

(1947) 09 BOM CK 0006
In the Bombay High Court
Case No : O.C.J. Appeal No. 1 of 1947

The Khandesh Spinning and Weaving Mills Company Limited	APPELLANT
Vs	
Moolji Jaitha and Co.	RESPONDENT

Date of Decision : 19-09-1947

Acts Referred:

Letters Patent Act, 1865 — Clause 12

Citation : AIR 1948 Bom 272 : (1948) 50 BOMLR 49

Hon'ble Judges : M.C. Chagla, Acting C.J.; Bhagwati, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.C. Chagla, Ag. C.J.

1. This appeal raises a very important question as to the jurisdiction conferred upon this Court under Clause 12 of the Letters Patent.
2. The appellants are a joint stock company and they filed the suit from which this appeal arises against the defendants who were the plaintiffs' managing agents for a very long time, their agency having been terminated on November 21, 1940. In the suit various reliefs were claimed against the defendants. The one with which we are concerned related to certain lands at Jalgaon which stood in the name of the defendants and which the plaintiffs claimed to be of their ownership, having; been acquired according to them by the defendants as plaintiffs' agents and with the funds belonging to the plaintiffs. In respect of these lands the plaintiffs sought a declaration that they belonged to and were the property of the plaintiffs and that the defendants had no beneficial interest therein and also they asked for an order against the defendants to execute all such documents and deeds, and do such acts as may be necessary for transferring these lands to the name of the plaintiffs. The defendants raised various issues. The learned Judge below tried an issue as to the jurisdiction of this Court to entertain the suit in so far as it related to the prayers concerning

the lands situated in Jalgaon. The learned Judge came to the conclusion that the Court had no jurisdiction to give relief with regard to these lands and he also held that various other issues which according to him were connected with the question of lands situated in Jalgaon did not arise for determination in view of his finding on the main question about jurisdiction.

3. The learned Judge came to the conclusion that the Court had no jurisdiction to entertain the suit with regard to lands at Jalgaon on two grounds : (1) he held that the suit filed by the plaintiffs was a suit for land in so far as it related to lands outside jurisdiction and as such this Court could not entertain it; (2) he also took the view that on a true construction of Clause 12 of the Letters Patent the fact that the defendants' firm carried on business within jurisdiction and its sole proprietor resided within jurisdiction did not confer jurisdiction upon this Court. In this appeal Sir Noshirwan Engineer for the appellants has argued both the points. But as we take the view that the suit is not a suit for land even in respect of lands situated outside jurisdiction, we do not think it necessary to express any opinion on the wider and perhaps the more important question whether on a true reading of Clause 12 of the Letters Patent suits of every description fall within the competence of this Court, once it is established that the defendant dwells or carries on business or personally works for gain within the limits of the original civil jurisdiction of this Court.

4. I am conscious of the fact that this very point was specifically argued at the request of Sir Amberson Marten C.J., when the full bench of this Court considered the question whether a mortgage suit was a suit for land or not in *Hatimbhai Hassanally v. Framroz Eduljee* 29 Bom. L.R. 498.. Although, in view of the decision of that Court that a mortgage suit was a suit for debt and not a suit for land, the question whether the fact that in that case the defendant resided in Bombay conferred jurisdiction upon, the Court or not, although the suit might have been a suit for land, did not arise, still, as I have just stated, the point was argued and six out of the seven learned Judges expressed the opinion on that point. But however learned those judgments and however worthy of respect the opinions expressed by those Judges, their opinions are no more than obiter, and however strong the temptation always is to express one's opinion on a point which is urged at the Bar, I will try and resist that temptation, because I will be doing no more than adding one more obiter opinion to the opinions which are already there, illuminating the pages of *Hatimbhai Hassanally v. Framroz Edulji*.

5. It is possible to give one of these three different meanings to the expression "suit for land" : suit for recovery of land; suit substantially relating to land and suit relating to or concerning land. It will be noticed that to give it the first meaning would be considerably to widen the jurisdiction of this Court by excluding from its competence only a very limited kind of suits. To give it the third meaning would be unduly restricting the jurisdiction of this Court, because that meaning would be wide enough to embrace a large number of suits which are not strictly suits for land. Therefore this Court has steered the middle course

and has taken the view that a suit for land is a suit substantially relating to land.

6. An attempt was made as far back as *Yenkoba B. Kasar v. Bambhaiji valad Arjun* (1872) 9 B.H.C.R. 12 to define suit for land as meaning no more than a suit for recovery of land. But the Court there was dealing with Section 5 of Act VIII of 1859. But that definition has really never been accepted by this Court and the matter has now been finally settled by the full bench decision in *Hatimbhai Hassanally v. Framroz Eduljee*. There the majority of Judges took the view that a suit for land meant a suit substantially relating to land. The only Judge who remained unrepentant was Mr. Justice Blackwell who thought that the only correct meaning of that expression was a suit for recovery of land.

7. But unfortunately to define "suit for land" as a suit substantially relating to land does not get over the difficulty in deciding in any particular case whether a suit is or is not substantially relating to land. We are still confronted with the problem as to what "substantially" means, and it is this problem which we have had to tackle in this appeal. In my opinion a suit "substantially relating to land" means and can only mean a suit which directly involves a question of title or right to land. Every suit in which a question of title or right to land arises is not necessarily a suit for land. It is not enough that such a question should arise merely incidentally, but it must arise directly for the determination of the Court.

8. The English law on the subject is perfectly clear.

The English Courts have in general no jurisdiction to determine directly the title to a foreign immovable nor can they entertain any action which substantially involves the determination of such title," ,See Halsbury's Laws of England, Vol. VI, p. 218, Article 266.

8. Again:

The English Courts have power to exercise a jurisdiction in personam in respect of foreign immovables against persons locally within their jurisdiction in cases where there is an equity between the parties arising from contract, fraud or trust provided that the decision of title be not directly involved,, But such an equity must be of a personal nature, i.e., there must be either a fiduciary relationship or privity of some other kind between the parties ; See Halsbury, Vol. VI, p. 221, Article 270.

9. In the well known case of *British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 602 Lord Herschell, Lord Chancellor, in his speech said this (p. 626):

Whilst Courts of Equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here.

And in that speech the Lord Chancellor points out the distinction in English law between local and transitory actions (p. 618):

...the law began to discriminate between cases in which the truth of the venue

was material and those in which it was not so. This gave rise to the distinction between transitory and local actions, that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay in any country he pleased.

Again at p. 619:

It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place.

10. Now, it is apt to be forgotten that those who drafted Clause 12 of the Letters Patent were English lawyers fully familiar with the equity jurisdiction of the English Courts, and it is difficult to believe that when they used the expression "suit for land" they did not realise the distinction between local and transitory actions and had not in mind the equity jurisdiction which the English Courts exercised in personam. It is perfectly true that this Court has no equity jurisdiction independently of Clause 12. Such original jurisdiction as it has has to be found within the ambit of that clause. But the question that has to be determined is whether in using the expression "suit for land" the draftsman of Clause 12 intended to confer upon this Court a jurisdiction more restricted than the English Courts have or whether that expression was intended to embrace only those kinds of suits which the English Courts would have had no jurisdiction to try and determine. Sir Charles Sargent in *His Highness Shrimant Maharaj Yeshwantrav Holkar v. Dadabhai Cursetji Ashburner* I.L.R(1890) . 14 Bom. 353 in deciding that in a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the original jurisdiction of the High Court, and to realize a mortgage debt by sale of the land, the Court had jurisdiction to try the suit, and to order a sale of the mortgaged land, said at (p. 859):

The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees in personam..., and we think that, had it been intended to exclude suits in personam as well as suits in rem from the jurisdiction of the High Courts, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

11. This observation clearly and emphatically gives recognition to the equity jurisdiction of this Court. But unfortunately Sir Charles Sargent did not make it clear that the jurisdiction he was speaking of was not something outside Clause 12 of the Letters Patent but was implicit in the terms and provisions of that clause. The validity and authenticity of Sir Charles Sargent's remarks have also been shaken by the fact that although he purported to exercise the equity jurisdiction in that case, as a matter of fact the defendant was not resident within jurisdiction. This decision had had a chequered career. It was reversed by a full bench in *India Spinning and Weaving Co. Ltd. v. Climax Industrial*

Syndicate 27 Bom. L.R. 1281 and was held to have laid down the correct law with regard to mortgage suits by a fuller bench in *Hatimbhai Hassanally v. Framroz Edulji*. But it is sought to be argued that the ratio decidendi of that case that under Clause 12 this Court has the same equity jurisdiction as the English Courts no longer correctly states the law on the subject. The learned Judge below takes the view that the ratio has been discarded, that it has received a decent burial and it is not possible to revive it from its ashes.

12. A review of the authorities subsequent to *Holkar's* case clearly shows to my mind that that is not the position. This Court, other High Courts in India and the Privy Council have time and again reiterated the fact that the jurisdiction conferred upon the Chartered High Courts by Clause 12 of the Letters Patent is a jurisdiction similar to the equity jurisdiction exercised by the English Courts. In *Nistarini Dassi v. Nundo Lull Bose* (1899) ILR 26 Cal. 891. Mr. Justice Stanley on the Original Side held that an administration suit to administer the estate of a deceased person comprising immovable properties situated outside jurisdiction was not a suit for land within the meaning of Clause 12. At p. 921 the learned Judge states in his judgment:

The Court assumes jurisdiction in regard to immovable 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. All that is sought here is (that the Court in administering this estate shall act in personam and compel the trustees and" executors to fulfil their obligations.

13. This case went in appeal and a Bench of the Calcutta High Court in *Nistarini Dassi v. Nundo Lal Bose* I.L.R.(1902) Cal. 369 confirmed the decision of the trial Court. In dealing with the point of jurisdiction Maclean C.J. said (p. 383):

First, this is not a suit for land. It is a suit for administration, and as incidental to that suit for a declaration that certain leases which the executors of the estate granted to themselves cannot stand as against the plaintiff, the beneficiary.

14. There was a further appeal to the Privy Council, *Benode Behary Bose v. Nistarini Dassi* ILR (1905) Cal. 180 Their Lordships of the Privy Council observed (p. 191):

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.

15. Therefore, according to the Privy Council, the question the Court has to ask in every case is what is the primary object of the suit. If the primary object is something unconnected with foreign land, then the suit is not a suit for land, even though incidentally the Courts might have to try questions of title to foreign land.

