

This distinction between the subject-matter of the two sections may not have been prominently brought out in some of the reported cases, but that it exists seems clear to me on a careful consideration of the language.

In the present case, the promissory note of 9th December, 1889, provided for payment of more than what was due under the decree. Therefore it was void. I would answer both the questions in the affirmative.

B. TYABJI, J.:—I concur and have nothing to add.

Attorneys for the plaintiff:—Messrs. *Matubhai and Jamietram*.

Attorneys for the defendant:—Mr. *Balkrishna F. N. Kirtikar*.

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ORIGINAL CIVIL.

Before Mr. Justice Strachey.

SORABJI CURSETJI SETT, PLAINTIFF, v. RATTONJI DOSSABHOY
KARANI, DEFENDANT.*

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April 12.

Jurisdiction—Letters Patent, 1865, Cl. 12—Suit for land—Foreclosure suit—Transfer of Property Act (IV of 1882), Sec. 85—Parties to suit—Practice—Procedure.

A suit for foreclosure is not a suit for land within the meaning of clause 12 of the Letters Patent, 1865, and the High Court of Bombay on its original side has jurisdiction to entertain such suits, although the property in question is situate outside the town and island of Bombay.

Holkar v. Dadabhai C. Ashburner⁽¹⁾ followed.

In a suit for foreclosure by a puisne mortgagee, the prior mortgagee should be made a party to the suit under section 85 of the Transfer of Property Act (IV of 1882). In a suit where a prior mortgagee was not a party, the Court at the hearing of the suit ordered that he should then be made a party.

Mata Din v. Kazim Husain⁽²⁾ followed.

SUIT for foreclosure. The defendant resided at Salsette, outside the jurisdiction of the High Court, and the mortgaged properties were all situate outside the jurisdiction.

* Suit, No. 40 of 1898.

(1) I. L. R., 14 Bom., 353.

(2) I. L. R., 13 All., 432

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There were two mortgages in question, and both were executed in Bombay. By the first, dated the 18th September, 1894, the defendant mortgaged to the plaintiff three properties situated at Vesáva in the island of Sálsette for Rs. 8,750. By subsequent indentures, also executed in Bombay, the said lands were further charged with large sums.

On the 22nd June, 1897, the defendant executed in Bombay another mortgage of two other properties, also situate at Vesáva, and it was provided that the whole of the money due to the plaintiff should be repayable to the plaintiff on the 1st July, 1897. One of the last-mentioned properties was already subject to a mortgage in favour of one Jivraj Ludha for Rs. 6,300. Jivraj Ludha was not made a party to this suit. The plaintiff was in possession of the properties comprised in the mortgage.

The sum alleged to be due to the plaintiff on foot of the above mortgages at date of suit was Rs. 41,286-12-0 with interest from the 17th January, 1898. The plaintiff prayed for a decree for this amount, and, in default of payment, for foreclosure.

The suit came on for hearing as a short cause. On behalf of the defendant it was contended (1) that the Court had no jurisdiction, the suit being a "suit for land" situate outside the jurisdiction; (2) that, having regard to section 85 of the Transfer of Property Act (IV of 1882), the suit should be dismissed, Jivraj Ludha not having been made a party.

Scott, for the plaintiff:—The question as to jurisdiction in cases of foreclosure is concluded by authority—*Holkar v. Dadabhai C. Ashburner*⁽¹⁾. That was a decree of the Court of Appeal, and it has been followed by several unreported cases: Suit No. 114 of 1894; Suit No. 371 of 1894; Suit No. 481 of 1897. In *Kessonji Damodar v. Khimji Jairam*⁽²⁾, Farran, J., granted foreclosure of land in Zanzibar, the defendant residing in Cutch; but the mortgage having been executed in Bombay, a preliminary issue as to jurisdiction was raised in that case and decided in the plaintiff's favour on the 19th March, 1894.

As to the question of parties, Jivraj Ludha is not a necessary party, as he is not a person interested in the mortgaged property.

(1) I. L. R., 11 Bom., 353.

(2) Suit No. 291 of 1893 (unreported).

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The property mortgaged to the present plaintiff was the equity of redemption in the property on which Jivraj Ludha had a mortgage, but Jivraj Ludha was not interested in the equity of redemption. Therefore, the rule laid down in section 85 of the Transfer of Property Act does not apply. He cited Fisher on Mortgages, p. 801.

Branson, for defendant:—Under the words of clause 12 of the Letters Patent, it is clear that this Court has no jurisdiction. A suit for foreclosure is a suit for land. It is not a suit *in personam*. The later decisions in effect overrule *Paget v. Ede*⁽¹⁾: see *Heath v. Pugh*⁽²⁾; *Harlock v. Ashberry*⁽³⁾; *Bibee Jaun v. Meerza Mahommeel*⁽⁴⁾; *Sreemutty Lalmonney v. Juddoonauth*⁽⁵⁾; *In the matter of petition of S. J. Leslie*⁽⁶⁾; *Juggodumba v. Pudlomoney*⁽⁷⁾; *Sreenath v. Cally Doss*⁽⁸⁾; *Land Mortgage Bank v. Sulurudeen*⁽⁹⁾; *Prem Chand v. Makhoda*⁽¹⁰⁾; *Jairam v. Atmaram*⁽¹¹⁾; *Vithalrao v. Vaghoji*⁽¹²⁾.

