Bombay High Court
Shiv Bhagwan Moti Ram Saraoji vs Onkarmal Ishar Dass And Ors. on 8 October, 1951
Equivalent citations: AIR 1952 Bom 365, (1952) 54 BOMLR 330
Author: Chagla
Bench: Chagla, Bhagwati
JUDGMENT Chagla, C.J.

(1) This appeal raises a very interesting and important question as to the jurisdiction of this Court. Mr. Justice Shah took the view that this Court had no jurisdiction to try the plaintiff's suit, and on that ground he dismissed it. It is from that order of dismissal that the plaintiff has come in appeal before us.

(2) A preliminary observation may be not out of place as to the manner in which issues as to jurisdiction should be tried. Mr. M. V. Desai has made a grievance that the learned Judge took the view that an issue with regard to jurisdiction is always an issue of law and must be tried as a preliminary issue. I do not think that this grievance is fully justified. As I read the judgment, the learned Judge has tried this issue as an issue of law because, for the purpose of his decision, he has assumed that all the facts averred by the plaintiff in his plaint are proved, and, therefore, this issue has been tried on a demurrer.

Now, it is open to a Court to take the view that, even if the plaintiff were to establish all the facts alleged by him the Court would have no jurisdiction. In that view of the matter, a preliminary issue on a demurrer will arise, and that would undoubtedly be an issue of law. But there may be a case where an issue as to jurisdiction would require leading of some evidence, in which case an issue of jurisdiction would raise a mixed question of law and fact. Such an issue may be tried as a preliminary issue, or it may be tried as an issue along with other issues. This would depend upon whether the evidence with regard to jurisdiction could be separated from the evidence on other, issues. Therefore, it would not be correct to say that in all cases an issue as to jurisdiction is necessarily an issue of law. This position is made perfectly clear in the judgment of Sir Beaumont in 'SOWKABAI v. SIB TUKOJIRAO HOLKAR', 34 Bom L R 6.

(3) One Ramlal died in 1881, leaving two sons Gan-patrai and Ishwardas. The plaintiff and defendants Nos. 7, 8 and 9 represent the branch of Gan-patrai, and defendants Nos. 1 to 6 represent the branch of Ishwardas. The plaintiff attained majority on October 26, 1937, and he executed a writing on April 15, 1944, which is annexed as Ex. 'C' to the plaint. It is in the nature of a release, and it provides that, on the plaintiff being paid a certain amount, he releases his right, title and Interest in certain properties mentioned in the document. The plaintiff alleges that his signature to that document was obtained by misrepresentation and undue influence, and he challenges the document on those among other grounds.

He further contends that various properties mentioned in Exhibit 'E' to the plaint are joint family properties in which he is interested as a coparcener, and that, as a matter of fact, only some of these properties were dealt with by the release, Exhibit 'C'. By this suit he wants a declaration that the document, Exhibit 'C', is void and inoperative and did not affect the rights of any parties thereto,

and he asks for a cancellation of that document; and he wants a partition of the properties mentioned in Exhibit 'E' as being joint family properties. The properties mentioned in Ex. 'E' are both movable and immovable properties. And the question that we have to consider is whether this Court has jurisdiction to try and dispose of a suit of the nature filed by the plaintiff. It may be stated that none of the defendants reside within jurisdiction.

(4) It is not seriously disputed by Mr. M. V. Desai -- in fact, he made a concession to that effect before the learned Judge below -- that the suit is primarily a suit for partition. The relief with regard to the cancellation of the document, Ex. 'C', is only incorporated in the plaint in order to remove the impediment which the plaintiff would have before he could get a partition which he seeks. If he did not ask the Court to declare this document void, he would be confronted with this release which he had executed. And so long as this release stood, he would not be entitled to a partition. It is, therefore, that he has asked for appropriate reliefs with regard to this document.

(5) Now, it will be unnecessary to consider in this appeal whether the Court would have jurisdiction to entertain a suit for cancellation of the document although the document was executed outside jurisdiction, and a reasonable apprehension as to the injury that the plaintiff would sustain by reason of the document remaining outstanding was also not experienced within jurisdiction merely because some of the properties which were the subject-matter of the document were situated within jurisdiction.

Two views are possible on this question. One is that it would be a material part of the cause of action for the plaintiff to aver that the document operated upon certain properties, and, therefore, he was likely to suffer injury in respect of those properties. The other view is that the only material allegation in a suit under Section 39 of the Specific Relief Act is a reasonable apprehension that a particular instrument might cause a party serious injury. If the former view were correct, then the existence of some properties within jurisdiction, upon which the document would operate, would undoubtedly constitute a part of the cause of action. And in such a case, with leave under Clause 12 of the Letters Patent, the Court would have jurisdiction to entertain a suit for cancellation. If the other view were correct, then the mere existence of properties within jurisdiction would not entitle the plaintiff to obtain leave under Clause 12 as no part of the cause of action could be said to have arisen within jurisdiction.

> The former view has been taken in 'HADJEE ISMAIL HADJEE HUBBEEB v. HADJEE MAHOMED H
> "....The fraudulent representations which led to the execution of the release may have

Then their Lordships came to the conclusion that, as far as immovable property was concerned, to the extent that these properties were situated in Bombay, part of the cause of action arose in Bombay. The same view has been taken by the Madras High Court in 'N. ACHAYYA v. N. YELLAMMA', AIR 1923 Mad 109. There the Court was considering a suit by a reversioner challenging a will made by the widow of the last coparcener. The properties upon which the will operated were situated in two different districts, and the Court came to the conclusion that the plaintiff's allegation of interest and the threat to his rights involved in the setting up of a forged will

by the widow were clearly parts of his cause of action, and, as he claimed interest in the properties situated in the two districts, the Courts in both the districts had jurisdiction to try the suit.

A contrary view has been taken by Mr. Justice Kania, as he then was, in an unreported judgment in 'KANTILAL K. KAPADIA v. JAYANTI-LAL K. KAPADIA', O.C.J. Suit No. 558 of 1938 D/- 13-7-1939. The learned Judge took the view that the material part of Section 39 of the Specific Relief Act was not injury to the property but a reasonable apprehension to the plaintiff of injury to the property, and that the place or places where the different properties covered by the deed existed did not appear to be relevant to be enquired into at all. It is unnecessary to consider which of the two views is right.

(6) The first and the most important question that we have to decide is whether this Court has jurisdiction to try a suit for partition in whicti the properties to be partitioned are both immovable and movable properties. It is well settled that a suit for partition of immovable properties is a suit for land. And under Clause 12 of the Letters Patent, the Court would have jurisdiction in the case of suits for land or other immovable property if such land or property is situated within jurisdiction. The construction of Clause 12 has been responsible for more judicial decisions than perhaps any other clause in the Letters Patent, and many learned Judges have pointed out the various possible constructions to which the language of Clause 12 lends itself.

But the view accepted by this Court is that, in cases of suits for land, if leave is taken under Clause 12, the Court can entertain such suits if part of the land or immovable property is situated within jurisdiction. It is not disputed that all the immovable properties which the plaintiff seeks to partition were situated outside jurisdiction at the date when the suit was filed. And, therefore, if this had been a simple suit for partition of immovable property, it is clear that this Court would have no jurisdiction to try the suit. But the difficulty arises by reason of the fact that this is a mixed suit for partition of immovable and movable properties, and the question that falls for determination is whether the Court has no jurisdiction to entertain the suit to the extent that it seeks partition of movables even though the movables might be situated within jurisdiction though the Court may refuse to try the suit to the extent that it seeks for partition of immovable properties.