16. In *Srinivasa Moorthy v. Venkata Varada Ayyangar* I.L.R.(1906) Mad. 239 the main question that fell to be determined was the question of jurisdiction of the Court over a foreigner who was present in Madras when the plaint was filed but left the following day before the summons was served. But as the suit was for administration and as some of the lands were situated outside jurisdiction, the question with which we are concerned was also considered by the Court. The learned Chief Justice Sir Arnold White considered the principles of English law with regard to actions in personam and Mr. Justice Subrahmanya Ayyar deals with the argument of counsel at p. 280 that to include in the administration the immovable property of the testator situated outside jurisdiction would be to pronounce on the title to it, and the argument is met by the learned Judge by appealing to the in personam jurisdiction exercised by the English Courts and the question of jurisdiction was disposed of by the Privy Council when the case went before it by stating that the question of jurisdiction was too plain for argument (34 Mad. 257).

17. Turning to the authorities of this Court Mr. Justice Strachey in *Soradnji v. Rattonji* I.L.R.(1898) 22 Bom. 701 applied the same test in order to determine whether a suit for foreclosure was or was not a suit for land within the meaning of Clause 12. The learned Judge correctly understood the ratio of *Holkar*'s case to mean that a suit for land was one which the Court of Equity in England will entertain and that the High Courts in India under Clause 12 had all the powers of a Court of Equity for enforcing their decrees in personam.

18. Then we come to the case of *Vaghoji v. Camaji* 6 Bom. L.R. 958 decided by Sir Lawrence Jenkins and Mr. Justice Batchelor. That was a suit for a declaration that the plaintiffs were entitled to exclusive possession and enjoyment of a talao situated outside the original jurisdiction of this Court. The Court held that the suit was a suit for land and it had no jurisdiction to entertain it. The learned Judge below was considerably influenced by this decision and he seems to have taken the view that this decision laid down that whenever there was a prayer for a declaration of title irrespective of what the true nature of the suit was the Court was bound to look upon the suit as a suit for land and refuse to entertain it. With respect I do not think that that is a correct reading of the judgment of Sir Lawrence Jenkins. At p. 256 the learned Chief Justice asks himself the question as to what is the jurisdiction exercised by the Court of Equity in England in relation to foreign land and the answer he gives is this (p. 258):

An examination of the authorities appears to me to establish the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad, where as between the litigants or their predecessors some privity or relation was

established on the ground of contract, trust or fraud, but in no case of which I am aware has the Court of Equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land.

19. Now, "the purpose was to obtain a declaration of title to foreign land" certainly does not mean that the question as to declaration of title incidentally arises in the suit. The purpose can only mean the main purpose and this is made clear by the learned Chief Justice at p. 258:

Taking the words therefore in their fair natural meaning can there be any doubt that this is a, suit for land? 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.

20. Therefore, the learned Chief Justice makes it perfectly clear that if the claim in the suit had been based on any contract, trust or fraud or any circumstance giving rise to privity between the parties, the suit would not have been a suit for land and the Court would have exercised jurisdiction which the Chancery Courts, exercised in England. Far from discarding the ratio decidendi of Holkar's case, to my mind this decision emphasises and reiterates it.

21. In Venkatrao Sethupathy v. Khimji Assur Virji (1916) 26 Bom. L.R. 535 Sir Basil Scott C.J. and Mr. Justice Heaton were dealing with a mortgage suit and Scott C.J., expressed approval of the observations of Mr. Justice Stanley in Nistarini Dassi v. Nundo Lall Bose. At p. 537 the learned Chief Justice says:

Mr. Justice Stanley observed that the Court assumes jurisdiction in regard to immovable 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.

22. Then in Mahomedally Adamji v. Abdul Hussein 26 Bom. L.R. 163 Sir Lallubhai Shah, Acting Chief Justice, and Mr. Justice Crump were dealing with an administration suit. That suit had gone before another Bench on a preliminary point whether an administration suit was or was not a suit for land, and the Court in Abdul Hussein v. Mahomedally Adamji 23 Bom. L.R. 1326 held that it was not a suit for land and the Court had jurisdiction to proceed with it. But they also held that any declaration as to the Court having jurisdiction to administer certain property outside jurisdiction was premature at that stage. The question about that property came up before Sir Lallubhai Shah and Mr. Justice Crump and it was argued that as the question related to title to foreign land the Court had no jurisdiction to give any declaration regarding such property. The

contention put forward by one of the heirs with regard to that property was that it was given over to him by way of gift by his deceased father and the other heirs contended that it continued to form part of the estate of the deceased. Sir Lallubhai Shah took the view that it was a case of privity between the parties and that the Court had jurisdiction to determine questions of title to foreign land arising in an administration suit. Even in *India Spinning and Weaving Co. Ltd. v. Climax Industrial Syndicate*, which overruled *Holkar's* case, Sir Norman Macleod categorically declares at p. 26 that he did 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 and in *Hatimbhai Hassanally v. Framroz Eduljee*, Sir Amberson Marten at p. 547 finds himself in substantial agreement with the passage from the judgment of Sir Basil Scott in the case I have referred to, *Venkatrao Sethupathy v. Khimji Assur Virji*, in which that learned Chief Justice approves of the views of Mr. Justice Stanley with regard to the equity jurisdiction of the Calcutta High Court.

23. In *Central Bank of India v. Nusserwanji* 34 Bom. L.R. 1384 the question arose before Mr. Justice Kania whether this Court had jurisdiction to enforce an equitable mortgage of property even if it was situated outside British India in a State the laws of which do not recognize such a mortgage, Mr. Justice Kania held that the Court had jurisdiction, because in his opinion the relief that he was called upon to grant was a relief in personam, and finally in *Bilasrai Joharmal v. Shivnarayan Sarupchand* (1943) 46 Bom. L.R. 518 although the Privy Council held that the High Court of Bombay had no jurisdiction to remove trustees of a charity functioning in an Indian State and to appoint new trustees of that charity, it was at pains to observe that although the trust estate was situated outside jurisdiction, there was no defect of jurisdiction as far as Clause 12 was concerned.

As a Court of Equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connection with, rights to property situated abroad. (p. 521.)

24. Therefore, it is perfectly clear that in the opinion of the Privy Council this High Court has the same powers as a Court of Equity and it can exercise the same jurisdiction that an English Court does in connection with rights to property situated abroad.

25. I may note that the Madras High Court in *Velliappa Chettiar v. Govinda Dass* I.L.R.(1928) Mad. 809 F.B. has held that a suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell, made in Madras, by parties resident therein, is not a suit for land within the meaning of Clause 12, and such a suit is cognizable by the High Court in its Ordinary Original Civil Jurisdiction, and Mr. Justice Ramesam observes (p. 822):

I may observe that in a suit for specific performance the decree is primarily addressed to the defendant : that is, the Court acts in personam?which a Court of Equity is always entitled to do.

26. The review of these authorities to my mind clearly establishes that our Courts have practically consistently taken the view that Clause 12 of the Letters Patent confers upon this Court an equity jurisdiction similar to the one exercised by the English Courts; that the Court must in each case ascertain what is the primary object or the leading purpose of the suit. If that object or that purpose does not directly involve a question of title or right to land, then the suit is not a suit for land, and further questions which may incidentally arise relating to title to land do not necessarily make the suit a suit for land, and Courts may even give a declaration as to title to land if it becomes necessary for the purpose of effectuating the main purpose of the suit, provided, as I have said, such main purpose does not directly involve a question of title or right to land.

27. Now, let us apply this test to the suit before us. It is therefore necessary to analyse in some detail the plaint filed by the plaintiffs and which invokes the jurisdiction of this Court. Paragraphs 1 to 8A refer to lands situate in Jalgaon. The plaintiffs' case is that all these lands were acquired and have been used by and for the purpose of the plaintiffs and were in the plaintiffs' possession, occupation and enjoyment. The plaintiffs say that the defendants purchased these lands in their own name while they were agents of the plaintiffs but really for the plaintiffs and the defendants had no beneficial interest in these lands. The plaintiffs further say that it is only after the termination of the defendants' agency that they falsely claimed that these lands belonged to them and were rented out to the plaintiffs. Paragraph 8A was subsequently incorporated in the plaint and it avers that the defendants being in fiduciary relation with the plaintiffs were bound to hold the lands for the benefit of the plaintiffs. An argument has been advanced before us that this particular paragraph of the plaint does not disclose any cause of action. It is unnecessary to decide that point for the purpose of determining the real question before us. Paras. 9, 10 and 11 charge the defendants with having fraudulently and dishonestly received double commission while acting as the managing agents of the plaintiffs. Para. 12 deals with a sale of certain property by the defendants to the plaintiffs which the plaintiffs in their turn sold to one Waman Motiram. Waman Motiram filed a suit against the plaintiffs for damages for having received 30 gunthas less and the Court decreed Waman's claim. The plaintiffs want this amount to be debited to the agency account against the defendants. Para. 13 complains about large sums of moneys being advanced by the defendants to the New East India Press Company Ltd. although the defendants knew that the financial position of the said company was not sound and alleges that a sum of Rs. 5,00,000 is still due from that company and it is not possible to recover that amount. In para. 14 the plaintiffs contend that if necessary the accounts between them and the defendants should be reopened and the defendants should be ordered to render an account to the plaintiffs of their management of the plaintiffs' affairs from the beginning of the agency up to its termination. Para. 15 states that the defendants are not entitled to retain the remuneration which they have received from the plaintiffs as their agents because of the wrongful acts of the defendants

which constitute gross misconduct; and the reliefs claimed are, first, as I have already stated, a declaration that the lands at Jalgaon belong to the plaintiffs and that the defendants should be ordered to execute the necessary documents transferring the ownership to the plaintiffs. Then there are prayers with regard to taking of agency accounts and payment of various sums of money including a sum of Rs. 650 which the plaintiffs say the defendants fraudulently induced the plaintiffs to pay as rent for two pieces of land at Jalgaon.

28. In my opinion looking to the scheme of the suit, it is a comprehensive suit by a principal against his agent for investigation into the affairs of the agency. Its main object and leading purpose is to charge the agent with various acts of misconduct. It is impossible to sever the question of land from other questions that pertain to the agency of the defendants. The suit with regard to land is not an independent claim relating to title to foreign land. The question relating to land is inextricably tied up with questions relating to the defendants' agency, because the gravamen of the charge against the defendants by the plaintiffs is that the defendants acquired these lands as the plaintiffs' agents and out of the funds belonging to the plaintiffs. There is definitely an equity between the "plaintiffs and the defendants, an equity arising out of the contract of agency which created fiduciary relations between the plaintiffs and the defendants. Therefore the equity is of a personal nature. The plaintiffs constituted the defendants their agents and reposed confidence in them; thus the defendants had to discharge their fiduciary obligations and it is to enforce those fiduciary obligations that this suit is filed and this Court is called upon not to act directly upon the lands in Jalgaon but rather to act upon the conscience of the defendants who live within jurisdiction. I have no doubt that such a suit would have been entertained by the Court of Chancery in England, and if that Court could have entertained it, equally so has this Court jurisdiction to entertain it.