Further, the suit should be dismissed having regard to section 85 of the Transfer of Property Act, inasmuch as Jivraj Ludha has not been made a party. See Shephard on the Transfer of Property Act, p. 284; *Ghulam Kadir v. Mustakim*⁽¹³⁾; *Balmakund v. Sangari*⁽¹⁴⁾.

STRACHEY, J.:—This is a suit for foreclosure of certain mortgages of land situate at Vesava, outside the local limits; of the ordinary original jurisdiction of the High Court. The defendant resides at the same place. It is not alleged that he carries on business or personally works for gain within the local limits. All the mortgages were executed in Bombay. The plaintiff is in possession of the lands comprised in the mortgages. Upon the admission of the plaint, leave was granted under clause 12 of the Letters Patent. The suit is a short cause, and no written statement has been filed; but Mr. Branson on behalf of the de-

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

(2) 6 Q. B. D., 345, at p. 359.

(3) 19 Ch. D., 539.

(4) 1 Ind. Jur. (N. S.), 40.

(5) 1 Ind. Jur. (N. S.), 319.

(6) 9 Beng. L. R., 171.

(7) 15 Beng. L. R., 318.

(8) I. L. R., 5 Cal., 82.

(9) I. L. R., 19 Cal., 358.

(10) I. L. R., 17 Cal., 699.

(11) I. L. R., 4 Bom., 482.

(12) I. L. R., 17 Bom., 570.

(13) I. L. R., 18 All., 109.

(14) I. L. R., 19 All., 379 at p. 381.

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defendant contends that the suit is a "suit for land" situate outside the local limits of the Court's original jurisdiction, and that, therefore, the Court has, under clause 12, no jurisdiction to entertain it.

The question is whether a suit for foreclosure is a "suit for land" within the meaning of the clause. The expression is a wide one, and, in the absence of authority upon the point, I should have had great difficulty in holding that it does not include a suit for foreclosure. The High Court of Calcutta has held, upon the construction of the corresponding clause of its Letters Patent, that suits for foreclosure or sale, suits for redemption, suits by a purchaser for specific performance of a contract for sale of land, and, generally, suits for the purpose of establishing title to or acquiring possession of or control over land, are "suits for land" — *Land Mortgage Bank v. Sudurudeen Ahmed* ⁽¹⁾, *Kanti Chunder Pal Chandhry v. Kissory Mohun Roy* ⁽²⁾, *In the matter of the petition of Leslie* ⁽³⁾, *Bibee Jaun v. Meerza Mahommed* ⁽⁴⁾, *Sreemutty Lab-money Dossee v. Juddoonauth Shaw* ⁽⁵⁾, *The Delhi and London Bank v. Wordie* ⁽⁶⁾, *Kellie v. Fraser* ⁽⁷⁾ and *Sreenath Roy v. Cally Doss Ghose* ⁽⁸⁾. But in this Court a more restricted meaning of the expression "suits for land" has been adopted. In *Holkar v. Dadabhai Ourselji Ashburner* ⁽⁹⁾, Sargent, C. J., and Scott, J., held that the Court had jurisdiction under clause 12 to try a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the original jurisdiction, and to order a mortgage-debt to be realized by sale of the land. In that case, as in the present, the defendant did not reside or carry on business or personally work for gain in Bombay. The judgment cites with approval the decision in *Yenkoba B. Kasar v. Rambhaji* ⁽¹⁰⁾ in which Gibbs and Melvill, J.J., held that a suit for the recovery of a mortgage-debt by sale of the mortgaged property was not a "suit for land" within the meaning of section 5 of Act VIII of 1859, the Civil Procedure Code then in force, and that a suit for land was a suit which asked for delivery of the land to the plaintiff.

(1) I. L. R., 19 Cal., 358.

(2) I. L. R., 19 Cal., 361, note.

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

(4) 1 Ind. Jur. (N. S.), 40.

(5) 1 Ind. Jur. (N. S.), 319.

(6) I. L. R., 1 Cal., 249.

(7) I. L. R., 2 Calc., 445.

(8) I. L. R., 5 Cal., 82.

(9) I. L. R., 14 Bom., 353.

(10) 9 Bom. H. C. Rep., 12.