The plaintiff avers that business in the name and style of Ramlal Ganpatrai was and is being carried on in Bombay by the plaintiff and defendant No. 1 as members of a joint and undivided Hindu family, and that this business has considerable assets in Bombay. Therefore, there is a clear averment that there is movable property belonging to the joint family within jurisdiction. Now, the view that found favour with the learned Judge below was that the existence of movable property within jurisdiction was not a part of the cause of action and also that a suit for partition of immovable property continued to be a suit for land although the plaintiff also asked for partition of movables. Dealing with the first point, it is difficult to understand, with respect to the learned Judge, how the existence of property in a partition suit is not a part of the cause of action, it is necessary for the plaintiff to allege that there is some property of which he is seeking partition. The mere fact that there was a joint family and that the plaintiff is a member of the joint family would not be sufficient to entitle him to maintain the suit. If a joint family had no property, then there would be nothing to partition, and, therefore, the averment as to the existence of property would be the averment of a

necessary and material fact. This necessary and material fact would undoubtedly be a part of the cause of action.

It is suggested that it would not be necessary to allege where the property existed and that it would be sufficient if the property existed irrespective of the location of the property. This argument is based upon a misunderstanding of the true meaning of the expression "where the cause of action arises". The first duty of the Court is to ascertain what facts constitute the cause of action. Having ascertained that, the next duty of the Court is to ascertain where these facts arose. It is perfectly true that the existence of a property at a particular place is not a part of the cause of action. What is a part of the cause of action is the existence of the property. But having ascertained that, the next question is, "where did that fact, namely, the existence of the property, arise?" And if the property is situated in Bombay, then, to the extent of that particular fact constituting the cause of action, the cause of action arises in Bombay. Certain facts constitute a cause of action irrespective of where they arise. But the importance of where they arise arises only in connection with the question of Jurisdiction.

It is only in order to determine the jurisdiction that the question has to be considered as to where certain facts arose. Therefore, in any opinion, if the existence of property is a material fact constituting a part of the cause of action in a partition suit, then the location of the property must be considered in order to determine the jurisdiction of the Court. If the property or part of the property is situated within jurisdiction, then the cause of action or a part of the cause of action has arisen within jurisdiction.

It is contended by Mr, Maneksha that the situs of movable property is irrelevant in a suit for partition of movables. Mr. Maneksha says that the situs of land is material when we have a suit for land, because Clause 12 provides that a suit for land can only be filed where the land is situated. But the question of location of movables does not arise from the point of view of its situs; it arises from the point of view of the cause of action. Mr. Maneksha urges that, if the intention was to confer jurisdiction upon a Court in respect of movables from the point of view of the situs of the movables, Clause 12 would have so provided. But Clause 13, after dealing with suits for land, deals with all other suits; and witli regard to all other suits, apart from the question of residence and doing business, jurisdiction is conferred where the cause of action arises.

Therefore, it was unnecessary to provide specifically with regard to suits for partition of movables or possession of movables. They would stand on the same looting as all other suits, and, if the cause of action arose within jurisdiction, then the Court would have jurisdiction to try these suits for movables. Therefore, in holding that the Court has jurisdiction to try a suit for partition of movables if the movables are situated within jurisdiction, I am not so holding on the ground that the situs of the movables is within jurisdiction, but solely on the ground that the location of the movables within jurisdiction constitutes a part of the cause of action of a partition suit for movables.

(7) With regard to the second consideration which weighed with the learned Judge below, it is difficult to see, on principle, why, if a plaintiff combines a suit for land with a suit which is not for land merely because the Court has no jurisdiction to try the suit for land, the Court should equally

not have jurisdiction to try the suit to the extent that it is not a suit for land if the cause of action with regard to the latter arises within jurisdiction. In this particular case, as I said before, it is not disputed that all the lands of which the partition is sought were situated outside jurisdiction at the date of the institution of the suit. And, therefore, at that date, the suit, to the extent that it related to a partition of immovable property being a suit for land, was liable to be dismissed.

But it is impossible to understand logically why the Court would have no jurisdiction to entertain this suit to the extent that it sought partition of movables situated within jurisdiction. For this contention, reliance is placed upon a judgment of Mr. Justice West in 'J AIR AM NARAYAN v. ATMA-RAM NARAYAN', 4 Bom 432. In that case, the plaintiff sued the defendant for partition of family property, which consisted both of movable and immovable property. The movable property was within jurisdiction, but all the immovable property was outside jurisdiction. No leave under Clause 12 had been taken. As I understand the judgment, what it really decides is that the Court cannot try a mixed or combined suit for partition of immovable and movable property if all the immovable property is situated outside jurisdiction, and that the presence of movable property within Jurisdiction can not confer jurisdiction upon the Court to try a suit for partition of immovable property.

Frankly, there are observations in the learned Judge's judgment which lend support to the argument which has found favour with the learned Judge. Mr. Justice West does differ from the view taken by Sir M. Sausse that the Court could decree a partition of movable property within its own jurisdiction while declining jurisdiction as to the immovable estate which lay beyond it. But a judgment, should be understood and appreciated in the light of what the learned Judge actually decided, and in this case he only dismissed the suit as to the immovable property outside the original civil jurisdiction of the Court and allowed the suit to go on with regard to the partition of movable property.

That is exactly what the learned Judge below should have done in the present case. But the learned Judge, on looking at the original record of the suit tried by Mr. Justice West, found that, in that case, the defendant resided within the local limits of the ordinary original jurisdiction of the Court; and, therefore, according to the learned Judge, Mr. Justice West entertained the suit to the extent that it related to movable property on the ground of the residence of the defendant and not on the ground of the cause of action having arisen within jurisdiction.

In the suit before us, the defendants do not reside within jurisdiction. Now, it is difficult to understand what the residence of the defendant had to do with the question if Mr. Justice West took the view that a suit for partition of immovable and movable properties was a suit for land and that a suit for land did not change its character merely by movable property being tacked on to the suit. If it was a suit for land, then the only material consideration was the location of the land. It is only in suits other than suits for land that one considers the question of the residence of the defendant. Therefore, the explanation given by the learned Judge as to why Mr. Justice West tried the suit with regard to movables is not, with respect, satisfactory.

There are two decisions of the Madras High Court which have taken the same view of mixed suits of partition of immovable and movable property as the view I am suggesting is the correct view. The

first is in 'SESKAGIRI RAIT v. HAMA-RAU', 19 Mad 448. There too the suit was for partition of land situated outside jurisdiction and movables situated within jurisdiction. Leave under Clause 12 of the Letters Patent was given, and the Madras High Court held that the leave was wrongly given as all the lands were situated outside jurisdiction and as leave, when a suit is for land, could only be given if part of the land was situated within jurisdiction. Therefore, the Court dismissed the suit as far as land was concerned and allowed the suit to proceed as far as movables were concerned, it is rather interesting to note that, in doing so, the Madras High Court followed the judgment Of Mr. Justice West in 'JAI-RAM NARAYAN V. ATMARAM NARAYAN', and that they adopted the construction placed by Mr. Justice West on Clause 12.

I may point out that in 'JAIRAM NARAYAN v. ATMARAM NARAYAN', the question of leave did arise because it was attempted to be argued that leave had been given in that case. Mr. Justice West held that leave was not given, and he also held that no question of leave arose because, on a true construction of Clause 12, leave in a suit for land can only be granted provided part of the land was situated within jurisdiction. In a suit for land, in granting leave, no question arises as to whether the cause of action has or has not arisen within jurisdiction. The other decision is in 'ABDUL KARIM v. EADRUDEEN', 28 Mad 216. There also the Madras High Court was considering a mixed suit, and the view taken by the High Court was that the Court has jurisdiction to try the suit except in so far as it was a suit for land outside jurisdiction, and that the suit should be dismissed in so far as it related to land outside jurisdiction or that leave to amend the plaint should be given by omitting from the plaint so much as related to land outside jurisdiction.

Mr. Justice Xania too, in the same unreported judgment in 'KANTILAL K. KAPADIA'S Case', O.C.J. Suit No. 553 of 1938 (Bom) to which reference has been made, has taken the same view. There, too, the suit was for a partition of movable and immovable properties and all the defendants were resident outside jurisdiction. The learned Judge held that the suit, so far as it related to movable property, was within jurisdiction. In my opinion, therefore, the Court has jurisdiction to jtry this suit to the extent that it seeks for partition of movables situated within jurisdiction. The learned Judge below was in error in dismissing the whole of the suit on the ground that the Court had no jurisdiction. The learned Judge should have dismissed the suit only to the extent that it sought for partition of lands situated outside jurisdiction.