29. It would be on the whole a fair and reasonable test to apply whenever the question arises whether a suit is a suit for land to inquire whether such a suit would have been entertained by the English Courts in the exercise of their equitable jurisdiction.

30. In my opinion, therefore, the learned Judge below was in error in coming to the conclusion that he did and I would therefore allow the appeal with costs and send back the suit to be disposed of on merits.

Bhagawati J.

31. This is an appeal from the judgment of Tendolkar J. who held that this Court had no jurisdiction to entertain the suit in so far as it related to prayers (a) and (b) of the plaint on the ground that the suit in regard to those prayers was a suit for land.

32. The questions which arise for our consideration in the appeal are, first, whether the suit in so far as it relates to the prayers (a) and (b) of the plaint is a suit for land within the meaning of the expression in Clause 12 of the Letters

Patent, and, secondly, whether on a true construction of Clause 12 of the Letters Patent this Court has jurisdiction to receive, try and determine suits of every description if 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 Court, or, to put in other words, whether the last alternative in Clause 12 of the Letters Patent beginning with the words "or if the defendant...with in the local limits" is a separate alternative, or is dependent on the earlier alternative beginning with the words "or in all other cases."

33. The facts shortly stated are these. The plaintiffs are a joint stock company incorporated in November 1873 and the defendants were up to November 21, 1940, the secretaries and treasurers of the plaintiffs under the terms of an agency agreement executed between the plaintiffs and themselves. The defendants' appointment as such secretaries and treasurers terminated on the November 21, 1940, when Messrs. Indra Singh and Sons, Ltd., were appointed secretaries and treasurers with the same rights, remuneration, etc., as those enjoyed by the defendants and took charge of the affairs of the plaintiffs from the defendants. It appears that after November 21, 1940, the plaintiffs investigated the management by the defendants of their affairs up to November 21, 1940, and in the first instance called upon the defendants to get transferred to their name some pieces of land standing in the Government records in the name of the defendants but which, the plaintiffs claimed, belonged to them having been purchased by the defendants as nominees of the plaintiffs and for and on their behalf out of the monies of the plaintiffs. The defendants claimed that those pieces of land belonged to themselves and declined to transfer the same to the name of the plaintiffs on various grounds. Apart from this claim which the plaintiffs made against the defendants, the plaintiffs also claimed against the defendants a refund of the commission which the defendants had charged on yarn and cloth from 1913 onwards amounting to about Rs. 50,000 to Rs. 60,000, which the plaintiffs contended the defendants were not entitled to charge the plaintiffs. The defendants had obtained from the plaintiffs a sum of Rs. 650 being the rent of two pieces of land purporting to have been let out by them to the plaintiffs and had got made in the books of the plaintiffs an entry in relation to the said payment. The plaintiffs claimed that this sum of Rs. 650 had been (Sic) obtained by the defendants from them and claimed to recover the same from the defendants. The plaintiffs further claimed that by reason of the various acts of misfeasance and nonfeasance which they had mentioned above the defendants had forfeited their right to earn any commission or remuneration as secretaries and treasurers and claimed that they were entitled to recover from the defendants a sum of Rs. 12,18,655-3-9 being the aggregate of their remuneration from the years 1913 to 1939. The plaintiffs accordingly addressed their attorneys' letter, dated August 19, 1942, to the defendants setting out all the aforesaid facts and contentions of theirs and called upon the defendants to transfer unto them the properties situate within and outside the Mills compound

and other properties belonging to the plaintiffs, to refund to them the wrongful commission which had been charged by the defendants from time to time in respect of yarn and cloth, to refund to the plaintiffs the sum of Rs. 650 wrongfully obtained by them from the plaintiffs and to pay back to the plaintiffs the sum of Rs. 12,18,655-3-9 with interest, being the remuneration, the right to receive which they had forfeited by reason of their misconduct. No reply was sent by the defendants to the plaintiffs' attorneys' letter, and the plaintiffs ultimately filed the suit against the defendants on November 21, 1942.

34. In the suit which they filed against the defendants the plaintiffs set out the various counts which they had mentioned in their attorneys' letter dated August 19, 1942, and added two more counts, viz., (1) a claim for damages which they had to pay to one Waman Motiram and the costs which they had incurred in defending the suit which Waman Motiram had filed against them in respect of 30 gunthas of land comprised in a Ginning Factory at Neri, East Khandesh, which they had sold to Waman Motiram, having in their turn purchased the same from the defendants, and (2) a claim to recover a sum of Rs 5,00,000 which remained due and owing to the plaintiffs by the New East India Press Company Ltd., which they contended had been lost to them by reason of the misconduct of the defendants in so far as the defendants had recovered from the said company their own monies which they had lent and advanced to them without taking care to recover the amount due from the said company to the plaintiffs.

35. On the basis of all these allegations contained in the plaint the plaintiffs claimed several reliefs against the defendants, prayer (a) being for a declaration that the said several pieces of land belonged to and were the property of the plaintiffs and that the defendants had no beneficial interest therein, and prayer (b) being for an order on the defendants to execute all such documents and deeds and do such acts as might be necessary for transferring the said lands to the name of the plaintiffs. Prayer (c) was for repayment of Rs. 650 being the amount wrongfully and unlawfully recovered by the defendants from the plaintiffs as aforesaid. Prayers (d) to (g) were for a rendition of accounts by the defendants of the plaintiffs' affairs and business from the time of the commencement of their agency up to its termination, and ancillary reliefs. Prayer (h) was in the alternative and it was for an order on the defendants to pay to the plaintiffs two specific sums of Rs. 60,000 and Rs. 12,18,655-3-9 and such sums as this Court might seem just as damages for their misconduct in carrying on the affairs of the plaintiffs.

36. These were the prayers which the plaintiffs sought against the defendants. The jurisdiction of the Court was invoked by the plaintiffs in para 17 of the plaint. They averred that the head office of the plaintiffs was in Bombay, that the defendants were liable to account to the plaintiffs in Bombay, that the amount which might be found due on taking such accounts was payable in Bombay, and that the defendants carried on business in Bombay". These were the grounds on which they stated that this Court had jurisdiction to entertain the suit.

37. The defendants filed their written statement and counter-claim on June 3, 1943, in which apart from traversing the allegations in the plaint they counter-claimed that they were the owners of and entitled to the properties mentioned in the schedules annexed thereto and also counter-claimed for possession of certain properties and other ancillary reliefs. The plaintiffs filed their reply to the counter-claim on September 16, 1943.

38. The next important event which happened was on August 11, 1944, when the defendants obtained an order on a notice of motion granting them permission to withdraw their counter-claim, they having been apparently advised that this Court had no jurisdiction to entertain either the claim or the counter-claim relating to Immovable properties situate at Jalgaon outside Bombay. It appears that when the suit was about to reach hearing the plaintiffs were advised that they should amend the plaint by adding para 8A therein. On this amendment being granted by the Court the plaint was amended by adding paragraph 8A to the plaint on August 19, 1946. The defendants then filed their supplemental written statement on September 2, 1946, wherein they specifically pleaded that this Court had no jurisdiction to entertain a claim in the suit relating to the properties situate at Jalgaon. This was the state of the pleadings when the suit ultimately reached hearing before Tendolkar J. on November 20, 1946. On the issues being raised counsel for the defendants applied that the first issue, viz., Whether this Honourable Court has jurisdiction to entertain the suit in so far as it relates to prayers (a) and (b) of the plaint?, should be tried as a preliminary issue. The learned Judge granted the application and that issue was tried as a preliminary issue. On the hearing of this preliminary issue the learned Judge held that this Court had no jurisdiction to entertain the suit with regard to those prayers and answered the issue in the negative. Hence this appeal.

39. The first question which therefore lies to be determined by us is whether the present suit in so far as it relates to the prayers (a) and (b) of the plaint is a suit for land within the meaning of the expression in Clause 12 of the Letters Patent. The expression 'suit for land' has been differently interpreted by different High Courts. There are three different interpretations which have been put on that expression:

- (1) suit for recovery of land,
- (2) suit substantially for land, and
- (3) suit relating to or concerning land.

The last interpretation has been favoured by the Calcutta and the Madras High Courts generally. Our High Court, however, had taken a restricted view of this expression. At one time a Division Bench of our High Court consisting of Gibbs and Melvill JJ. in *Venkoba B. Kasar v. Rambhaji valad Arjun* (1872) 9 B.H.C.R. 12 went to the length of holding that a suit for land was a suit which asked for delivery of the land to the plaintiff. No doubt the learned Judges there were concerned with the interpretation of Section 5 of the Act VIII of 1859 where the

expression "suit for land" occurred. This was, however, the interpretation which they put on the expression "suit for land." When the expression "suit for land" occurring in Clause 12 of the Letters Patent came to be considered by the Appeal Court in *Vaghoji v. Camaji* 6 Bom. L.R. 958 the Appeal Court observed that the view of the learned Judges in *Venkoba v. Rambhaji* was based on the comparison of Section 5 of the Civil Procedure Code, 1859, with Sections 223 and 224 of the Code, that they had no such guide in the Letters Patent for the meaning of the expression "suit for land" so that the determining factor in that case being absent and the decision standing alone was not a decision by which they were bound in construing Clause 12 of the Letters Patent. Since the decision in *Venkoba v. Rambhaji* there is no case which has gone so far until we come to the judgment of Blackwell J. in *Hatimbhai Hassanally v. Framroz Eduljee* 29 Bom. L.R. 498 where the learned Judge held that the expression "suit for land" meant a suit to obtain land. In spite of this expression of opinion by Blackwell J., which stands almost alone in this construction which he put on the expression "suit for land," the whole trend of decisions of our High Court and also the opinion of the majority in the full bench case of *Hatimbhai v. Framroz* has been that the expression "suit for land" means a suit substantially for land, and it is too late in the day to argue as Sir Noshirwan Engineer for the appellants did, that the suit for land meant a suit to obtain land, or a suit for the recovery of land. Our High Court has throughout, except with the solitary exception which I have noted above, adhered to the view for a period, in any event, since some 18 years prior to the case of *His Highness Shrimant Maharaj Yeskvantrao Holkar v. Dadabhai Cursetji Ashburner* I.L.R.(1890) 14 Bom. 353 making a period of almost 34 years up to the decision of the full bench in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate* I.L.R(1925) 50 Bom. 1 that a "Suit for land" is a suit substantially for land. It was only when a contrary decision was reached by the full bench in *India Spinning & Weaving Co. v. Climax Industrial Syndicate* that this trend of decisions was sought to be reversed, though the old position was restored When a contrary decision was reached again by another full bench in *Hatimbhai v. Framroz*. Since then it has not been contended except in the course of the arguments of Sir Noshirwan Engineer, as I have stated above, that a suit for land is a suit to obtain land, or a suit for recovery of land. We may therefore safely assume that a suit for land means so far as our High Court is concerned a suit substantially for land.

