are mine, for although the learned Judge noted that the person against whom the equitable jurisdiction would be exercised had to be in England, he appears to have thought it made no difference that the defendant before him was outside his jurisdiction, provided that leave was obtained under Clause 12.

18. In *Vaghoji v. Cavnaji* I.L.R.(1904) 29 Bom. 249 the plaintiffs filed their suit in Bombay against the defendant who resided in Bombay, for a declaration that they were entitled to the exclusive possession and enjoyment of a certain talao beyond the local limits of the Court's original jurisdiction. On a summons for the rescission of the leave given under Clause 12, Kussell J. was of opinion that the plaintiff's were really seeking a remedy in personam and held that leave had been properly granted, The defendant appealed. Jenkins C, J. first pointed out that the granting of leave made no difference an if the suit was one for land, leave would be of no avail. It was sometimes overlooked that under Clause 12 leave was only required when the cause of action had arisen in part within the local limits of the ordinary original civil jurisdiction. It may be noted in passing that by the decision of this Court in *Bahoo Harkisondas Vs. Nagindas Bhagwandas*, a different construction has been placed on Clause 12 and it was held that if the land was partly within the jurisdiction the suit would lie for the land outside the jurisdiction if leave was obtained. In AIR 1914 67 (Privy Council) which was a suit on a mortgage bond, it appears to have been admitted that if part of the land mortgaged was within the jurisdiction of the High Court, that would suffice to prevent jurisdiction in the High Court to try the case.

19. To return to *Vaghoji v. Cavnaji* it was next contended that the suit was not a suit for land as it did not ask for delivery of the land and the question was settled by authority. The learned Chief Justice, therefore, dealt with the authorities to which I have already referred. With reference to *Yenkolm v. Rambhaji*, he said (p. 254):

This view [that a suit for land was a suit in which delivery of land was asked for] was based on a comparison of section 3 ("of Act VIII of 1859) with Sections 223 and 224 of the Act, which speak of a decree for a house, land or other Immovable property."

"We have no such guide in the Letters Patent; and the decision, standing alone, is not a decision by which we are bound in construing Clause 12 of the Letters Patent.

20. Then referring to *Holkar v. Dadabhai* his lordship said that the ratio decidendi by which they were bound was to be found in the concluding paragraph, and the test was whether the suit was one which would have been entertained by the Courts of Equity in England in relation to land abroad and for that purpose it was necessary to see what the plaintiff's prayed for by their plaint. They asked for a

declaration that they were entitled to exclusive possession and enjoyment of the talao and for an injunction to give effect to that declaration. An examination of the authorities established the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad whereas between the litigants or their predecessors some priority or relation was established on the ground of contract, trust or fraud, and not where the purpose was to obtain a declaration of title to foreign land. His lordship concluded that the expression "suits for land" could not be intended to be read with a technical limitation which had never been associated with it, and taking the words in their fair natural meaning there would be no doubt that the suit before the Court was a suit for land.

21. In *Zulekaltai v. Ebrahim Haji Vyedina* I.L.R.(1912) 37 Bom. 404 : 14 Bom. L.R. 846 Davar J., after a review of the authorities, held that a suit inter alia to enforce the delivery to the plaintiff of the title deeds of certain Immovable property outside the jurisdiction, where it appeared on the pleadings that the substantial point to be decided was the title of the plaintiff to the property was a suit for land and the High Court had no jurisdiction to try the case. In *Jugyernauth Dosti v. Bripnatli*, Doss I.L.R.(1878) Cal. 322 the contrary was held, and I think rightly, as it is difficult to see how a suit to recover title deeds can be beyond the jurisdiction of the Court if the defendant is within the jurisdiction.