(8) The second point of considerable importance which has been argued by Mr. Desai is that the Court has jurisdiction to try the suit for movables also on the ground that the defendants any on the business within jurisdiction. The facts which are alleged in the plaint bearing on this question are that defendant No. 1 as a coparcener carries on business in Bombay in the name and style of Ramlal Ganpatrai, and that this business is a partnership business with outsiders and defendant No. 1's share in this business belongs to the joint family. The learned Judge below wanted to have evidence led to clarify the expression used by the plaintiff in the plaint that all the defendants carried on business in Bombay.

But the necessity for taking evidence was obviated by an admission made by Mr. Desai that what was meant by that expression was that defendant No. 1 carried on business on behalf of all the defendants and the plaintiff as manager and that it is because of this that the plaintiff alleged that ail

the defendants were carrying on business in Bombay. Now, as I said before, the defendants represent two branches of the joint family. Among the defendants, there are minors and females. And the very interesting question that was debated at the bar was whether it could be said in law that all the members of a joint family are carrying on business if the 'karta' of the joint family as manager carries on an ancestral business.

In this case, the plaintiff's allegation is that defendant No. 1 is the 'karta' of the joint family, that he carries on business in Bombay, that the business is ancestral, and that, therefore, through defendant No. 1 the whole Joint family and every member of it carries on business within Jurisdiction. Now, what does the expression "carry on business" as used it Clause 12 of the Letters Patent really denote? It will be noticed that the scheme of Clause 12 is to confer jurisdiction upon the Court With regard to suits other than suits for land, in the first instance in relation to the cause of action. That jurisdiction is not exercised 'in personam' because, even though the defendant may not be within jurisdiction, the Court can exercise its jurisdiction in relation to the subject-matter of the suit.

The other part of Clause 12 deals with jurisdiction 'in personam' and jurisdiction 'in personam' has three different aspects. The first aspect is the residence of the defendant; the second aspect is carrying on of business by the defendant; and the third aspect is the defendant personally working for gam. All these three aspects emphasize the jurisdiction of the Court 'in personam.' The effectiveness of the jurisdiction arises from the presence of the defendant actually or constructively within jurisdiction. Now, it is important to note that it is not the existence of the business within jurisdiction or the ownership of the business or the interest in the business that is emphasized: what is really emphasized is the fact of the business being carried on by the defendant. Now, one test that has been suggested by Mr. Desai is that, if a person holds an interest in business and receives profits from the business, then it could be said of that person that he is carrying on the business.

That is the test that is suggested by the Nagpur High Court in 'TARABAI v. CHOGMAL', AIR 1932 Nag 114. With respect, I am not prepared to accept that test. The Nagpur High Court itself laid down this test relying on a judgment of the Allahabad High Court in 'KIRPA RAM v. MANGAL SEN', AIR 1322 All 367. Now, when we turn to that judgment, the test laid down by that Court is entirely different. That test is that "carrying on business" means in this section -- they were dealing with Section 20 of the Civil Procedure Code -- having an interest in the business transactions at the particular place; a voice in what is done; a share in the gain or loss, as the case may be; and some control, if not over the actual method of working, at any rate, upon the existence of the business. Therefore, a share in the gain or loss is not the only test: the more important test is that the defendant must have some control over the business. To my mind, the better test is the test suggested by the Privy Council in 'COSWAMISBRIGIRDHARIJI v. GOVERD-HAN-LALJI', 18 Bom 294 (PC). Their Lordships point out, at page 393, that the phrase "carry on business" is a very elastic one and is almost incapable of definition, and that the tribunal must in each case look to the particular circumstances. Then they go on to say that it appears to their Lordships that the Letters Patent intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who had business transactions with him. Therefore, in my opinion, the test of carrying on of business is that the man who carries on business must be in a position to contract debts in relation, to that business so as to make himself personally liable: liable in such a way that he

can be personally sued on those debts which he has contracted. It may be that, in certain cases, the defendant may not personally contract the debts because he may not be personally and physically carrying on the business within jurisdiction.

He may carry on the business through an agent; but even so, the agent through whom he carries on the business must be such an agent as to be in a position to contract debts on behalf of his principal which would make the principal personally liable for those debts. It has also been said that, if business is carried on through an agent, the agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. (See Sir Dinshah MuUa's Commentary on the Code of Civil Procedure, page 117.) It is perfectly true, as pointed out by the learned Judge below, that, in carrying on business, Clause 12 does not require the personal factor as it does in the case of working, for gain. But even so, there must be a carrying on of the business and not merely the owning of it or having an interest in it.

(9) We have now to apply this test to the case of the 'karta' of a joint Hindu family carrying on an ancestral business. And before I apply the test, certain principles of Hindu law with regard to the carrying on of ancestral business should be clearly stated. These principles have been well settled long ago, and really there is no dispute about them, although Mr. Desai has cited a large number of authorities to enunciate these principles. The 'karta' of a Hindu family has the authority to carry on an ancestral business; he has also the authority to bind the other coparceners, including the minors, and make them liable for the debts he has incurred in the course of carrying on the ancestral business.

But the liability of the other coparceners is not a personal liability: that liability is confined to their share in the joint family property. On the other hand, the liability of the 'karta' is both personal as the man who actually carries on the business, and also extends not only to his share in the joint family property but also with regard to his personal or self-acquired property. Although the 'karta' carries on the ancestral business, the business really belongs to the joint family, and the joint family is entitled to the profits or liable for the losses in the business. Strangers may be admitted as partners into the ancestral business, but a partnership so formed is a contractual partnership which will be governed by the provisions of the Partnership Act, and the partners will be the strangers joining the ancestral business and the 'karta' or those members of the joint family who, in fact, enter into partnership with the strangers see 'PICHHAPPA v. CHOKALINGAM', 36 Bom LE 976 (PC).

It is true that the 'karta', if he enters into a partnership with strangers, will represent the joint family; it is also true that the share of the 'karta' in the partnership will belong to the joint family. But the partners will only be the 'karta' and the stranger or strangers. If a creditor of the partnership files a suit against the partners, although he may get a decree only against the 'karta', he would be entitled to execute the decree against the other coparceners see 'MULGUND CO-OPERATIVE CREDIT SOCIETY v. SHIDLINGAPPA ISH-WARAPPA, 43 Bom LB 807, but with this important reservation that, whereas he could execute the decree personally against the 'karta', he would not be able to execute the decree against the other coparceners personally but only to the extent of their share in the joint family property.

(10) Now, this being the position in Hindu law, can it be said that, when a 'karta' carries on ancestral business, it is the joint family as such and every member of that family -- females and minors included -- who carry on the business within the meaning of Clause 12 of the Letters Patent? Let us apply the test, which I suggested is the proper test. Can it be said that the 'karta' of a, joint Hindu family is an agent of the joint family for the purpose of carrying on the business of the joint family in the sense that he has the authority to contract debts on behalf of the joint family and to render the members of the joint family liable for those debts? Mr. Desai says that the members of the joint family are liable because their share in the joint family property can be proceeded against under a decree passed against the 'karta.' But the liability that is necessary for the purpose of this test is not liability as to property, but it must be a personal liability. And there is no doubt whatever on the authorities that the coparceners are not personally liable for the debts contracted by the 'karta.' In this connection, reference may be made to the decision of the Privy Council in 'ANNAMALAI CHETTY v. MURUGESA CHETTY', 30 Ind App 220 (P C). In that case their Lordships considered the position of the manager of a joint Hindu family and expressed the opinion that such a person is not the agent of the members of the family so as to make them liable to be sued as if they are the principal of the manager, and that the relation of such persons is not that of principal and agent but it is much more like that of trustees and 'cestui que trust.' In that case, there was a suit filed by the plaintiff in the District Court of South Arcot in the Madras Presidency on a foreign judgment which the plaintiff had obtained against the defendants in Pondicherry. And one of the questions that arose for the determination of the South Arcot Court was whether the Court had jurisdiction to maintain the suit.