40. The word "substantially" however might create some difficulty. What are the suits which the Court would determine to be suits substantially for land? There are various suits which come to be filed by the litigants in the Courts and it falls to be determined by the Court for the purposes of assuming jurisdiction whether the suits are suits for land, or are suits which fall within the description of "all other cases." There is a well known distinction between actions in rem and actions in personam, or between what are otherwise called local and transitory actions. This distinction between local and transitory actions had been adverted to by Lord Herschell L.C. in *British South Africa Co. v. Companhia de Mocambique*

[1893] A.C. 602 :

This gave rise to the distinction between transitory and local actions, that is, between those in which facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased.

Actions in rem or local actions are those actions in which the decision of title to Immovable property is directly involved. These have to be brought in the Courts within whose jurisdiction the Immovable property is situate, and no Court would have jurisdiction to entertain a suit with regard to such Immovable property, if it is not situate within the local limits of its jurisdiction. As regards what may be compendiously described as foreign immovables the principle has been laid down in Halsbury's Laws of England, Hailsham Edition, Vol. VI, p. 218, para. 266:

The English Courts have in general no jurisdiction to determine directly the title to a foreign immovable, nor can they entertain any action which substantially involves the determination of such title. Thus, no action will lie in this country to obtain possession, or to recover damages for dispossession, of foreign land, since the question of title must be determined in order to discover the rights of the parties.

Actions in personam are distinct from actions in rem and fall within the category of transitory actions. They are a separate class of actions in which jurisdiction is exercised by the Courts on the principle "Equity acts in personam." The principle on which this equitable jurisdiction in personam is exercised is thus-enunciated in Halsbury's Laws of England, Hailsham Edition, Vol. VI, p. 221, para. 270:

The English Courts have power to exercise a jurisdiction in personam, in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, i.e., there must be either a fiduciary relationship or privity of some other kind between the parties.

This general principle, however, is subject to certain limitations which are laid down in para. 272 at p. 223 in the same volume. It would be sufficient for our purposes here to notice only a few of them,

Thus, the Courts will not nor will they interfere where to do so would be useless, and it would be impossible for the decree to be carried into effect....

Moreover, as equitable remedies are in the discretion of the Court, jurisdiction will not be exercised (and a fortiori proceedings in foreign Courts will not be restrained by injunction) where, on the whole, the question can be more conveniently decided in the local Courts than in England.? This equitable jurisdiction in personam can be otherwise described in the language which our own legislature has chosen to adopt in the proviso to Section 16 of the CPC by

using the expression: "If relief sought can be entirely obtained through the personal obedience of the defendant.

The Supreme Court established by the Charter of 1823 was the predecessor of our High Court and under Sections 23 and 24 of that Charter it had jurisdiction over all British subjects who resided within any of the factories subject to or dependent upon the Government of Bombay, and that Court had authority to hear and determine all suits and actions whatsoever against any of the said subjects, arising in territories subject to, or dependent upon, that Government. It had also full power to hear and determine all suits and actions that might be brought against the inhabitants of Bombay. The Supreme Court was constituted u/s 36 of the Charter a Court of Equity and was invested with equitable jurisdiction over person or persons therein described for its ordinary civil jurisdiction as therein mentioned. All this jurisdiction of the Supreme Court was inherited by our High Court when it was constituted under the Letters Patent of 1862, though so far as the exercise of the ordinary original civil jurisdiction was concerned, it was circumscribed within Clauses 11 and 12 of the Letters Patent. The same was the position under the Letters Patent of 1865 except for the amendments and additional powers and provisions incorporated in the fresh Letters Patent of 1865, inter alia in el. 12 thereof. This equitable jurisdiction corresponding to that of a Court of Chancery was and has been exercised by our High Court ever since 1862 though Clauses 11 and 12 govern the local limits of the Court's jurisdiction. To use the words of Sir Amberson Marten, in effect this Court or its predecessor has been administering equitable jurisdiction in personam for over a 100 years.

41. Before I proceed to discuss the cases of our High Court in which this equitable jurisdiction in personam has been exercised, it would be worthwhile referring to a few English cases which show what is the nature and extent of the equitable jurisdiction in personam which has been exercised by the Courts in England. In *Harrison v. Harrison* (1872) L.R.8 Ch. App. 342 Lord Seborne L. C. observed (p. 346):

In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract (which might make a difference), depend simply upon the law of the country where the real estate exists. Here there is no question of trust or personal contract at all.?

and at p. 349:

In the first place, as against the real estate in Scotland the Courts of England have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who, in this case, is the Scotch heir. What is that personal equity?

42. In *In re Hawthorne: Graham v. Massey* (1883) 23 Ch. D. 713 Kay J. observed

(p. 746):

An important question of jurisdiction arises in this case.... It is obvious that neither Charles Stewart Hawthorne nor the Defendants is or are with reference to this claim by English law in any fiduciary relation to the Plaintiffs. They are not bound by contract with them. Nor is the claim in any way based upon a suggestion of fraud. It is a bona fide claim on both sides of title to land, or the proceeds of land, in Saxony,

In *Deschamps v. Miller* [1908] 1 Ch. 856 Parker J. observed at p. 863, following In *re Hawthorne: Graham v. Massey* (1883) 23 Ch. D. 743:

In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter.

In *British South Africa Company v. De Beers Consolidated Mines, Limited* [1910] 2 Ch. 502 Kennedy L.J., observed as follows (p. 528):

One of such considerations is generally, if not universally, conclusive. If it is apparent that the contract affects immovables situated out of the jurisdiction, the *lex loci rei sitae*, in general at least, must be taken as the proper law of the contract. In the case of a contract with regard to an immovable, "its proper law is, in general but not necessarily, the law of the country where the immovable is situate": see Dicey, *Conflict of Laws*, 2nd ed., p. 510. But whilst I believe it to be true that an English Court will not assume jurisdiction to deal directly with either the property in or the possession of real estate which forms part of a foreign country or a colony as I had occasion to point out in the recent case of *Bank of Africa, Limited v. Cohen* [1909] 2 Ch. 129 in the judgment which was read by the appellants' counsel in the course of his argument, yet, as I there also pointed out, when an English Court has before it parties to a contract affecting immovables out of the jurisdiction, it will, acting in *personam* and not in *rem*,

"upon the conscience," as it has been put, "of the person living here", when it finds an equitable right enforceable by a judgment in personam, give effect to that equitable right, and so indirectly affect the interests of the litigants in immovable property abroad,

The same position is laid down in the speech, of Lord Herschell L. C. in *British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 602 :?

Whilst Courts of Equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here. In *Lord Cranstown v. Johnston* (1796) 3 Ves. Jun. 170 Sir R.P. Arden, Master of the Rolls, said: *Archer v. Preston*, *Lord Arglasse v. Muschamp*, and *Lord Kildare v. Mustace*, clearly show that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situate in England.? The last case which I need refer to in this connection is the case of *Attorney-General v. Stewart* (1817) 2 Mer. 143 where Sir William Grant M. Rule observed (p. 156):?

The question in this case is, whether a real estate, or the money produced by the sale of a real estate, situated in the island of Grenada, can be legally devised to a charitable use. That is a question, with respect to which no Court in this country has any direct original jurisdiction. All titles to land are, regularly, to be decided upon, in the first instance, by the Courts of local judicature, from whose decision an appeal lies to His Majesty in Council. In the present case, how-ever, it becomes incidentally necessary to decide the question here; there being a fund in Court which is the produce of real estates in Grenada, and which must be differently disposed of, according as the devise shall or shall not be held to be valid.

This then is the nature and extent of the equitable jurisdiction in personam exercised by the English Courts of Chancery and which has been enunciated in the passage from Halsbury's Laws of England quoted, above.

43. The same jurisdiction has been exercised by our High Court as the successor of the Supreme Court from the very commencement. The earliest reported decision of our High Court in this behalf is *Venkoba B. Kasar v. Rambhaji valad Arjun* (1872) 9 B.H.C.R. 12 where the learned Judges held 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 Civil Procedure. They observed that the Court of Chancery, though it had no power directly to affect property situate out of the bounds of its jurisdiction, and would not therefore try the validity of a will of land in the Colonies though made in England, nor entertain a bill of partition, yet would order the sale of an estate in the Colonies, in order to realize a sum of money charged upon it.

44. The next case is the case of *Holkar v. Dadabhai* (1890) ILR 14 Bom. 353. This was a suit for specific performance of an agreement made in Bombay but

relating to land situate outside the ordinary original jurisdiction of the High Court and also to realise a mortgage debt by sale of the said land. The Division Bench of Sir Charles Sargent C.J. and Scott J. held that the Court had jurisdiction to try the suit and to order the sale of the mortgaged land. The ratio decidendi of this decision is to be found" at p. 359:

The construction which the Court of Calcutta would thus appear to have placed on the section...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 *Graham v. Massey*; *In re Hawthorne* (1883) 23 Ch. D. 748 ; and the principle on which they proceed is stated by the Earl of Selborne, L. C., in *Ewing v. Orr Ewing* (1883) 9 App. Cas. 34. "The Courts of Equity in England", he says, "are and always 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 as to subjects which were not either locally or *ratione domicilli* within their jurisdiction.

The present suit, whether it be regarded as a suit for specific performance or to enforce an equitable mortgage by deposit of title-deeds, is clearly one which a Court of Equity in England would entertain: *Paget v. Ede* (1874) L.R. 18 Eq. 118 and in which, as appears from 2 *Spence's Equity Jurisprudence*, p. 678, and *Coote on Mortgages*, Vol. II, p. 992 (5th ed.), they would, if the land were in the colonies where it is the practice in mortgage suits to enforce the security by sale, make an order for sale, instead of one for foreclosure.