22. In *Yeshvadabai Vs. Janardhan Raghunath Warik*, , the plaintiff sued to recover maintenance charged on specific Immovable property in Bombay-At the date of the institution of the suit the defendant was not residing in Bombay, and it was held that no part of the cause of action arose within the jurisdiction. The question then arose whether the suit was a suit for land, Fawcett J. said (p. 1175):

Referring to *Vighoji v. Camaji* he (Davar J.) says that Sir Lawrence Jenkins there lays down in clear and explicit language that the words "suit for land" do not mean only suits for the recovery of land. It is true that it has been held by this Court that a suit for foreclosure of a mortgage on land is not a suit for land : *Sorabji v. Rattonji* I.L.R.(1898) 22 Bom. 701 although, according to the Calcutta and Madras decisions, such a suit would be a suit for land. But its authority is much weakened by *Vagkoji v Camaji*, and the substantial criticism of His Highness Shrinant Maharaj Yeshwantirav Holkar v. Dadabhai Ourselji Ashimner contained in *Mulla's Civil Procedure Code*, 7th Edn., p, 1036. I can see no sufficient reason for refraining from following the decision of the Madras High Court in *Sundara Bai Sahiba v. Trimmal Rao Sahib* I.L.R.(1909) Mad. 131.

23. Fawcett J. then referred to *Sitabai v. Laxmibai* (1915) 18 Bom. L.R. 67a case u/s 16 of the Civil Procedure Code. That section which does not apply to Chartered High Courts in exercise of their ordinary original civil jurisdiction now makes it perfectly clear what suits shall be filed in the Subordinate Courts in the Court within the local limits of whose jurisdiction the property is situated. There is some justification for thinking that the suits under headings (a) to (e) were the suits which were covered by the expression "suits for land" in Section 5 of Act

VIII of 1859 and the proviso gives a partial effect to the maxim "Equity acts in personam."

24. The conditions, as pointed out by Mr. Mulla, are (1) that the relief sought can be entirely obtained through the personal obedience of the defendant and (2) the property must be situated in and not beyond British India.

25. Returning to *Yexhvadabai v. Janardhan*, Fawcett J. considered that the words "suits for land" in Clause 12 were very wide words and ordinarily covered suits in which there was to be a determination of a right such as that claimed in the case, viz., to have the property charged with the maintenance awarded to the plaintiff. It would follow in effect that the learned Judge was really of opinion that the words "suits for land" covered all the suits mentioned in Section 16 under headings (a) to (e).

26. In *Venkatrao fletltupathy v. Katimji Asswr Virji* (1916) 26 Bom. L.R. 635 it was held that a suit by a mortgagee to enforce his rights under a mortgage was not a suit for land within the meaning of Clause 12. Scott C. J. said (pp. 536-38):-

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 realise and dispose of his and his dobtos" 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 realise the security which has been vested in him....It has been suggested for the defendants, however, that the Court here cannot act in personam, inasmuch as, although the cause of action arose wholly or in part within the jurisdiction and leave has been obtained to sue, he and the other defendants reside not in Bombay but; in Bellary. But the personal jurisdiction of the Court is exercised under Clause 12 of the Letters Patent not only in cases where the defendant or some of them resided permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons when the cause of action or part of it has arisen in Bombay....Lastly, I may refer to the judgment of Byrne J. in *Duder v. Amntefctimnch Trustees Kantoor* [1902] 2 Ch. 132 aa showing that where a defendant is lawfully brought before the Court, the Court would not be deterred from making an order in personam with respect to land situate outside the jurisdiction mainly by the fact that the person so brought before it has his residence in another country.

27. But it must be noted that in *Duder v. Arnsterdamsch Trustees Kantoor* the other defendants were within the jurisdiction, and leave was given to serve the fresh defendants outside the jurisdiction following the decision in *Bawtree v. The Great North-West Central Railway Co.* A certificate was granted for leave to appeal to the Privy Council in *Venkairao Sethupathy v. Khimji Asuur Virji* (1916)

96 Bom. L.R. 535 but the appeal was not prosecuted.

28. In *Jasraj v. Akubni* (1922) 26 Bom L.R. 500 it was held by Shah J. that the High Court had jurisdiction to entertain a suit by a mortgagee to enforce the mortgage against property outside the local limits of the ordinary original civil jurisdiction, against a mortgagor living outside the jurisdiction. His lordship referred to the decision of the Privy Council in AIR 1914 67 (Privy Council) . which it was contended overruled *Holkar*'s case, and said (p. 540):-

Speaking for myself I find it difficult to reconcile the view taken by their lordships in *Harendra Lal Roy Chowdhuri v. Hani Dasai Debi* with the decision in *Holkar v. Dadabhai*.