It was contended by the plaintiff that the defendant carried on business within jurisdiction. It was suggested that the defendant carried on business through one Kandasami Chetty who was the manager of the joint family. It was established that Kandasami Chetty carried on business in South Arcot. It is true, as pointed out by Mr. Desai, that the Madras High Court in 'MURUGESA CHETTI v. ANNAMALAI CHETIT, 23 Mad 458 from which decision the appeal went to the Privy Council and was decided in 'ANNAMALAI CHETTY v. MURUGESA CHETTY', 30 Ind App 220 (PC), did hold that the business which Kandasami Chetty was carrying on was started after there had been a partial division of joint family property. And it may be that, in this case, the business carried on by Kandasami was not an ancestral business. But undoubtedly there was joint family property, and what the Privy Council was considering was the position of a manager of a joint family 'quao' the other coparceners, and the view of the Privy Council was that a manager is not the agent of the coparceners.

This principle would equally well apply when a 'karta' is carrying on ancestral business : he is not carrying on that business as an agent, but more as a trustee on behalf of the beneficiaries who are the coparceners. Reliance was also placed by Mr. Desai on the decision in 'LACHHMAN DAS v. COMMR. OF INCOME-TAX, PUNJAB, N.W.F. AND DELHI PROVINCES, LAHORE', 74 Ind App 277 PC, In that case, the only question that came to be considered was whether a partnership could be formed between the 'karta' of a Hindu joint-family, representing the undivided family, and a member of the undivided family. And the Privy Council held that such a partnership could be formed. Mr. Desai has relied on the observations of Mr. Jayakar delivering the judgment of the Court at page 284 that, though in its nature a joint Hindu family may be fleeting and transitory, it

has been regarded as capable of entering through the agency of its 'karta' into dealings with others. All that this observation means is that a 'karta, in proper cases, can bind the joint family by his dealings. It certainly does not mean that the 'karta' can make the members of a joint Hindu family personally liable in respect of the transactions which he enters into.

Therefore, in my opinion, the true position is that, when a joint Hindu family has a business, in order to determine who carries on the business, what has to be ascertained is who is the actual contracting party in relation to the transactions entered into in the course of the business. If the 'karta' is carrying on the business, then he is the contracting party. It may be that other major coparceners may associate themselves with the 'karta' in the conduct of the business, in which case they may also be treated as contracting parties and may make themselves personally liable for the debts contracted. It may also be that the other adult coparceners, by their conduct, may hold them-selves out as contracting parties, in which case they also would be personally liable. It is only these coparceners that can be considered to be carrying on business within the meaning of Clause 12 of the Letters patent.

Let us consider the case where a joint Hindu family enters into partnership with strangers. In such a case, only those coparceners who actually enter into partnership with strangers can be held to carry on business, because it is only these coparceners who would be personally liable for the debts contracted by the partnership. In this case, the only allegation in the plaint is that defendant No. 1 carries on business as a member of the joint Hindu family. Therefore, it would not be true to say of the other defendants that they also carry on business within jurisdiction. Therefore, in my opinion, the Court has no jurisdiction to entertain this suit on the ground that all the defendants carry on business in Bombay.

(11) The next point to be considered is with regard to a certain property situated in Vikhroli. This is a vacant land and was shown in exh. 'E' to the plaint at Item 21 as one of the joint family properties. Now, at the date when the suit was instituted, Vikhroli did not form a part of Greater Bombay and was not within the ordinary original civil jurisdiction of this High Court. But by reason of Act XVII of 1945 amended by Act VIII of 1050, Vikhroli was brought within the ordinary original civil jurisdiction of this Court from April 3, 1950. Therefore, when the suit came on for hearing before Mr. Justice Shah, the immovable property situated at Vikhroli was situated within the ordinary original civil jurisdiction of this Court. And the question that arises for determination is whether, notwithstanding the fact that the Court had no jurisdiction with regard to this property at the inception of the suit, this Court can try the suit with regard to this property by reason of the fact that jurisdiction was subsequently conferred on it.

Mr. Justice Shah has taken the view that, by Section 7 of Act VIII of 1950, all pending proceedings are stayed, and the pending proceedings shall be continued in that Court where they were pending as if the new Act had not been passed, and such Court shall have, for the purpose of pending proceedings, all jurisdiction and powers which it had immediately before the Act came into force. Now, obviously, this section cannot apply to this suit; it only applies to those proceedings which were instituted in Courts with jurisdiction and where the jurisdiction was subsequently taken away from the Courts. We have here a converse case where a proceeding is instituted in a Court without

jurisdiction and jurisdiction has been subsequently conferred upon the Court.

Now, I think it may be stated as a general principle that no party has a vested right to a particular proceeding or to a particular forum, and it is also well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal. In 'GANGARAM v. PUNAMCHAND', 21 Bom 823, an appeal was preferred to the District Court from a judgment of a Subordinate Judge under the Dekkhan Agriculturists' Relief Act. At the date when the appeal was preferred, the District Court had no jurisdiction to hear the appeal While the appeal was pending, the Dekkhan Agriculturists' Relief Act was amended and an appeal was allowed, and Sir Charles Farran and Mr. Justice Fulton held that the District Judge was right in maintaining the appeal. It is clear, therefore, in this case, that, although the District Court had no jurisdiction to hear the appeal at the date when it was preferred, still, by reason of the fact that jurisdiction was conferred upon the Court to hear that appeal, the District Court assumed jurisdiction to hear and dispose of the appeal.

Mr. Maneksha says that, at the date when the suit was filed, the defendants had a right with regard to the land at Vikhroli to have the suit heard in the District Court of Thana and he cannot be deprived of that right by subsequent legislation. Now, as I said before, the defendants have no vested right in any particular forum. This Court was bound to take notice of the change in the law and was bound to administer the law as it was when the suit came on for hearing. Therefore, if the Court had jurisdiction to try the suit when it came on for disposal, it could not refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted.

(12) The final question that has been raised is whether, by reason of the fact that leave under Clause 12 had been granted before the filing of the suit, the fact that part of the immovable property is situated in Bombay would entitle the Court to entertain the suit for partition with regard to all the immovable properties. Now, as I have pointed out before, in the case of a suit for land, the Court has jurisdiction to entertain the suit even though some of the lands are situated outside jurisdiction, provided some lands are situated within jurisdiction and leave has been obtained under Clause 12. But the very foundation of the jurisdiction of the Court is leave granted on the basis of some immovable property situated within jurisdiction. Now, the granting of leave is a judicial act, and the Court must judicially consider the fact of some property being within jurisdiction, and, on the consideration of that fact, proceed to give leave under Clause 12.

In this case, it is clear that there was no averment of any property being situated within jurisdiction. In fact, there could be no such averment, because at the date of the inception of the suit no immovable property was, in fact, situated within jurisdiction. Therefore, although leave was granted under Clause 12, it was not granted for the purpose of enabling the Court to entertain a suit for land. Mr. Desai says that there are two authorities of this Court in 'RAMPURTAB SAMRUTHROY v. FREM-SINGH CHANDAMAL', 15 Bom 93 and 'MOTILAL v. SHANKARLAL', 41 Bom L R 536 which lay down that if leave has been granted in respect of a particular cause of action, the leave will not enure for a different cause of action. In other words, a party must obtain fresh leave if, by

amendment of the plaint, he seeks to alter his cause of action.

Mr. Desai says that his cause of action remains the same, and, therefore, the leave which he has already obtained should enure for his benefit in view of the changed circumstances. I do not think this argument is tenable. Although we do not have here a case of a change of a cause of action, we have really a stronger case because what Mr. Desai is now seeking to do is to ask the Court to entertain a suit for land with leave under Clause 12 when he never obtained such leave prior to the filing of the suit.