The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees in personam? *Martin v. Lawrence* I.L.R(1879) Cal. 655 ; *Hassanbhoj v. Cowasji Jehangir Jassawalla* (1881) ILR 7 Bom. 1?and we think that, had it been intended to exclude suits in personam as well as suits in rem from the jurisdiction of the High Courts, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

Holkar v. Dadabhai was decided in the year 1890. In the year 1894 Farran J. in an unreported judgment, *Kessowji Damodhar v. Khimji Jairam* I.L.R.(1926) 51 Bom. 516 which was since reported in the foot-note in *Hatimbhai v. Framroz*, held, following the decision in *Holkar v. Dadabhai*, that this Court had jurisdiction to entertain the foreclosure suit against the defendant Khimji Jairam. A decree for foreclosure being a decree in personam, it followed as a corollary to that decision that this Court had similar jurisdiction over the 2nd and 3rd defendants to whom Khimji Jairam had mortgaged his right to redeem and who then pro tan to stood in his shoes.

45. The ratio decidendi in *Holkar v. Dadabhai* was followed by Strachey J. in *Sorabji V. Rattonji* I.L.R(1898). 22 Bom. 701. That was a suit for foreclosure, and it was held that a suit for foreclosure was not a suit for land within the meaning of Clause 12 of the Letters Patent and the High Court of Bombay on its original

side had jurisdiction to entertain such suits, although the property in question was situate outside the town and island of Bombay.

46. The next case is that of *Vaghoji v. Camaji* 6 L.R. 958 which was decided by the Division Bench of Sir Lawrence Jenkins C.J. and Batchelor J. The suit was for a declaration that the plaintiffs were entitled to exclusive possession and enjoyment of a talao situate outside the jurisdiction of the Court and that the defendants had no right in or to the same. The plaintiffs sought an injunction to give effect to that declaration and further prayed that it might be declared that they were the exclusive owners of the talao. It was held that the suit was a suit for land and that under the circumstances the Court had no jurisdiction to entertain it. In arriving at this decision, the learned Judges referred to the ratio decidendi in *Holkar v. Dadabhai*, which was to be found in the concluding paragraphs of the judgment there and held themselves bound by the same. They applied the test proposed by Sir Charles Sargent and considered whether the suit before them was a suit which would have been entertained by the Court of Equity in England in relation to land abroad. The following passages from the judgment are important to note (p. 256):

An examination of the authorities appears to me to establish the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad, where as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case of which I am aware has the Court Of Equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land.

and (p. 258):

Taking the words therefore in their fair natural meaning, can there be any doubt that this is a suit for land? 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.

It may be observed that this judgment and the two passages which I quoted there-from just now were considered by the learned Judge below to be decisive of the case. The learned Judge read these passages as meaning that there would be no jurisdiction to entertain a suit for the declaration of title to land even if the suit was based on contract, trust or fraud or any circumstance giving rise to privity between the parties. With great respect to the learned Judge this reading of the two passages from the judgment of the Appeal Court in *Vaghoji v. Camaji* is not justified. If regard be had to the passages quoted by me above from the authorities in England and the summary of the whole position as it has been enunciated in the passages from *Halsbury's Laws of England*, Vol. VI, also

quoted by me above, the position is that the Courts in England have exercised jurisdiction in personam in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, trust or fraud provided that the decision of title be not directly involved. Subject, therefore, to this limitation that the decision of title to foreign immovables be not directly involved, the Courts in exercise of the equitable jurisdiction in personam have always entertained suits even though they may be in respect of foreign immovables provided the persons affected thereby were within the jurisdiction and where the claim was based on contract, trust or fraud, or circumstances giving rise to privity between the parties. It is only in those cases where the purpose, i.e. the leading purpose of the suit, was to obtain a declaration of title to foreign land, i.e. in cases where the decision of title to foreign land was directly involved, that the Courts have refused to exercise the equitable jurisdiction in personam. The learned Judge with great respect failed to appreciate the true position as it emerges from the consideration of the English authorities which I have referred to above and wrongly advised himself as to the reading of the two passages from the judgment of Sir Lawrence Jenkins C.J. in *Vaghoji v. Camaji*. This jurisdiction in personam was exercised by Batchelor J. in *Hunsraj v. Runchordas* (1905) 7 Bom. L.R. 319. In that suit the defendant had contracted to sell to the plaintiff a plot of land situate outside the local limits of the original jurisdiction of the High Court. The defendant resided in Bombay. The plaintiff brought a suit on the original side of the High Court, to get specific performance of the agreement to sell the land, the prayer being that the defendant be ordered specifically to perform the said agreement, and upon his making out a marketable title to the said land to execute a conveyance thereof in favour of the plaintiff. The learned Judge observed (p. 324):

It is not denied that the High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees in personam. Without regard, then, to the ultimate end or purpose of this suit it is immediately a suit to enforce the specific performance of a contract, and as such is within the jurisdiction in accordance with the principles adopted by Sir Charles Sergeant,⁷ (the reference obviously being to *Holkar v. Dadabhai*).

The ratio decidendi in *Holkar v. Dadabhai* was thus followed by the learned Judgment arriving at this decision.

47. In 1916 a division bench of our Court consisting of Sir Basil Scott C.J. and Heaton J. in *Venkatrao Sethupathy v. Khimji Assur Virji* (1916) 26 Bom. L.R. 535 followed the ratio deci-dendi in *Holkar v. Dadabhai* even though the correctness of it was challenged in the arguments before them. The suit was a suit by a mortgagee to enforce his right under the mortgage. The land mortgaged was outside the local limits of the ordinary original jurisdiction of the Court, and it was held, following *Holkar v. Dadabhai* and *Sorabji v. Rattonji*, that the High Court had jurisdiction to entertain the suit. The learned Chief Justice there

observed that in 1890 when *Holkar v. Dadabhai* was decided this Court had for 18 years exercised jurisdiction over cases like those and since *Holkar*'s case this Court had exercised jurisdiction in similar cases for a further period of 27 years thus making a consecutive period of 45 years during which the practice was uniform to exercise jurisdiction relating to land outside the presidency. This decision was not reported in the year 1916 when it was pronounced, but came to be reported in the year 1924 in *Venkatrao v. Khimji* along with a later decision in 1922 pronounced by Sir Lallubhai Shah in *Jasraj v. Akubai* (1922) 26 Bom. L.R. 539. That was a suit by a mortgagee to enforce the mortgage against property situated outside the local limits of the ordinary original civil jurisdiction and against mortgagors living outside the jurisdiction. Sir Lallubhai Shah there doubted the correctness of the decision in *Holkar v. Dadabhai* in view of the Privy Council decision in *Harendra Lal Roy Chowdhuri v. Hari Dassi Debi* 16 Bom. L.R. 400. The learned Judge found it difficult to reconcile the view taken by their Lordships of the Privy Council in that case of *Harendra Lal Roy Chowdhuri v. Hari Dassi Debi* with the decision in *Holkar v. Dadabhai*. He was, however, referred to the unreported judgment of the Appeal Court in *Venkatrao v. Khimji* and having read that judgment which was binding on him came to the conclusion that he would not be justified in not following *Holkar v. Dadabhai*. He referred to the fact that the practice of this Court had been consistently to entertain such suits even after the judgment of the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dassi Debi* and considered that so far as this Court was concerned the point must be treated as concluded by the judgment in *Venkatrao v. Khimji*, The ratio decidendi of *Holkar v. Dadabhai* was therefore reaffirmed and was followed by Sir Lallubhai Shah in *Jasraj v. Akubai*.

48. Sir Lallubhai Shah had occasion to consider this aspect of the case in *Mahomedally Adamji v. Abdul Hussein* 26 Bom. L.R. 163 constituting the division bench of this Court along with Crump J. The suit was a suit for the administration of the estate of one Adamji, a Broach Mahomedan, who died intestate leaving property including Immovable property at Kurla outside the ordinary jurisdiction of the Court. One of the sons had claimed the Kurla property as his own stating that his father had made a gift of it to him. In the administration suit which was filed the Appeal Court consisting of Sir Norman Macleod C.J. and Shah J. had held in *Abdul Hussein v. Mahomedally Adamji* 23 Bom. L.R. 1326 that an administration suit was not a ?suit for land? within the meaning of Clause 12 of the Letters Patent and that the High Court could entertain an administration suit even though there were Immovable properties alleged to be belonging to the estate of the deceased outside the limits of its ordinary original civil jurisdiction. The point was however kept open for argument if and when the question fell to be determined on the reference proceeding before the Commissioner. When the reference was proceeding before the Commissioner this question as to the title to the Kurla property was sought to be gone into and a special report was made by the Commissioner in order to have it determined by the Court whether the question of title to the Immovable property at Kurla could be tried. Sir Lallubhai

Shah and Crump J. held that the High Court could in an administration suit determine the question whether certain Immovable property situated outside the territorial limits of its jurisdiction belonged to the deceased at the time of his death even though leave under Clause 12 of the Letters Patent was not obtained. The learned Chief Justice there observed (p. 334):

The question to my mind is not now whether the suit in respect of this property so far as it relates to this property is a suit for land or not, but whether such an inquiry is appropriate in an administration suit. It must be taken now, as held by this Court in *Abdul Hussein v. Mahomedally Adamji*, that an administration suit as such is not a suit for land within the meaning of Clause 12. This question is really an incident of the administration suit.

49. The learned Chief Justice there referred to the observations of their Lordships of the Privy Council in *Benode Behari Bose v. Nistarini Dassi* I.L.R.(1905) Cal. 180 and fortified himself in the decision which he arrived at. *Vaghoji v. Camaji* was referred to in the course of the arguments as supporting the position that it was a suit for land. The learned Chief Justice considered this argument and observed (p. 336):

But even assuming, for the sake of argument, that the observations in *Vaghoji v. Camaji* afford some guidance in determining whether the Court has jurisdiction to determine the question of title or not, I am unable to hold that there is anything in those observations which really helps the respondent.

Apart from the consideration that these observations were not made with reference to an administration suit, it is clear that it could not be said in this case that there are no circumstances giving rise to privity between the parties in this case. It is quite true that this is not a case of fraud. But this is a case of privity between the parties to the suit where one of the heirs contends that the property was given over to him by way of gift by his deceased father and the other heirs contend that it continued to form part of the estate of the deceased. In such a case it is difficult to say that on the strength of the observations in *Vaghoji v. Camaji* it can be held that the question between the parties so situated relating to the question of title would be outside the jurisdiction of this Court even though the immovable property may be beyond the limits of the territorial jurisdiction of this Court.

50. This decision in effect goes to show that the Court did exercise the equitable jurisdiction in personam especially on the ground that it was a case of privity between the parties to the suit.