29. But as the decision in *Venkatrao Sethupathy v. Khimji Assur Virji* was subsequent to the decision of the Privy Council, though it made no reference to it, the learned Judge considered that the later decision of the Appeal Court was binding upon him.

30. In *K.C. Shriman Nedan Rajah Kotakal Vs. The Malabar Timber Co. Ltd.*, . Fawcett J. held that a suit to declare a charge upon lands outside the jurisdiction was not a suit for land, though if the land was within the jurisdiction it would be a suit for land so as to give the High Court a jurisdiction which it would not otherwise have had. I find it difficult myself to reconcile this decision with the decision of the same learned Judge in *Yenhvadabai v. Janardhan*, but Fawcett J. satisfied himself that this could be done. He thought that when the land was outside the jurisdiction the words "suits for land" in Clause 12 should be read subject to the qualification that the Bombay High Court had a jurisdiction in *jwrsanam* similar to that exercised by a Court of Equity in England and by a *moffussil* Court under the proviso to Section 16 of the Civil Procedure Code, 1908.

31. There may be some justification for saying that the Court has jurisdiction to declare in favour of A that he shall have a charge on the property of B outside the jurisdiction and to restrain B from dealing with the property if B resides within or has property within the jurisdiction, so that obedience to the decree can be enforced by arresting B or attaching his property, but the plaintiff asked for an order for sale in default of payment on the trial of the preliminary issue regarding jurisdiction. The learned Judge declined to deal with the question whether a suit to enforce the charge by sale of land could be said to be within the personal jurisdiction.

32. In *Pranlal Tribhuwandas Vs. Goculdas Damodar*, Pratt J. held that the High Court had. no jurisdiction to grant a declaration as to who out of two or more competing mortgagees was a prior mortgagee, when the property mortgaged was outside the jurisdiction of the Court. His own opinion was that *Holkar* case had been overruled by the Privy Council in *Harendra, Lal Roy Chowdhuri v. Hari Dassi Deli*, but by virtue of the decision of the Appeal Court in *Venkatrao v. Khimji Assur Virji* he was constrained to hold that *Holkar*'s case was still good law. However he considered that the declaration the plaintiff asked for was not

within the equitable jurisdiction assumed by the English Courts in such cases on the authority of *Vaghoji, v. Camaji*, since no privity on the ground of contract, trust or fraud was established between the plaintiff and the second defendant.

33. Whether a suit for specific performance of a contract for sale of land outside the jurisdiction can lie in this High Court at the instance of the purchaser has not been expressly decided.

34. In *Jamshed v. Burjorji* (1915) 18 Bom. L.R. 163 the plaintiff sued for specific performance of a contract by him for the purchase of land outside the limits of its ordinary original civil jurisdiction. No issue was raised on the question of jurisdiction and a decree was eventually passed in favour of the plaintiff, though it might be considered that such a decree would involve the conveyance and delivery of land.

35. I now come to the cases cited which have been decided by . the High Court of Calcutta. In *The Delhi and London Bank v. Wordie* ILR (1876) Cal. 249 the plaintiff filed a suit against the trustees of a certain deed executed by two of the defendants conveying inter alia property outside the jurisdiction of the High Court upon certain trusts, praying that the trusts of the deed might be carried into effect, that the trustees might be relieved and a receiver appointed to carry out the trusts under the orders of the Court. After referring to *Penn v. Lord Baltimore*, *Bagram v. Moses* (1863) 1 Hyde 284 and *Paget v. Ede* their lordships said (p. 263):-

But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought substantially "for land"; that is, for the purpose of acquiring title to, or control over, land within the meaning of a particular Clause in the Charter; and we think, having regard to what is the real object of the suit, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land. The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed.