(13) Mr. Justice Shah also made an order that the leave under Clause 12 should be revoked because the Court had no jurisdiction. With respect, it was unnecessary to revoke the leave. Because if the Court had no jurisdiction at all, no question of leave can possibly arise. The leave is only revoked when the Court has jurisdiction and the Court comes to the conclusion that, looking to the balance of convenience, leave should not have been granted. If the learned Judge meant that, as the Court had no jurisdiction, no question of granting leave arose and no leave should have been granted, then he was right.

(14) Mr. Maneksha has drawn our attention to the fact that this is a case where all the parties reside in Amritsar; that bulk of the properties are situated in Amritsar; that most of the witnesses are in Amritsar; and that everything points to the suit being more conveniently tried in the Court at Amritsar rather than in this Court. These are all relevant and material facts which the Court may consider if and when the defendants take out a summons for revocation of leave. We are not concerned here with a question of revocation: we are only concerned with the question as to whether the Court has jurisdiction to try the suit as framed.

(15) The result, therefore, is that the order of the learned Judge dismissing the suit will be set aside. The Court will try the suit for partition of movables and also of the immovable property situated at Vikhroli. 'With regard to movables they may be within or without jurisdiction as leave under Clause 12 has been obtained.

Bhagwati, J.

(16) The plaintiff who resides at Amritsar filed this suit against his first cousin, his two sons and one daughter, his wife, his mother and the plaintiff's own two sons and wife, who were all residing at Amritsar, and Cawnpore, for a declaration that a document dated April 15, 1944, executed by him in favour of his first cousin was void and inoperative and for partition of all the movable and immovable properties belonging to the joint family constituted by his branch as well as the branch of his first cousin and for ancillary reliefs. In so far as none of the parties resided in Bombay the cause of action for the purpose of jurisdiction in this Court was set out by the plaintiff in paragraph 23 of his plaint as under:--

"That the business in the name and style of Ram-lal Ganpatrai was and is being carried on in Bombay by the plaintiff and the 1st defendant as members of a joint and undivided Hindu family and in partnership with outsiders and the shares of the plaintiff and the 1st defendant in the said

business is ancestral joint family property in their hands."

He contended that therefore all the defendants carried on business in Bombay. He moreover contended that the said business had considerable assets in Bombay and the said document purported to affect the said business and the assets in Bombay and that he was entitled to have the same set aside and cancelled in Bombay.

A material part of the cause of action thus arose in Bombay, according to the plaintiff, and he submitted that with leave granted under Clause 12 of the Letters patent this Court had jurisdiction to entertain the suit and grant all the reliefs mentioned in the plaint. Without prejudice to the aforesaid contention and in the alternative he further submitted that with such leave granted this Court would in any event have jurisdiction to set aside the said document and grant reliefs in respect of all movable properties including the immovable properties which were held to be the assets of any partnership.

(17) The contesting defendants filed their written statements contending, that the document which the plaintiff sought to set aside was executed at Amritsar, that they resided outside the jurisdiction of this Court, that they, and in any event defendants Nos. 2, 3, 4 and 6 did not carry on business within the jurisdiction of this Court, that an overwhelming portion of the assets and all the immovable properties of which partition was sought by the plaintiff in the suit were situate outside the jurisdiction of this Court and that therefore this Court had no jurisdiction to entertain the suit.

(18) The learned trial Judge tried the issue as to jurisdiction as a preliminary issue and dismissed the plaintiff's suit.

(19) Mr. M. V, Desai for the appellant at the very outset made a grievance that the learned trial Judge overruled his contention that the finding on the issue as to jurisdiction must depend upon the proof of certain facts, and consequently the issue as to jurisdiction was not one of law but was an issue of fact. The learned trial Judge in the interlocutory judgment which he delivered on December 21, 1950, observed that normally when the question of the jurisdiction of the Court to entertain or to try a suit was raised, that question must be adjudicated upon initially before any other question, either of law or fact, was tried, and he relied upon the terms of O. XIV, R. 2, of the Civil Procedure Code, which made it obligatory upon the Court to decide all issues of law on which the suit could be disposed of, postponing the raising of other issues.

Mr. M.V. Desai was not quite correct when he submitted that the issue of Jurisdiction was a pure issue of fact. An issue as to jurisdiction can be an issue of law or an issue of fact or a mixed issue of law and fact, and the duty of the Court to try the issue of jurisdiction as a preliminary issue does not arise in all cases.Order XIV, Rule 2, of the Civil Procedure Code, lays down that: --

"Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

The obligation is laid on the Court to try the, issue of jurisdiction as a preliminary issue only if it is an issue of law, and in that event the Court would be justified in postponing the raising of other issues. When, however, the issue of jurisdiction is either an issue of fact or a mixed issue of law and fact, the procedure is laid down in the decision of our appeal Court in 'SOWKABAI v. TUKO JIRAO HOLKAR', 34 Bom L R 6 as under:

"Order XIV of the Civil Procedure Code gives no power to the Court to frame a preliminary issue of fact.

Where, however, the Judge has framed all issues which properly arise in a case, he may select one or more of those issues to be tried first and independently, where the evidence on such issue or issues can "be conveniently separated from the rest of the evidence and the finding on that issue or those issues may render the trial of other issues unnecessary."

The learned Judge was, therefore, with respect to him, in error when he observed that when the question of jurisdiction of the Court to entertain or try a suit was raised, that question must be adjudicated upon initially before any other question either of law or of fact was tried.

(20) The position, however, as it ultimately obtained before the learned trial Judge, was that the issue as to jurisdiction was really decided by him as on a demurrer. If the issue of jurisdiction was tried as on a demurrer, there could certainly be no objection to such trial because in that event all the allegations contained in the plaint would be assumed to be correct for the purposes of the trial of the issue and no objection could ever be raised by Mr. Dosai on the ground that any evidence which he wanted to lead on the issue as to jurisdiction was not allowed to be led before the Court. In. the appeal before us also the issue as to jurisdiction was argued as on a demurrer. The grievance of Mr. Desai therefore is not justified.

(21) whether this Court has jurisdiction to receive, try and determine this suit depends on the construction of the provisions of Clause 12 of tho Letters Patent, Clause 12 of the Letters Patent empowers this Court to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in ail other cases if the cause of action shall have arisen, cither wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits.

A clear demarcation is made in this clause between suits for land or other immovable property on the one hand and all other cases on the other. In the case of suits for land this Court would have jurisdiction to entertain the same if the land was situated, wholly, or where the "leave o£ the Court has been first obtained, in part, within the jurisdiction of this Court. In all other cases this Court would have jurisdiction to entertain the same if the cause of action had arisen either wholly or in case leave of the Court had been first obtained in part within jurisdiction or if the defendant at the commencement of the suit dwelt or carried on business or personally worked for gain within jurisdiction.

(22) The immovable properties comprised in this suit were situated at Karachi, Vikroli, Amritsar ami other places and the movable properties were situated in Bombay as well as other places. At the date of the institution of the suit none of these immovable properties was situated within the jurisdiction of this Court, because Vikroli was not within the limits of Greater Bombay as defined by the Bombay Act XVII of 1945. This Court had therefore no jurisdiction to entertain a suit for partition of the immovable properties comprised in the suit as no part thereof was situated within jurisdiction.

A suit for partition of immovable property is a suit for land and this Court had therefore no jurisdiction to entertain the suit for such partition because no part of the land was situated within jurisdiction. The case would, however, be different in regard to the movable properties, and this Court would have jurisdiction to entertain the suit for partition of movable properties if by reason of the situs or location of some of the movables within jurisdiction it could be said that a part of the cause of action had arisen within jurisdiction. In that event with leave under Clause 12 of the Letters Patent being granted this Court would have jurisdiction to entertain the suit for partition of all the movable properties which were the subject-matter of the suit.