51. A further decision of Fawcett J. in *K.C. Shriman Nedan Rajah Kotakal Vs. The Malabar Timber Co. Ltd.*, may be noted in this connection though the learned Judge resiled from it in *Hatimbhai v. Framroz*. It was held by the learned Judge there that the High Court of Bombay had, under Clause 12 of the Letters Patent, jurisdiction in personam, in regard to lands situate outside its original jurisdiction and it could therefore entertain a suit by a vendor to declare a charge upon such

lands for his unpaid purchase money as against a vendee or his assignee, residing or carrying on business in Bombay.. The first question which was addressed by the learned Judge to himself was whether, as ruled in *Holkar v. Dadabhai*, this Court had jurisdiction in personam in regard to land outside the jurisdiction of the Court. The learned Judge answered the question in the affirmative after discussing the various cases beginning with *Holkar v. Dadabhai*, which I have discussed above. He held that *Holkar v. Dadabhai* was neither overruled nor shaken to an extent that ought to prevent him from following it. In view of the doubt which had been cast upon the correctness of that decision by the decision of their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dassi Debi*, the learned Judge gave an interlocutory judgment where he held that the Bombay decisions had not been overruled by that decision of the Privy Council. He pointed out that there were two other cases where such jurisdiction in personam had been exercised by the Madras and Calcutta High Courts respectively and the Privy Council had held that the High Courts had jurisdiction to do so. He referred to the cases of *Benode Behari Bose v. Nistarini Dassi* and *Srinivasa Moorthy v. Venkata Varada Aiyangar* 13 Bom. L.R. 520 both of which were cases decided by the Privy Council and which had affirmed the jurisdiction in personam exercised by the High Courts. This decision is important as laying down that in spite of the decision of their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dassi Debi* the ratio decidendi of *Holkar v. Dadabhai* was considered good.

52. The next case to be referred to in this connection is *India Spinning and Weaving Co., Limited v. Climax, Industrial Syndicate*, which was a decision by the full bench overruling *Holkar v. Dadabhai*, *Sorabji v. Rattonji*, *Venkatrao v. Khimji* and *Jesraj v. Akubai*. This decision was in its turn overruled by the full bench decision in *Hatimbhai Hassanally v. Framroz Eduljee Dinshaw*, The only thing which is necessary to refer to in this decision is the remarks of Sir Norman Macleod at p. 26, where he says:

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,

53. When we come to *Hatimbhai Hassanally v. Framroz Edulji*, we find the position taken up in *India Spinning and Weaving Co., Limited v. Climax Industrial Syndicate* reversed and we also find *Holkar v. Dadabhai* and *Venkatrao v. Khimji* approved. The judgments in this full bench case are very elaborate and it is not necessary for me to go into any particular details with regard thereto, I would not have found it necessary to even go into these judgments in the manner which I propose to do but for the fact that an argument was advanced before the learned Judge below and was accepted by him that the ratio decidendi in the case of *Holkar v. Dadabhai* was given a decent burial by the full bench in *Hatimbhai Hassanally v. Framroz Edulji*. The learned Judge has observed in his

judgment that the full bench has not applied what Strachey J. considers as the ratio decidendi in *Holkar v. Dadabhai* for the purpose of determining what is a suit for land and therefore that ratio decidendi should be taken as discarded. The learned Judge referred to a quotation from the judgment of Marten C.J. at p. 551 and observed that apart from the quotation there was not a word in any of the judgments of the full bench about this ratio decidendi. He took the judgment of Marten C.J. as indicating clearly that the learned Chief Justice did not accept that ratio decidendi and he merely considered that Sargent C.J. had referred to the equity jurisdiction in personam for the purpose of illustrating the real nature of a mortgage suit. Even though the full bench approved the decision of *Holkar v. Dadabhai* the learned Judge was not prepared to hold that they approved of what Strachey J. calls the ratio decidendi of the case. In the view therefore which he took that the full bench had given a decent burial to that ratio decidendi, he considered it was not open to him to revive it from its ashes and he therefore did not think it necessary to consider whether a suit like the present one would have been entertained by Courts of Equity in England although the question was argued before him at length. With great respect to the learned Judge, it appears that he has not correctly read the judgment of Marten C.J. and the judgments of some of the other Judges constituting the full bench in that case. If one goes to the judgment of Marten C.J. one finds at p. 535 an affirmation of the position 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, a paraphrase really of the position that the Court exercised jurisdiction in personam. At p. 536, again, the learned Chief Justice talks of the position which would obtain in the event of a decree for sale being effected:

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.

54. He again observes at p. 537:

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.

55. This jurisdiction in personam is emphasised by the learned Chief Justice at p. 538, where he definitely observes:

In effect, therefore, this Court or its predecessor has been administering an equitable jurisdiction in personam for over one hundred years.

At p. 547 the learned Chief Justice substantially agrees with the passage from the judgment of Sir Basil Scott in *Venkatrao v. Khimji*, which in so many words talks of the Court assuming jurisdiction with regard to immovable property 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. In view of all these observations to be found in the judgment of the learned Chief Justice, I find it impossible to agree with the learned Judge below where he comments on the passage occurring at p. 551 of the judgment and the inference which he draws therefrom that the learned Chief Justice there did not follow the ratio decidendi of *Holkar v. Dadabhai* and wanted to give a decent burial to the equitable jurisdiction in personam exercised by our Court. There is a reference to this equitable jurisdiction in personam also at pp. 560 and 561 and the judgment of the learned Chief Justice tends to the same conclusion that it was far from his mind to disavow the ratio decidendi in *Holkar v. Dadabhai* and affirm that this Court had no jurisdiction in personam, the jurisdiction which had been exercised by this Court and its predecessor for over a hundred years. Blackwell J. at p. 674 no doubt stated that there is no independent equity jurisdiction apart from Clause 12 of the Letters Patent, and that unless a suit was brought within the four corners of Clause 12, this Court had no jurisdiction to entertain it by seeking to apply the equity powers of the Courts in England, or any other powers. Nobody need quarrel with that proposition at all. The limits of the ordinary original civil jurisdiction of this Court are circumscribed within Clauses 11 and 12 of the Letters Patent, and in order to determine whether this Court has jurisdiction to entertain any suit resort must be had to the provisions of Clause 12 of the Letters Patent. That does not mean however that in arriving at the conclusion whether this Court exercised equity jurisdiction in personam resort cannot be had to the principles of the exercise of equitable jurisdiction in personam by the Courts of Chancery in England, and the ratio decidendi in *Holkar v. Dadabhai* which has been all throughout adopted by our Court, though no doubt it can only be done within the four corners of Clause 12 of the Letters Patent. If at all, this judgment of Blackwell J. also shows that there is an equitable jurisdiction in personam but that it should be sought for within the four corners of Clause 12 of the Letters Patent and not independently or outside it. Fawcett J. no doubt does not discuss this position or this aspect of the case at all. He observes, however, (p. 607):

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.

Here again one need not quarrel with the proposition as laid down. What is important to note is that the learned Judge does not say that there is no jurisdiction in personam which can ever be exercised by this Court, though within the ambit of Clause 12 of the Letters Patent. On the contrary, when one goes to pp. 608 and 609 of his judgment, one finds an affirmation of the jurisdiction in personam by reason of the decisions of their Lordships of the Privy Council in *Benode Behary Bose v. Nistarini Dassi* and *Srinivasa Moorthy v. Venkata Varada Ayyan-gar* I.L.R.(1906) .mad. 239. The learned Judge there emphasises the fact of the reliefs in personam, another way really of saying that the Courts there were exercising jurisdiction in personam. In the judgment of Kemp J. at p. 634

there is a reaffirmation of the ratio decidendi in *Holkar v. Dadabhai* in so far as he observes:

In my opinion the ratio decidendi in *Holkar*'s case appears, notwithstanding, to have been the accepted test in this Presidency until the recent decision in *India Spinning and Weaving Co., Limited v. Climax Industrial Syndicate*.

By the very reversal of *India Spinning and Weaving Co., Ltd. v. Climax Industrial Syndicate*, to which the learned Judge was a party, it would necessarily follow that this ratio decidendi, if at all it was given any burial in *India Spinning and Weaving Co.*'s case was resuscitated by the full bench decision in *Hatimbhai Hassanally v. Framroz Edulji Dinshaw*. There is a discussion as to the jurisdiction in personam at p. 642 of the judgment of the learned Judge which seems to me to assume the jurisdiction in personam though it has to be exercised within the ambit of Clause 12 of the Letters Patent. The judgment of *Mirza J.* at p. 656 discusses the principles on which the Courts of Equity in England act in such cases. The learned Judge quotes the passages from *Dicey* in his *Conflict of Laws* and *Westlake* in his *Private International Law* and demarcates what are the limits within which the Courts of Equity exercise such jurisdiction. The learned Judge discusses the limitations of the exercise of equitable jurisdiction in personam by our Court with special regard to the provisions of O. XXI and Order XXXIV of the CPC and comes to the conclusion that those provisions are not appropriate to a mortgage decree and the execution thereof. The whole discussion proceeds on the basis that a mortgage decree may be regarded as a decree in personam, but the learned Judge points out the difficulties in the matter of the execution of such a decree. He finally winds up by saying (p. 659):

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.? I do not construe these remarks of the learned Judge as meaning that this Court has no jurisdiction in personam of the type exercised by the Courts of Chancery in England. *Patkar J.* observes (p. 703):

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 CPC mofussil Courts are invested with that jurisdiction.

With great respect to the learned Judge, I do not think that it was ever the intention of the legislature to invest the mofussil Courts with higher powers than those which were enjoyed by the High Court, even though within the ambit of Clause 12 of the Letters Patent. The powers of the High Court with regard to the equitable jurisdiction in personam which it inherited from the Supreme Court were neither expressly nor by necessary implication abrogated by the enactment of Clause 12 of the Letters Patent. The jurisdiction had got to be exercised within

the ambit of Clause 12 of the Letters Patent, but that jurisdiction was not only for entertaining actions in rem, it was also for entertaining actions in personam. Taleyarkhan J. at p. 706 agreed with Marten C.J. and expressed no opinion one way or the other whether the ratio decidendi in Holkar v. Dadabhai was incorrect or was not acceptable. He preferred to rest his opinion on the broad ground that the suit by a mortgagee for realisation of the money advanced by him to the mortgagor by sale of the mortgaged property was substantially a suit for the recovery of the mortgage debt and as such not a suit for land within the meaning of Clause 12 of the Letters Patent.