36. In *Juggernaut Doss v. Brijnath Doss* ILR (1878) Cal. 322 it was held that, a suit to recover title deeds, although it might involve a question of title, was not a suit to obtain possession of land or (o deal in any way with the land itself within the meaning of the Charter. In *Sreenath Rog v. Gaily Doss Ghose* ILR (1879) Cal. 82 the defendant borrowed Rs. 4,000 from the plaintiff and agreed to execute a mortgage of land beyond the jurisdiction of the Court. It was held that so far as the suit was a suit for specific performance of the agreement with respect to land the Court had no jurisdiction, but that in the circumstances of the case a money decree would be passed for the return of the Rs. 4,000.

37. In *Land Mortgage Bank v. Sudurudeen Alimed* I.L.R.(1892) Cal. 358 a vendor sued in the High Court to enforce inter alia the specific performance of a contract entered into by the defendant for the purchase of land outside the jurisdiction

and in the alternative for damages. On settlement of issues an issue was raised whether the Court had jurisdiction to try the suit. Trevelyan J. said (p. 366) :-

It seems to me that, having regard to the expression used in *Keliie v. Fraser* ILR (1877) Cal. 445 and *The Delhi and London Bank v. Wordie* ILR (1876) Cal. 249 : 13 Bom. L.R. 520 as to the meaning of a "suit for land," that there is a distinction between a vendor's suit and purchaser's suit for specific performance. The question as to whether a purchaser's suit would be one which I need not decide here.

38. Then after considering *Holkar* case and the English cases cited before him, his lordship said (p. 367) .-

I do not think, myself, that this case depends . entirely on what is a "suit for land" within the meaning of the Letters Patent , I do not think that this is a suit for land. It is not a suit to sell or acquire possession of or title to land in any sense....! decline to hold that wherever land has anything to do with a suit it is therefore a "suit for land.., I hold that, having regard to everything except paragraph (b) of the prayer of the plaint a prayer for sale and application of the sale proceeds in compensating the plaintiff], this is not a suit for land, I am inclined to hold that, so far as that paragraph is concerned, this is a suit for land, but it is not necessary to determine that question now, as the right to relief under that prayer cannot be determined until the facts are found.

39. In *Hara Lal Banerjee v. Nitambini Debi* ILR (1901) Cal. 315 the plaintiff asked for an account and administration of his grandfather's estate, the whole of the Immovable property of which was outside the jurisdiction, and the construction of the will of his grandfather. Harington J. said (p. 322):-

The question is, having regard to the reliefs asked for in this Court, does it come within the description which I have just read (that is to say, a suit brought for the purpose of acquiring the possession of, or establishing title to or an interest in the property-the subject of the dispute) ? I confess I think it does. It appears to me, where the plaintiff says under a will I am entitled to immediate possession of Immovable property, construe that will and declare my rights, it is impossible to say that he is not seeking to establish a title to, or a right in, the Immovable property, And, if that is so, his suit falls within the terms of Clause 12 of the Charter, and there is no jurisdiction to entertain it, if the Immovable property is outside the jurisdiction of this Court The jurisdiction of this Court...is limited by the express terms of the Charter, The question, therefore, has to be decided by reference to the words of the Charter and not by a consideration of the jurisdiction exercised by Courts of Equity in England.

40. But in 15 CWN 741 (Privy Council) it was held that a suit by three executors against a fourth for the administration of the estate including Immovable property of a deceased person which was outside the jurisdiction was not a suit for land.

41. In *Lodna Colliery Co., Ltd. v. Bipin Bihari Bose* I.L.R.(1912) Cal. 739 the plaintiff sued for damages owing to the defendant having carried away coal from their land. Fletcher J. said (p. 751) :-

It seems to me that so far as the same is a suit to recover damages arising out of an action for trespass to land, that is a suit for land. In England it has always been considered as a suit for land.