(23) The suit was in its intent threefold: (1) for a declaration that the document dated April 15, 1944, was void and inoperative, (2) for partition of the immovable "properties belonging to the joint family, and (3) for partition of the movable properties belonging to the joint family. "It was contended that the relief by way of declaration that the said document was void and inoperative was a relief under Section 39 of the Specific Relief Act, viz. one for cancellation of the document, and that was an equitable relief which was sought by the plaintiff, and that relief could be granted by the Court within whose jurisdiction the properties, movable or immovable, affected by that document were situated.

It was further contended that some of the movable properties which were affected by that document were situate in Bombay and therefore a part of the cause of action arose in Bombay and that with leave under Clause 12 of the Letters Patent being granted this Court would have jurisdiction to entertain the suit with regard to all the properties, movable as well as immovable, which were affected by the said document. It was next urged that even though the land at Vikroli was not within the jurisdiction of this Court at the commencement of the suit, it came within the jurisdiction by the enactment of the Bombay Act VIII of 1950, that therefore when the suit came to be tried, a part of the lands which were the subject-matter of the suit for partition was within the jurisdiction and this Court had jurisdiction to entertain the suit for partition of all the lands comprised in the suit as leave under Clause 12 of the Letters Patent had been granted by the Court at the commencement of the suit.

It was lastly contended that this Court had jurisdiction to entertain the suit for partition of all the moveable properties because some of the moveable properties were situated within jurisdiction and with leave granted under Clause 12 of the Letters Patent this Court would have jurisdiction to entertain the suit for partition of all the moveable properties belonging to the family.

It was further urged in this connection that the business which was carried on by the plaintiff and defendant No. 1 in the name of Rarnial Ganpatrai in Bombay having been crnea on by them as the members of a joint and undivided Hindu family, though in partnership with outsiders, was a joint family business, the shares therein were held by the plaintiff & defendant No. 1 as ancestral family property in their hands and that therefore all the defendants who were interested in that business should be deemed to be carrying on business within jurisdiction, with the result that the suit for partition of the moveable properties belonging to the joint family being not a suit for land but coming within the category of "all other cases" could be entertained by this Court.

(24) The suit for a declaration that the document dated April 15, 1944, was void and inoperative is no doubt a suit for cancellation of the document within the meaning of Section 39 of the Specific Relief Act, and the question would have to be determined as to how far this Court has jurisdiction, to entertain such a suit. The document was admittedly executed at Amritsar. The defendants resided at Amritsar, The only manner in which jurisdiction of this Court could be invoked was by urging that the document was operative upon and would affect the properties which were situated within jurisdiction and therefore a part of the cause of action in regard to this relief for cancellation arose within jurisdiction.

In support of this argument reliance was placed on a decision of the Calcutta High Court reported in 'HADJEE ISMAIL HADJEE HUBBEEB v. HAD-JEK MAHOMED HADJEE JOOSUB, 13 Beng LR 91. The document in that case was executed in Calcutta and the plaintiff sued the defendants, one of them being a resident in Bombay but carrying on business by his gomasta in Calcutta, and others resident in Bombay, to set aside the document. The properties which were affected by the document were situated in Bombay, and Sir Richard Couch C. J. observed)p. 98):

"....Here the cause of action, whatever may be the true meaning of the expression, cannot be said to have arisen wholly in Calcutta. The fraudulent representation? which led to the execution of the release may have been made, and the release may Have been executed here, but the cause of action in this case consists of more than that. It includes the effect of the release upon the plaintiff's share of the property. If there had been no property, the execution of the release would not have injured the plaintiff in any way. In order to constitute a cause of action, there must be an injury to him from the operation of the release. Then where did the release take effect; where was it operative? The property was in Bombay....

In such a case as the present, I think the cause of action in respect of the immoveable property arose in the place where the release took effect.."

This is clearly an authority for the proposition that a part of the cause of action would arise within the jurisdiction of the Court where the property affected by the document was situated.

(25) Reliance was further placed on a decision of the Madras High Court reported in 'N. ACHAYYA v. N. YELLAMMA AIR 1923 Mad 109. That was a suit by the plaintiff as one of the two nearest reversioners to the estate of a deceased Hindu for a declaration that the will set up by his widow as having been executed by him and as giving her absolute rights in his properties was a forgery and

was void against him and for obtaining its cancellation.

Mr. Justice Venkatasubba Rao followed the decision in 'HADJEE ISMAIL HADJEE HUBBEEB v. HADJEE MAHOMED HADJEE JOOSCJB', 13 Beng LR 91 and observed (p. 112):

"....If the document is sought to be used to the detriment of a person at a particular place, the cause of action doubtless arises also at that place. 'BANKE BEHARI LAL v. POKHE RAM', 25 All 48. I fail to see, then, why if the document affects the right of a person to a property situated at any place, the cause of action does not arise in that place. The mere existence of the instrument apart from any specific act of the person who relies on the document, prejudicially affects the right of the plaintiff, to the property. If the instrument is left outstanding it constitutes a menace to his right in regard to the property which is within any particular area; it is not merely when the defendant seeks to enforce his rights under the instrument that harm results to the plaintiff. As I observed above, it cannot be denied that the cause of action arises at a place where the document is sought to be enforced independent of the circumstance of its having been executed or the fraud having been practised at an altogether different place. But why should this act on the part of the defendant be essential to the cause of action arising within that place, if, as a matter of fact, there is within it some property which the document affects and to which the plaintiff is entitled?"

The learned Judge then quoted the observations from the judgment of Couch C. J. quoted above and adopted the argument contained in that passage.

(26) These two cases are authority for the proposition that the cause of action in regard to the suit for a cancellation of a document under Section 39 of the Specific Relief Act arises where the property affected by the document is situated.

(27) Our attention was, however, drawn to an unreported judgment of Mr. Justice Kania, as he then was, delivered by him in 'KANTILAL K. KA-PADIA v. JAYANTIIAL K. KAPADIA, OCJ Suit No. 558 of 1938 (Bom). That was a case which is almost on all fours with the present one before us and these two cases reported in "HADJEE ISMAIL V. HADJEE MAHOMED', 13 Beng LR 91 and N. ACHAYYA v. N. YELLAMMA AIR 1923 Mad 109, were cited before the learned Judge. The learned Judge, however, distinguished these cases observing that the case in 'HADJEE ISMAU. v. HADJEE MAHOMED', was not treated and none of the prayers was considered as a relief sought under Section 39 of the Specific Relief Act and was not useful to be considered in deciding whether the declaration sought for in the suit before him by prayers Nos. 1 and 2 treating them as an independent cause of action should be granted or not.

The learned Judge distinguished the case in 'N. ACHAYYA v. N. YELLAMMA', by observing that before the plaintiff in that suit could claim any relief he had got to establish that he was interested in the property left by the deceased and that he had got to establish his interest in the properties in the event of there being any will. The learned Judge observed in the course of his judgment that for such a suit the place where the document was executed and the place where the reasonable apprehension took place would constitute a cause of action and that the place or places where the different properties covered by the deed existed did not appear to be relevant to be inquired into at all. With

great respect to the learned Judge, I fail to understand how one can distinguish the ratio of the two decisions in the manner he did.

The very basis of a suit under Section 39 of the Specific Relief Act is the apprehension of injury to the plaintiff. No such apprehension of injury can ever arise if there was no property in which the plaintiff was interested and in regard to which a reasonable apprehension was felt by him. The existence of the property is therefore as much essential to the success of a suit as the existence of an apprehension, because if there was no property no apprehension could ever be felt by him. The existence of the property and the reasonable apprehension of injury to his rights therein are both necessary to be established by him, and if they are the essential parts of the cause of action, the existence of the property within jurisdiction is certainly a part of the cause of action which arises within jurisdiction. That being the position, I am afraid, I cannot accept the reasoning adopted by the learned Judge and would prefer to follow the decisions in 'HADJEE ISMAIL v. HADJEE MAHOMED' and 'N. ACHAYYA v. N. YELLAMMA', if it were necessary to do so for the purpose of the determination of the issue as to jurisdiction in this suit.