56. Having regard to what I have stated above, it follows that Marten C.J. emphasised and most of the Judges accepted the position that the High Court had jurisdiction in personam, had exercised it and was exercising it, and the ratio decidendi in Holkar v. Dadabhai was not only not given a burial but was resuscitated by the reversal of the full bench decision in India Spinning and Weaving Co., Ltd. v. Climax Industrial Syndicate. The absence of an elaborate discussion of this ratio decidendi in Holkar v. Dadabhai from the judgments of the other learned Judges in the full bench case of Hatimbhai Hassanally v. Framroz Edulji Dinshaw may be explained by reason of the fact that their attention was mainly concentrated on the question whether the mortgage suit was a suit for land, in which case it being a local action it would be excluded from the category of transitory actions and actions where relief sought could be entirely obtained through personal obedience of the defendant.

57. The last case which I need refer to in this connection is the case of Central Bank of India v. Nusserwanji 34 Bom. L.R. 1384. It was a case of an equitable mortgage of immovable property situate at Itola in the Baroda State. Kama J. observed (p. 240):

A suit to enforce a mortgage by sale of the mortgaged property is not considered to be a suit for land within the meaning of clause 12 of the Letters Patent, but on the ground that the Court can grant the relief in personam, the Court has assumed jurisdiction to order a sale of the mortgaged property. These propositions apply to all the mortgages and are equally good in respect of an equitable mortgage. For these reasons the non-existence of the distinction between legal and equitable estates in Indian Acts does not affect the situation. Having regard to the observations of the Court in Halimbhai's case, a mortgagee holding an equitable mortgage in India is in the same position as a mortgagee under an equitable mortgage under the English law for the purpose of determining the jurisdiction of the Court to grant the relief by sale of the mortgaged property. Therefore, as under the English law, on the facts of the present case the relief by way of sale of the property could have been granted, I do not see any reason why in this suit such relief should not be granted to the plaintiffs. The validity or invalidity of the transaction according to the law of the Baroda State on the ground that the formalities of the law of that State were not observed is immaterial, because the relief granted is a relief in personam.? These

observations of the learned Judge also emphasise the equitable jurisdiction in personam exercised by the High Court.

58. It remains for me only to consider how far this equitable jurisdiction in personam is affirmed or disaffirmed by the various decisions of the Privy Council. In the course of the discussion above I have already referred to the Calcutta and Madras cases which went up to the Privy Council. The Calcutta case was *Nistarini Dassi v. Nundo Lal Bose* I.L.R.(1899) Cal. 891. It was an administration suit and in the course of that administration suit certain leases of immovable property granted by the executors to themselves were sought to be set aside on the ground that such leases were acts of mal-administration. The properties comprised in the leases complained of were wholly outside the limits of the ordinary original civil jurisdiction of the Court. It was however held that if the High Court had jurisdiction to entertain such an administration action, the fact that the property comprised in the leases complained of was wholly outside the limits of its ordinary original civil jurisdiction did not preclude it from setting aside such leases, and leave for that purpose under Clause 12 of the Charter was not necessary. The ground of the decision was that the Court assumed jurisdiction in regard to immovable properties situate outside its jurisdiction in cases where it could act in personam either to compel the owner to give effect to legal obligations into which he had entered or to a trust reposed in him. Stanley J. in the course of his judgment observed (p. 921):

The suit is one for the administration of the real and personal estate of Mohendra Nath Bose a portion of whose immovable property is without the jurisdiction, while other portions are within the jurisdiction of this Court. The suit is merely to have this 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. This does not turn the suit into one for the recovery of immovable property. If the trustee had assigned some of the properties to a stranger, and recovery of 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. The Court assumes jurisdiction in regard to immovable 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. All that is sought here is that the Court in administering this estate shall act in personam and compel the trustees and executors to fulfil their obligations.

59. An appeal was filed from this decision and it came for hearing before the Appeal Court of Calcutta. The decision of the Appeal Court is reported in *Nistarini Dassi v. Nundo Lal Bose* I.L.R.(1902) Cal. 369. The Appeal Court there held that it was not a suit for land, that it was a suit for administration, and as incidental

to that suit for a declaration that certain leases which the executors of the estate granted to themselves could not stand as against the plaintiff, the beneficiary. This was one of the grounds on which the Appeal Court held that it was not a suit for land. The matter went up to the Privy Council and the decision of their Lordships of the Privy Council is reported in *Benode Behari Bose v. Nistarini Dassi* 7 Bom. L.R. 887. Their Lordships observed as under (p. 191):

On the question of jurisdiction their Lordships consider the decision right. The primary object of 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. Nor does the circumstance that a decree had been granted by the court of the 24 Pergunnahs making a fraudulent award an order of court protect that decree from the jurisdiction of the Calcutta court, when redressing that fraud. 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.

60. The Madras case is the case of *Srinivasa Moorthy v. Venkata Varada Ayyangar* ILR (1905) Mad. 239. The Appeal Court consisting of Sir Arnold White C.J. and Section Subramania Ayyar J. there held (p. 217):

The preliminary order for the general administration of the estate of the deceased was not open to objection on the ground that part of the immovable property of the deceased was situated in Mysore. In compelling the defendant to perform the trusts of the will the Court is acting in personam, and when so acting has the same jurisdiction with regard to any contract made or equities between persons here as it has where the lands or assets are locally situate within the jurisdiction.

An appeal was filed from this decision to the Privy Council and the judgment of their Lordships of the Privy Council is reported in *Srinivas Moorthy v. Venkata Varada Aiyangar* 13 Bom. L.R. 520. Their Lordships observed at p. 267 that the question of jurisdiction was too plain for argument. No doubt in the part of the judgment which followed their Lordships stressed the point of the defendant dwelling within the jurisdiction of the court. The fact however remains that this point as to the jurisdiction in personam was before their Lordships of the Privy Council and no observations were made by their Lordships in any manner whatsoever throwing any doubt on or rejecting the position which had been taken up by the learned Judges of the Appeal Court in Madras.

61. The latest decision of the Privy Council in this behalf which I need refer to is that of *Bilasrai Joharmal v. Shivanarayan Sarupchand* (1943) 46 Bom. L.R. 518. Their Lordships of the Privy Council observe (p. 521):

It does not appear that any objection was taken at the trial to the jurisdiction under Clause 12 of the High Court's Letters Patent, and their Lordships are satisfied that there was no defect of jurisdiction in that sense. As a Court of Equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connection with rights to property situated abroad.

If any affirmation of this proposition was needed that the High Court has equitable jurisdiction in personam of the type which the Courts of Chancery in England had and have exercised, it is to be found in these observations of their Lordships of the Privy Council in *Bilasrai Joharmal v. Shivnarayan Sarupchand*.

62. I may observe that in exercising this equitable-jurisdiction in personam, though within the ambit of cl.12 of the Letters Patent, the High Court is not assuming jurisdiction to entertain what are called local actions or actions in rem in relation to land situate outside the local limits of its ordinary original jurisdiction. Suits substantially for land within the meaning of the expression "suit for land" as it has been adopted by our Court are suits which are local actions or actions in rem, the main purpose of which is to decide questions as to the title to land. These suits must be brought within the jurisdiction of the Court within which the land or immovable property is situate. The leading purpose of such suits is to establish the title to what may be compendiously described as foreign land, or foreign immovables, Such suits are not entertained even by the Courts of Chancery in England in exercise of the equitable jurisdiction in personam. Where, however, the jurisdiction is exercised in personam, the party affected is within the local limits of the jurisdiction of the Court, and the action is based on contract, trust or fraud or any circumstance giving rise to privity between the parties, the action is an action in personam in the exercise of the equitable jurisdiction in personam which the Court possesses and the leading purpose of such a suit is not to obtain a declaration of title to foreign land but to enforce the equitable jurisdiction in personam. It may be that in the exercise of such equitable jurisdiction in personam questions of title to foreign land may incidentally arise and the Court would in those cases certainly go into those questions. That does not, however, convert a suit which is an action in personam into an action in rem or a local action. For determining whether an action is a local action or an action in rem, or is a transitory action or an action in personam, what one has got to see is the leading purpose of the suit. If the leading purpose of the suit is to obtain a declaration of title to foreign land, it is an action in rem or a local action and it is a suit for land. If the leading purpose of the suit is the exercise of the equitable jurisdiction in personam, it is an action in personam or a transitory action and it is not converted into an action in rem or a local action merely because questions of title to foreign land incidentally arise in the exercise of that jurisdiction in personam.

63. As illustrations of these actions in personam attention has been already drawn to the administration suits or suits for the execution of trusts, the like of

which we had in *Nistarini Dassi v. Nando Lall Bose and Srinivas Moorthy v. Venkata Varada Ayyanger*, Another illustration may be given by referring to what may develop to be the position in partnership suits. A partnership may have acquired in the course of its being carried on assets in the shape of immovable property which may be situate within the jurisdiction or which may be situate even outside the jurisdiction of the Court, A partner may claim that a certain property which is alleged to belong to the partnership belongs to him individually and does not belong to the partnership. The leading purpose of the suit is to obtain a dissolution of the partnership and take the partnership accounts between the partners. In the course of that suit, however, it would be necessary to ascertain what are the assets of the partnership, movable as well as immovable, and ancillary thereto may arise a question whether a certain property alleged by a partner to belong to him really belongs to him or belongs to the partnership and that property may just as well be situate outside the jurisdiction of the Court. The Court would in that case have certainly jurisdiction to entertain the suit and to determine the question of title to what may be compendiously described as foreign land incidentally and as a part of the winding up of the affairs of the partnership. There could be no objection on the ground of the suit for such determination of title to foreign land being a suit for land and not being capable of being entertained by the Court. It would be a suit based on contract, or circumstances giving rise to privity between the parties and certainly, within the equitable jurisdiction in personam which is exercised by the Court.

64. With regard to the exercise of such jurisdiction by the Court there would be no objection also on the ground of any inherent lack of jurisdiction in the Court to determine such questions of title to foreign land. If the legislature has so intended, it is open to the Courts of a country to exercise jurisdiction even over foreign land and determine questions of title relating thereto, though as a matter of prudence and having regard to the various limitations which have been set on the exercise of such jurisdiction as enunciated in Halsbury's Laws of England, Vol. VI, p. 223, para 272, the Court may not exercise that jurisdiction. As instances of this exercise of jurisdiction may be pointed out cases where with leave under Clause 12 of the Letters -Patent a suit can be entertained even as regards properties situate outside the jurisdiction or foreign properties by a Court where a part of the properties, the subject-matter of the suit, is situate within jurisdiction. If by reason of the part of the property being situate within jurisdiction the Court could have jurisdiction to entertain suits with regard to foreign land, wherever situate, provided leave under Clause 12 of the Letters Patent were asked for and granted, there is certainly no question of a lack of inherent jurisdiction in the Court to try questions of title to foreign land even though they may be directly involved. If that be the position, there is certainly no question of inherent lack of jurisdiction in a Court to try questions as regards the determination of title to foreign land where they incidentally arise in cases where the Court exercises its equitable jurisdiction in personam.