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At first I had some doubt whether the decision of Sargent, C. J., and Scott, J., was binding upon me in this case, as that was not a suit for foreclosure. But when the *ratio decidendi* is examined, I think that it does bind me. It proceeds in part upon *Paget v. Edel*⁽¹⁾, which was a foreclosure suit, and in effect it holds that, in using the expression "suits for land," the framers of clause 12 of the Letters Patent had in view the doctrines of the Court of Chancery in reference to suits relating to land situate out of England, and intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would have refused to entertain on the ground that the land was situate abroad. Now the rule in England, as stated in Dicey's *Conflict of Laws*, is that the Courts have no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, land situate out of England, or for the recovery of damages for trespass to such land. To this rule there is an exception, namely, that the Courts have jurisdiction to entertain an action against a person who is in England respecting land situate out of England on the ground of a contract or an equity between the parties with reference to such land. The principle of the distinction is that while the Court will not give judgments concerning foreign land which it cannot render effective, still, where, from a person's presence in England, the Court has jurisdiction over him, it will, acting *in personam* and not *in rem*, compel him to give effect to obligations which he has incurred with regard to the land. The judgment in *Holkar v. Dadabhai Curssetji Ashburner*⁽²⁾ applies this distinction to the expression "suits for land" in clause 12 of the Letters Patent, and holds that the Court has jurisdiction to entertain a suit for specific performance of a contract relating to land, or for a sale of mortgaged property, situate outside the local limits, on the ground that such suits are among those which a Court of equity in England will entertain; that the High Courts in India have all the powers of a Court of equity in England for enforcing their decrees *in personam*; and 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,

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

(2) I. L. R., 14 Bom., 353.

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who were presumably English lawyers, would have employed different language. The only difference between that case and the present is that there the Court was dealing with one kind of suit *in personam* while I am dealing with another. Both suits for specific performance of contracts relating to land and suits for foreclosure are given by Mr. Dicey as instances of the action of the Courts in England *in personam*, and the authority cited in connection with foreclosure (and assumed to be still good law, notwithstanding the observations in *Heath v. Pugh*⁽¹⁾ on which Mr. Branson's argument was largely based), is *Paget v. Ede*⁽²⁾, on which Sargent, C. J., and Scott, J., rely. In *In re Hawthorne*⁽³⁾, decided in 1883, two years after *Heath v. Pugh*, Mr. Justice Kay referred to *Paget v. Ede* as an authority. I think, therefore, that the decision in *Holkar v. Dadabhai Cursetji Ashburner*⁽⁴⁾ governs the present case, and I need not consider whether, apart from authority, I should think it justifiable to import the doctrines of the Court of Chancery regarding land situate out of England into clause 12 of the Letters Patent, especially in cases where the defendant does not reside, though the cause of action wholly or in part arises, within the local limits of the Court's ordinary original jurisdiction. If the question were *res integra*, it would be necessary to consider in connection with it not only *Heath v. Pugh*, but the effect of a foreclosure decree under sections 86 and 87 of the Transfer of Property Act, 1882, and Nos. 109 and 129 of the fourth Schedule of the Code of Civil Procedure. There is a later (unreported) decision more directly in point, the case of *Kessowji Damodar v. Khimji Jairam* decided by the present Chief Justice in 1894. That was a suit for foreclosure of a mortgage of property situate in Zanzibar. The defendant resided and carried on business in Cutch. The mortgage was executed in Bombay. A preliminary issue was argued raising the question of jurisdiction, and, on the 19th March, 1894, Farran, J., held that the Court had jurisdiction to entertain the suit, which accordingly was heard and decided on the 24th November, 1894. Following these decisions, I must

(1) 6 Q. B. D., 315 : affirmed in *Pugh v. Heath*, 7 App. Cas., 235.

(2) L. R., 18 Eq., 118.

(3) 23 Ch. D., 713.

(4) I. L. R., 11 Bom., 353.

hold that this is not a "suit for land" within the meaning of clause 12 of the Letters Patent, and that I have jurisdiction to entertain it.

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Another point raised by Mr. Branson is that the plaint shows that one of the properties to which the suit relates is subject to a prior mortgage in favour of one Jivraj Ludha, and that under section 85 of the Transfer of Property Act, 1882, the prior mortgagee ought to have been joined as a party to the suit. On the other hand, Mr. Scott contended that the expression in section 85 "the property comprised in a mortgage" would include an equity of redemption, and that as the first mortgagee had no interest in the equity of redemption which alone is comprised in the mortgage so far as regards the property in question, the section does not apply. The whole question was very fully considered by a Full Bench of the Allahabad High Court in *Mata Din Kasodhan v. Kazim Husain*⁽¹⁾, and I see no reason to dissent from the opinion of the majority that in a suit by a puisne mortgagee a prior mortgagee must be joined as a party. The question then is what should now be done. I see no reason why the first mortgagee should not now be joined. In *Kessowji Damodar v. Khimji*⁽²⁾, Farran, J., ordered that the assignee of a mortgagee should be made a party, after the hearing of the preliminary issue to which I have referred. I, therefore, direct that Jivraj Ludha be now made a party to this suit.

Attorneys for plaintiff :—Messrs. *Pestonji, Rustim and Cama*.

Attorneys for defendant :—Messrs. *King and Cama*.

(1) I. L. R., 13 All., 432.

(2) Unreported.