(28) This difficulty however does not arise in this case, because Mr. Desai admitted in the Court below that the suit was substantially and essentially a suit for partition. That is the basis on which Mr. Justice Kania also decided the question of jurisdiction in the suit before him. He treated the suit before him as a suit for partition treating the reliefs as to the cancellation of the document as merely ancillary. The suit was a suit for partition, the defendant would put forward by way of defence the document which was executed by the plaintiff, which if established, would put the plaintiff out of Court, and the plaintiff therefore in order to afford a shield to that attack put forward the case in the plaint itself which would entitle him to a cancellation of the document which would thus be trotted out against him.

Considering the ease from that aspect and treating it as substantially and essentially a suit for partition, it would not be necessary to go so far as to dissent from the reasoning of the learned Judge and I would proceed to consider how far this Court has jurisdiction to entertain the suit for partition as claimed.

(29) As already observed, a suit for partition of immoveable properties is a suit for land, and the suit in so far as it seeks partition of the immovable properties which are comprised in the particulars exh. E to the plaint would therefore be a suit for land. These lands are situated at Karachi, vikhroli, Amritsar and other places, and even Vikhroli was outside jurisdiction at the commencement of the suit. It could not therefore be urged that any of the suit lands was within jurisdiction at the commencement of the suit. Bombay Act XVII of 1945 had extended the limits of the City of Bombay by including therein some portions of the Bombay Suburban District.

But the areas comprised in Greater Bombay as described in the schedule A thereto did not comprise Vikhroli. Vikhroli came to be comprised in the area by the enactment of Bombay Act VIII of 3950 and it was after the enactment of that Act that the jurisdiction of this Court was extended to Vikhroli. It is clear therefore that this Court had no jurisdiction at all to entertain a suit for partition of immoveable properties belonging to the family at the commencement of the suit. The question

therefore which would arise for our consideration would be how far the enactment of Bombay Act VIII of 1950 made any difference to the position.

There is authority for the proposition that it the law is changed at the date of the hearing, the Court should give effect to the changed law, and that it is the duty of the Court to administer the law of the land at the date when the Court ;s administering it, (See 'QUILTER v. MAPLESON', (1883) 9 QBD 672 and 'MUKERJEE, OFFICIAL RECEI-VER v. RAMEATAN KUER', 63 Ind App 47 P. C.). It was contended that this being the law of procedure as distinguished from the substantive law, it would be retrospective in operation, and that this Court would have jurisdiction to entertain the suit for a partition of the Vikhroli property which came within jurisdiction by reason of the enactment of the Bombay Act VIII of 1950.

It was urged, on the other hand, that the Bombay Act VIII of 1930 was not retrospective in operation and that the jurisdiction of this Court had got to be decided having regard to the circumstances as they existed at the date of the commencement of the suit. Having regard, however, to the provisions of Section 7 of Bombay Act VIII of 1950, it is clear that the Bombay Act VIII of 1950 was retrospective in operation. That section saved all pending proceedings in the Court where the same had been instituted so that if any suit in respect of Vikhroli lands had been filed in the appropriate Court, that Court would not cease to have jurisdiction to try and determine the same and the parties would not be relegated to their remedies in the Courts in Greater Bombay which were invested with jurisdiction over the same.

Moreover, in the case before us, no such suit had been filed in the appropriate Court for a partition of the Vikhroli lands so that any question would arise with regard to the saving of a pending suit in connection therewith. The suit, if at all, had been filed in this Court which acquired extended jurisdiction over the Vikhroli lands by the enactment of the Bombay Act VIII of 1950, and that being so, a suit which originally was not filed in a Court with jurisdiction came to be, after the enactment of Bombay Act VIII of 1950, a suit filed in a Court with jurisdiction to entertain the same. The result, therefore, is that this Court did acquire jurisdiction to entertain the suit for partition of the Vikhroli lands, and the only question which remained to be considered was whether leave under Clause 12 of the Letters Patent Which had been obtained at the commencement of the suit would enure for the benefit of the plaintiff so as to include within this suit also the lands which were situated outside the jurisdiction of this Court.

It was urged by Mr. Desai that leave under Clause 12 of the Letters Patent had already been granted both in regard to the moveable and immoveable properties which were comprised in the suit, and that therefore when this Court came to be invested with jurisdiction to entertain the suit with regard to the Vikhroli lands, that leave operated so as to invest this Court also with jurisdiction to partition the lands situated outside jurisdiction. It was urged by Mr. Desai that it was neither a different cause of action nor an alteration of the cause of action as it had been originally framed, and reliance was placed on two decisions of our High Court reported in 'RAMPURTAB SAMRUTHROY v. PREMSUKH CHANDAMAL', 15 Bom 93 and 'MOTILAL v. SHAN-KAELAL', 41 Bom LR 535.

In 'RAMPURTAB SAMRUTHROY v. PREMSUKH CHANDAMAL', it was held that :

"The grant of leave under clause XII of the Letters Patent, 1865 is a judicial act, which must be held to relate only to the cause of action contained in the plaint, as presented to the Court at the time of the grant. Such leave, which affords the very foundation of the jurisdiction, is not available to confer jurisdiction in respect of a different cause of action which was not judicially considered at the time it was granted. In respect of such a different cause of action, leave under clause XII cannot be granted after the institution of the suit; and, therefore, the Court cannot try such different cause of action, except in another suit duly instituted."

Mr. Desai contended that what he was doing in the present case was not to rely on any different cause of action but to continue the suit en the same cause of action on which he had based it. All the immoveable properties were comprised in the particulars exh. E to the plaint and there was nothing which he was adding to the scope of the suit as originally framed. In 'MOTILAL v. SHANKARLAL', a suit for money instituted originally with leave under Clause 12 of the Letters Patent by several persons acting as partners was by amendment of the plaint converted into a smt by only one of them, and it was held that such suit altered the cause of action and could not lie in absence of a fresh leave under Clause 12 of the Letters Patent after the amendment.

Mr. Desai urged that what he was doing in the present suit was not to institute a different suit but to continue the same suit as had been filed by him and that therefore the leave under Clause 12 of the Letters Patent which he had originally obtained should enure for his benefit in regard to the immoveable properties situated outside jurisdiction. The difficulty, however, in the way of Mr. Desai is that this is not a case where leave under Clause 12 of the Letters Patent was obtained in the first instance with reference to any immoveable property which was the subject-matter of the suit. Leave under Clause 12 of the Letters Patent was obtained on the allegations contained in paragraph 23 of the plaint, and it is significant to note that in that paragraph there is no mention at all made of any immoveable property being situated within jurisdiction so as to invoke the jurisdiction of the Court with regard to immoveable properties situated outside jurisdiction with leave under Clause 12 of the Letters Patent being granted.

All the properties including the property at Vikhroli were admittedly outside the jurisdiction of this Court and it could not at all have been within the contemplation of the plaintiff at the time when he instituted the suit that he should obtain leave under Clause 12 of the Letters Patent on the basis ql the suit being a suit for land. If that was the position, the leave under Clause 12 of the Letters Patent obtained at the commencement of the suit could by no stretch of imagination be extended to include the claim for partition of immoyeable properties on the basis of the suit being initially a suit for land situated in part within jurisdiction. The claim of the plaintiff for partition of the immoveable properties therefore can only be confined to the land at Vikhroli which was comprised within the jurisdiction of this Court by the enactment of Bombay Act VIII of 1950 and this Court would have jurisdiction to entertain the suit for partition only of the land at Vikhroli.

(30) The suit for partition of the moveable properties belonging to the joint family would be comprised within the category of "all other cases" mentioned in Clause 12 of the Letters Patent, and in that behalf we will have to consider how far a part of the cause of action can be said to have arisen within the jurisdiction of this Court, It was urged by Mr. Desai that the situs or location of the

moveable properties within jurisdiction would invest the Court with jurisdiction, and reliance was placed in support of this contention of his on a passage from Diccy's Conflict of Laws, 6th edn., p. 33:

" 'Jurisdiction, founded on possession of property.'Ought the possession of immovable or movable property in a particular country to give the Courts thereof jurisdiction over the possessor?