42. The reason being, as the learned Judge points out, that it would become necessary that the title in respect of the coal would have to be gone into to ascertain whether the defendant had a right to break through or not. In the *Sudumdilt Goal Co., Ltd. v. Empire Coal Co., Ltd.* ILR (1915) Cal. 942 it was held that the expression "suits for land or other Immovable property" in Clause 12 of the Charter of 1865 could not be construed as limited to suits for the recovery of land in its strict sense, but must be extended to a suit for compensation for wrong to land, where the substantial question is a right to land. Fletcher J., following the decision in the last cited case, dismissed the suit. The plaintiff appealed. In the course of the arguments Jenkins C. J. remarked (p. 945):- "At the time the Charter was passed the CPC of 1850 was in force. The section in that Code referring to "suits for land" was subsequently replaced by similar sections in successive Codes. Section 16 of the present Code describes what was meant by "suits for land." And again (p. 950):-

It appears to me that the test proposed by Clause 12 is not one of form but one of substance. A suit brought in trespass for the purpose of having title to land tried, is a suit for land.

43. And in giving judgment his lordship said (p. 951):-

The question is what was intended by the expression "suits for land or other Immovable property". It appears to me that it was not a mere formal test that was proposed to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the CPC of 1859, Section 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute: and, running on parallel lines with that, we find the CPC of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as suits for land, and it is instructive to observe what they are

44. In *Nalum Lakhshmikanntham v. Krishnusawmy Mudaliar* ILR (1903) Mad. 157 Moore J. preferred to follow the decision in *In re S.J. Leslie* (1872) 9 B. L.R. 171 rather than the decision in *Ywnkobib v. Rambhaji* and held that a suit to enforce a mortgage by deposit of title deeds of property outside the jurisdiction by sale of the lands was a suit for land within the meaning of Clause 12 of the Letters

Patent. His lordship considered that a suit for land included any suit in which a decree was asked for operating directly upon the land and therefore included any suit brought to enforce a security upon the land and that the phrase "suits for land or other Immovable property"" as used in Clause 1"2 of the Letters Patent, included all suits mentioned in Clauses (a) to (f) in Section 16 of the Civil Procedure Code. In *Sundarn Bai Sahiba v. Tirumal Rao Sahib* ILR (1009) Mad. 131 : 16 Bom. L.R. 400 the plaintiff" prayed that maintenance might be charged on certain specific land. It was held that the plaintiff" asked for a decree which would operate directly on the land, if the decree were passed it would be a decree against that land, and the decree might be framed so as to provide for a sale if the defendant failed to pay. The suit then was a suit for land, It is curious to note that the learned Judge appears to have been of opinion that *IloHcar"*n case and *Sorabji v. Eattonji* were considerably shaken if they had not been overruled by the later decision in *Vaghoji v. Catnuji*.

45. Lastly, there is the Privy Council decision already referred to: AIR 1914 67 (Privy Council) . The main question there was whether there had been a fraud committed in registering the deed in Calcutta on the ground that part of the property conveyed was in Calcutta, which was contrary to the fact, It does not seem to have been seriously contended that if none of the property was situate within the jurisdiction, the Court would have had jurisdiction to deal with the suit which was on a mortgage bond. I doubt very much whether the case was cited in *Venkatrao v. Khimji Assur Virjee*, as it was really decided on the question of registration. 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 per-Honatn, 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 peraonam. 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. 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. Mr. Mulla in his notes to Section 16 of the CPC in the 5th edition analysed very carefully the different classes of suits in personam. He divided them into two main divisions :

(1) Those in which the relief can be entirely obtained by the personal obedience of the defendant.

(2) Those in which the relief sought can be obtained only partially by the personal obedience of the defendant.

46. The second division is again divided into two sub-divisions:-

(a) Cases of contract, fraud and trust,

(b) Other cases.