65. As a result of the above I have come to the conclusion that this Court has and does exercise the equitable jurisdiction in personam which has been exercised by the Courts of Chancery in England and assumes jurisdiction over lands outside the local limits of its jurisdiction where as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud and that where the suit is based on contract, trust or fraud, or any other circumstances giving rise to privity between the parties, the Court would have incidentally or ancillary thereto jurisdiction to determine questions as to the title to foreign land, provided, however, that the main or leading purpose of the suit is not to obtain a declaration of title to foreign land, meaning thereby land outside the local limits of the ordinary original jurisdiction of the High Court. I, therefore, disagree with the conclusion arrived at by the learned Judge below and his reading of *Vaghoji v. Camaji*.

66. This leads me to consider what is the leading purpose of the present suit. Is it a suit substantially for land or a suit filed by the plaintiffs against the defendants of the nature of an action in personam which this Court would have jurisdiction to entertain in the exercise of its equitable jurisdiction in personam. I have already referred to the plaint in the earlier portion of my judgment, and I will therefore not refer to it in such detail as I would otherwise have done. Paragraph 1 of the plaint describes the plaintiffs and the manner in which various lands were acquired by the plaintiffs in the course of their business, though through the instrumentality of the defendants, their secretaries and treasurers. Paragraphs 2 and 8 describe the defendants as the secretaries and treasurers of the plaintiffs under the agency agreement which has been therein referred to, and point out that the defendants continued to be the agents and the secretaries and treasurers of the plaintiffs up to November 21, 1940, when their agency was terminated. Paragraphs 4 to 8 refer to the immovable properties which according to the plaintiffs were purchased by the defendants in their name, though for and on behalf of the plaintiffs and out of the funds or monies of the plaintiffs. They set out the claim of the plaintiffs as the beneficial owners of these properties and also set up the rival claim which had been put forward by the defendants as owners of these properties. They also refer to the payment of Rs. 650 which had been obtained by the defendants from the plaintiffs by way of rent of some of the immovable properties purported to have been rented by them to the plaintiffs. Paragraphs 9, 10 and 11 refer to the double commission on yarn and cloth which the defendants had obtained from the plaintiffs during the time that the defendants were their secretaries and treasurers. Paragraph 12 refers to the Neri, East Khandesh, factory and the deficit of 30 gunthas from the area in respect of which Waman Motiram had filed a suit against the plaintiffs and the plaintiffs claim to recover from the defendants the damages which they had to pay to Waman Motiram and the costs incurred by them in the said litigation. Paragraph 13 refers to the advances of large sums of moneys of the plaintiffs to the New East India Press Company Ltd. during the period of the defendants' management of their affairs and the fact of the defendants having recovered

their own moneys from the company but having failed to recover the monies due by that company to the plaintiffs and the claim arising there from. In paragraph 14 of the plaint the plaintiffs have contended that the account between them and the defendants should be reopened and the defendants should be ordered to render an account to the plaintiffs of their management of the plaintiffs' affairs from the beginning of the agency until its termination, or in any event, the plaintiffs be given leave to surcharge and object to the accounts. In paragraph 15 of the plaint the plaintiffs have claimed that the defendants are not entitled to keep the remuneration received from the plaintiffs in respect of the agency by reason of the wrongful acts of the defendants which constitute gross misconduct in the exercise of their duties as the plaintiffs' agents. These are the averments in the plaint on which the various prayers of the plaint are based, and the prayers as I have already stated refer in prayers (a) and (6) to the lands situate in Jalgaon, in prayer (c) to the sum of Rs. 650 being the amount obtained by the defendants from the plaintiffs by way of rent of some of the lands and in prayers (d), (e) and (f) to the rendition of accounts by the defendants to the plaintiffs of the defendants' management of their affairs, with a prayer (h) in the alternative for payment of specific suras and damages. The learned Counsel for the respondents has urged that this plaint must be dissected and divided into two separate parts, one relating to the lands and the payment of Rs. 650 and the other relating to the rendition of accounts. According to his submission the plaintiffs have-rolled into one suit two distinct claims and causes of action, (1) in respect of the lands, situate at Jalgaon and (2) in respect of the rendition of the accounts by the defendants, the secretaries and treasurers of theirs, up to November 21, 1940. If that submission was correct, it would follow that there are two distinct actions rolled into (1) an action in rem or local action with regard to lands situate at Jalgaon, and (2) an action in personam or a transitory action with regard to the rendition of accounts by the defendants. The counsel for the appellants has on the other hand submitted that the leading purpose of the suit is to have accounts taken of the dealings and transactions of the defendants, the secretaries and treasurers of the plaintiffs, with the affairs of the plaintiffs both in regard to the movable and immovable properties of the plaintiffs from the commencement of the agency until termination thereof on November 21, 1940, and consequential reliefs including the transfer of the property standing in the name of the defendants to the name of the plaintiffs. He has submitted that in order to grant such relief to the plaintiffs it may be necessary as ancillary thereto or incidentally to determine the question of title of the plaintiffs to the lands situate at Jalgaon which are claimed by the plaintiffs as belonging to them on the various grounds urged in the letter of August 19, 1942, and paragraphs 4 to 8 and 8A of the plaint. That would, however, according to his submission not convert the suit which is a suit for the accounts of the dealings and transactions of the defendants as the agents of the plaintiffs with the affairs of the plaintiffs both regarding movable and immovable properties, into a suit the leading purpose of which would be the determination of the title of the plaintiffs to the lands situate at Jalgaon.

67. On a reading of the plaint as it stands before me, I accept the submission of counsel for the appellants and reject the submission of counsel for the respondents. It is not possible to dissect or divide the plaint in the manner sought for by counsel for the respondents. The suit is a compendious or a comprehensive suit filed by the plaintiffs, the principals, against the defendants, the agents, to have the rendition of accounts by the defendants of all their dealings and transactions with the affairs of the plaintiffs from the commencement of the agency until the termination thereof. The purchases of the immovable properties in the name of the defendants being alleged to have been made out of the funds of the plaintiffs in the hands of the defendants and for and on behalf of the plaintiffs would also be an item in the accounts between the defendants and the plaintiffs. If it was established that these, properties were, as alleged, purchased by the defendants in their own name though out of the funds of the plaintiffs and for and on behalf of the plaintiffs, it would be a matter of course for the Court to order the defendants to transfer these properties to the name of the plaintiffs. It would be an act to be done by the agents in the rendition of the accounts of the agency to their principals, the plaintiffs. If in the course of their management of the affairs of the plaintiffs they handled the funds or the movables of the plaintiffs in the manner in which it is alleged they did, and obtained those immovable properties which are claimed by the plaintiffs in their name but really for and on behalf of the plaintiffs, it would follow as a matter of course that on the termination of the agency the agents would be bound to hand over all the moveable as well as Immovable properties thus belonging to the plaintiffs to them and also to transfer the Immovable properties standing in their name to the name of the plaintiffs. It would be a necessary corollary of the rendition of accounts by the defendants to the plaintiffs their principals. Merely because the matter has been clarified in the plaint by putting it in succinct and consecutive paragraphs dividing the claim with regard to the immovable properties and the claims with regard to the commission and with regard to other matters separately so that the attention of the Court may be clearly concentrated on the real issues which arise between the parties, though in this compendious and comprehensive suit by the plaintiffs the principals against the defendants the agents, it cannot be stated that the leading purpose of the suit was two-fold, viz., (1) an action in rem with regard to the properties situate at Jalgaon, and (2) an action in personam with regard to the rendition of accounts by the defendants to the plaintiffs. The suit is based on contract between the plaintiffs and the defendants. It also alleges though faintly in para. 8A of the plaint a trust or a fraud. It certainly mentions the fraud in the latter part of the plaint, viz., paras. 9 to 13, and it is a comprehensive suit which has been filed by the plaintiffs against the defendants based on the agency agreement between the parties up to November 21, 1940, and circumstances which certainly give rise to privity between the parties and is an action of the nature of an action in personam which the Court does entertain in the exercise of its equitable jurisdiction in personam. The suit being based on contract, trust or fraud or circumstances giving rise to privity between the parties, it is an action in personam even though

incidentally the Court may have to go into the question of title to lands at Jalgaon which are situate outside the local limits of its jurisdiction. That however does not convert the leading purpose of the suit which is a suit to enforce equitable jurisdiction in personam into one for obtaining relief substantially for land, thus converting the suit into a suit for land within the meaning of Clause 12 of the Letters Patent. It is not a suit the main or leading purpose of which is to obtain a declaration of title to land situate outside the jurisdiction of the Court. It therefore falls within the category of "all other cases", and the defendants being within the jurisdiction, this Court has jurisdiction to entertain the suit in respect of all the reliefs including the reliefs prayed for in prayers (a) and (b) of the plaint.

68. I am, therefore, of opinion that the Court has jurisdiction to entertain the suit in so far as it relates to prayers (a) and (b) of the plaint and am of opinion that the judgment of the learned Judge below was wrong and should be reversed.

69. In view of the conclusion which I have arrived at above, it is absolutely unnecessary to go into the further question which was mooted in the beginning of my judgment, viz., whether on a true construction of Clause 12 of the Letters Patent this Court has jurisdiction to receive, try and determine suits of every description if 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 Court. This question is a very important and interesting one, but any conclusion which I may come to in this behalf would, in view of the conclusion which I have come to on the first question above, be really obiter. This question was discussed at considerable length by the learned Judges of the full bench in *Hathimbhai v. Framroz*, diverse conclusions were reached in this behalf by the learned Judges there, but they were all unfortunately obiter, and I do not propose to add one more obiter to those obiter dicta to be found in *Hatimbhai v. Framroz*.

70. The appeal will, therefore, be allowed, the decision of the Court below reversed and issue No. 1 answered in the affirmative. The issues 4 to 6, 15, 16 and 24 to 31 and the part of issue No. 23 relating to RS. 650 which were held by the learned Judge below as not arising will be tried by him and adjudicated upon at the further hearing of the suit. The respondents will pay the appellants costs of this appeal.