47. Premising that the person or the personal property of the defendant must be within the jurisdiction he pointed out that Courts of Equity in England will exercise jurisdiction in cases coming within the headings above (1) and (2) (a) whereas only suits falling within the division (1) fall under the proviso to Section 16. It is this difference which I think, with all due respect, Fawcett J. failed to notice in *Raju Kutakal v. Malabar Timber*. when he appeared to think that the jurisdiction given to the subordinate Courts by the proviso to Section 10 of the Code was the same as the jurisdiction in personam exercised by the Courts of Equity in England. So that, in my opinion, we cannot read into Clause 12 of the Letters Patent anything more than the proviso to Section 16. It must follow that if my view of the proper construction to be placed on Clause 12 of the Letters Patent is correct, the present suit filed by the plaintiff against the second defendant who resides outside the jurisdiction asking for a sale of the mortgaged properties also outside the jurisdiction in default of payment of the amount due on the mortgage is not competent. We have, however, to consider whether in spite of that opinion we should not give effect to the doctrine of stare decisis. We have been told by the Advocate General that a decree passed without jurisdiction is a nullity and that if we decide in this case that the Court has no jurisdiction to hear the case, all the previous decrees of this Court passed in mortgage decrees where the mortgaged properties were outside the local limits would become nullities and the titles of persons who had bought properties in pursuance of such decrees would become clouded. The authority cited for that, proposition was *Rajlakshmi Dasee v. Kutayani Dasee* ILR (1910) Cal. 639. In that case a suit, was intentionally undervalued. The defendant raised no objection and the suit was tried. The appeal was filed before the District Judge instead of before the High Court and the District Judge decided the appeal by H. consent decree, The plaintiff then filed the suit before the Court praying for a declaration that the consent decree to which she was not a party was in no way binding upon her. The first ground on which the plaintiff relied was that the District Judge had no jurisdiction on the subject-matter of the litigation. The plaintiff was not successful in the trial Court, In appeal to the High Court the learned Judges considered that as the subject-matter of the suit was over Rs. 1,37,000 the consent decree made by the District Judge was made wholly without jurisdiction. They did not feel themselves called upon to consider what the effect of such lack of jurisdiction would be upon the decree in so far as the parties thereto were

concerned, but it was manifest that a stranger who was interested in the property affected by the decree could obviously ask for a declaration that the decree was a nullity, It was an elementary principle of law that if a Court had no jurisdiction over the subject-matter its judgments and orders were more nullities and might not only be set aside at any time- by the Court in which they were rendered but be declared void in every Court in which they were presented. The authorities cited for this proposition were: *Ferguson v. Mahon* (1839) 11 A. & E. 179; *Briscoe v. Stephens* (1824) 2 Bing. 213; *Buchanan v. Rucker* (1803) 9 East 192 *Attorney General v. Lord Hotham* (1823) 1 T. & R. 209; *Perkin v. Proctor* (1768) 2 Wils. 382; *Ex parte Kinning* (1847) 4 C.B. 507 and *Brown v Compton* (1800) 8 T.R. 424 .

48. In *Briscoe v. Stephens* the plaintiff had sued in an inferior Court in which judgment had been given against him. It was held that he could bring another action in a Court having jurisdiction.

49. In *Buchanan v. Rucker*. it was held that the law will not raise an assumpsit upon a judgment obtained by default in one of the Colonies against a party who upon the face of the proceeding appeared only to have been served by nailing a copy of the declaration at the Court House Door.

50. In *Attorney General v. Lord Hotham*, upon an information to set aside a lease for ninety-nine years of charity lands the defendant set up a title adverse to the lease. Apart from the merits it was held that the defendant could not dispute the title while in possession, when a limited tribunal took upon itself to exercise a jurisdiction which did not belong to it and decided upon matters with respect to which it had no authority. Its decision amounted to nothing and no party could in the least be bound by it.

51. In *Ex parte Kinning*, it was held that when under 8 & 9 Vic. c. 127 Section 31, a Judge of an inferior Court of record had upon proof of a debtor's ability to pay made an order for payment of instalments, he could not after default grant a warrant of imprisonment without giving the debtor an opportunity of being heard.

52. In *Brown v. Compton*, there was an action of debt against the sheriff for the escape of a prisoner. In justification the order of a Court not having jurisdiction was pleaded, but judgment was given for the plaintiff.

53. In *Ferguson v. Mahon* the plaintiff brought an action of debt on a foreign judgment. It was held that though the defendant could not contest the merits of the action or the propriety of the decision, he could show that the Court had not properly jurisdiction over him.

54. It will be seen that none of these cases directly assist the proposition the Advocate General wished to advance. If we hold that this is a suit for land so that the Court has no jurisdiction we do not say that this Court had no jurisdiction in the various cases which have been cited in which it has held that it had jurisdiction That would be beyond our power. We only decide that those cases are

not binding upon us for the purpose of our present decision. If it was open to anyone interested to dispute the validity of those decisions as having been passed without jurisdiction, it is still open to them to make the attempt whether we decide in this case that we have or have not jurisdiction. Put in another way the question whether the Courts in those cases had jurisdiction or not does not depend upon our decision in this case. It was also suggested that any purchaser of property outside the jurisdiction under a decree of this Court might now seek to get rid of his purchase on the ground that the decree was a nullity. I doubt whether there is the remotest possibility of anyone being so rash as to make such an attempt. It has not been the case of an inferior tribunal arrogating to itself the jurisdiction of a superior tribunal, or of the Courts of one country being asked to pass a decree on a judgment of the Courts of another country. This Court construed its Charter in order to decide whether it had jurisdiction, and on that question it had jurisdiction to decide right or wrong. However that may be. I do not see how the prospect placed before us by the Advocate General of such suits being filed can deter us from holding that we have no jurisdiction to try this suit when we think the words of our Charter provide an absolute bar.

55. Reference may usefully be made in this respect to the case of *Naro Hari v. Anpurnabai* ILR (1874) 11 Bom. 160 n where West J. said at p. 171 :

The order of the one Court (the District Court) as of the other (the High Court) binds a person generally subject to the jurisdiction until it is reversed or set aside, and can be questioned only in the ways provided by the law. In the recent case, the Master of the Rolls thought it a good answer to an application founded on the Court's having sold property without jurisdiction that there was a decree standing unrevorsod, and directing the sale, *Steed v. Preece* (1874) L.R. 18 (1874) P.J. 218 . The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry

56. The Advocate General also told us that mortgagees had advanced money on properties outside the jurisdiction on the faith of the decision that suits on mortgages would lie in the High Court. That again could not, in my opinion, provide an excuse for our assuming a jurisdiction which was not given to us by law.

57. Still it may be considered whether the construction put upon Clause 12 of the Letters Patent by the Court in *Hoi-fear's* case should not be allowed to stand even though we think it wrong, because thirty-five years have passed since it was decided and it would really be a matter of convenience to the public that we should accept it as correct and assume a jurisdiction which we do not believe we possess, a course of action which I must confess would cause injury to none. The objection in this case to adhering to so easy a road out of the difficulty lies in the fact that we cannot find the slightest foundation for the exercise of our equitable powers. We cannot by any process of argument claim the right to make orders against the person of a party outside the limits of our jurisdiction.

58. The constitution of the Courts in this presidency is entirely different to the constitution of the Courts in England, where the High Court of Judicature exercises jurisdiction over the whole of England. Here each District Court is a Court of general civil jurisdiction, and there is no warrant for the High Court to exert its equitable powers against persons residing within the jurisdiction of the District Courts. I am aware that we are bound to attach the greatest importance to the doctrine of stare decisis, but in my opinion that doctrine "can be no authority for our establishing so novel a proposition. In my opinion we should hold that the Court has no jurisdiction to try this suit.