"Two points must be carefully distinguished. The possession of property, whether land or goods, undoubtedly gives the Courts of the country where the property is situate jurisdiction over that property, and, therefore, over the owner or possessor thereof, in regard thereto .... One may perhaps go further and say that the possession of property, immovable or movable, in a country gives the Courts jurisdiction over the possessor in regard to obligations connected with this property."

A passage from Salmond on Jurisprudence, 10th edn., p. 431, was also relied upon:

"A right over a chattel is movable property, and where chattel goes the right goes also."

Mr. Desai further relied upon a decision of the Allahabad High Court reported in 'AMBIT KUN-WAR v. GUR CHARAN SINGH AIR 1934 AH 226, The suit there was for the recovery of certain promissory notes which were in the custody of the Imperial Bank of India and was filed in the Court of the Subordinate Judge at Dehra Dun. The defendants contended that the Court of the Subordinate Judge at Dehra Dun had no jurisdiction to entertain the suit, and it was held that the movable property was within the jurisdiction of the Dehra Dun court and that was enough to invest the Court with jurisdiction.

In the course of the judgment Mr. Justice Mukerji observed as under (p. 229) :

"Again, the movable property in suit is within the jurisdiction of the Dehra Dun Court. This fact, although not specifically alleged in the plaint, is admitted on behalf of the appellants and is proved by the fact that the Dehra Dun branch of the Imperial Bank produced the promissory notes for the inspection of the Court and allowed photographs of the same to be taken. It is again common ground that the fixed deposit is with the Dehra Dun branch of the Imperial Bank. In the case of 'SIRDAR GURDYAL SINGH v. RAJAH OP FARIDKOT', 21 Ind App 171 (PC) their Lordships remarked (at p. 238) as follows: 'Territorial jurisdiction attaches. .. upon all persons either permanently or temporarily resident within the territory.... exists always as to land within the territory and it may be exercised over movables within the territory.....' "It does appear therefore that in suits relating to movable property a Court, within whose jurisdiction the movable property is kept, has jurisdiction to try the case. In this view also the lower Court was not without jurisdiction."

Reliance was also placed on 'JAIRAM NARAYAN V. ATMARAM NARAYAN', 4 Bom 482, 'SESHA-GIRI RAU v. RAMA RAU', 19 Mad 443 and 'ABDUL KARIM V. BADRUDEEN SAHIB', 23 Mad 216, where even though the suits comprised immovable as well as movable properties, the immovable properties being situated outside Jurisdiction, the suits were held not maintainable in regard to immovable properties outside jurisdiction but were allowed to proceed with regard to the

moveable properties within jurisdiction. Reliance was lastly placed on the unreported judgment of Mr. Justice Kania in 'KANTILAL K. KAPADIA v. JAYANTT-LAL K. KAPADIA', O.C.J. Suit No. 553 of 1938, D/-13-7-39 above referred to where the learned Judge in circumstances identical with those obtaining in the ease before us observed:

"Under the circumstances I hold that the suit so far as it relates to movable property is within the jurisdiction of this Court."

The principle which emerges from the above is that the situs or location of the movable property within jurisdiction invests the Court with jurisdiction. The cause of action is the bundle of facts which are necessary for the plaintiff to establish in order to obtain the relief which he seeks at the hands of the Court and the jurisdiction of the Court is determined by the fact of the cause of action wholly or in part having arisen within its jurisdiction. The cause of action for instance in a suit on a promissory note consists of the execution of the promissory note, the demand of the monies due under the promissory note and the nonpayment thereof. Any of these facts may take place within jurisdiction, and if even a part of the cause of action arises within the jurisdiction of the Court, the Court would have jurisdiction to entertain the suit on the promissory note.

In a suit for partition of movable property the cause of action consists of the existence of the movable property, the interest of the parties in the movable property, the demand for partition and the non-compliance therewith. The existence of movable property would be an essential part of the cause of action, and if that movable property is situated within the jurisdiction of a particular Court, that part of the cause of action would certainly arise within the jurisdiction of that Court, It is clear therefore that the situs or location of the movable property within jurisdiction would, by reason of a part of the cause of action having arisen within local limits, invest the Court with jurisdiction.

(31) Reliance was, however, placed by Mr. Mane-ksha as also by the learned trial Judge on certain observations in 'JAIRAM NARAYAN v. ATMARAM NARAYAN', 4 Bom 432 and 'SESHAGIRI RAU v. RAMA RAU', 19 Mad 448 which lend support to the contention that where a suit was filed for the partition of movable properties as well as immovable properties, no leave under Clause 12 of the Letters Patent should be granted and the Court should decline to entertain such suit. 'JAIRAM NARAYAN V. ATMARAM NARAYAN', 4 Bom 482 was a judgment of Mr. Justice West, and the main question with which the learned Judge there was concerned was whether leave under Clause 12 of the Letters Patent was properly granted under those circumstances.

The learned Judge observed (p. 487):

"In the present suit the partition of land is the principal object: there is a claim for a partition of movable property also, but, apparently, of a less substantial kind."

The main consideration by which the learned Judge was moved was that the suit for movable property was not allowed to attach to itself a suit for immovable property, as by leave of the Court another suit for immovable property might in that way be drawn within another than the local jurisdiction.

This decision was considered by the Madras High Court in 'ABDUL KABIM V. BADRUDEEN', 28 Mad 215 and the Court there observed (p. 222):

"... In the latter case the observations of West, J. to which Moore, J. refers in his judgment were made with reference to the question whether leave to sue could properly be given, not with reference to the question whether the Court had jurisdiction as regards the property within the local limits of the jurisdiction. This is clear from the fact that the Court allowed the case to proceed with reference to the movable property within the limits of the jurisdiction, seeing that in both these cases, although the point does not appear to have been argued, the suit was only dismissed as regards the land outside the jurisdiction, it must be taken that the learned Judges were of opinion that the Court had jurisdiction as regards the movable property within the jurisdiction."

The other case which was referred to above was the case Of 'SESHAGIRI RAU v. RAMA RAU', which followed the ratio in 'JAIRAM NAB AY AN v. ATMARAM NARAYAN', Mr. Justice Kania had the same observations to make in the unreportcd judgment above referred to with regard to 'JAIRAM NARAYAN V. ATMARAM NARAYAN'.

"This is because the immovable property being situated wholly outside jurisdiction the Court has no power to grant leave to sue as regards such property. This is in fact stating that a suit for partition of immovable property is a suit for land and when all the immovable properties are outside the jurisdiction no question of obtaining leave under clause XII arises."

The observations therefore which were relied upon by Mr. Maneksha and also by the learned Judge below in 'JAIRAM NARAYAN v. ATMARAM NARAYAN', do not lend support to the contention that no suit for partition of movable properties within jurisdiction can lie in cases where it is mixed up with the suit for partition of immovable properties all situated outside the jurisdiction of the Court. These observations therefore do not militate against the position which we have laid down above, viz. that the existence of the movable properties is a part of the cause of action, and if that cause of action has arisen within the jurisdiction of this Court by reason of the situs or location of the movable properties within the local limits, this Court would have jurisdiction to entertain the suit for partition of the movable properties within jurisdiction.

Looking at the matter from this point of view, it is clear that this Court has jurisdiction to entertain the suit for partition of movable properties which are situated within jurisdiction, & with leave granted under Clause 12 of the Letters Patent it would also have jurisdiction to partition movable properties belonging to the joint family outside jurisdiction. The suit for partition of movable properties would be comprised within the category of "all other cases" mentioned in the latter part of Clause 12 of the Letters. Patent, and, that being so, a part of the cause of action having arisen within jurisdiction, this Court would have jurisdiction to entertain the suit for partition of movable properties even outside jurisdiction with leave under Clause 12 of the Letters Patent being granted.

(32) This ratio is determinative of the case and it would, not be necessary to go into the other interesting question of Hindu law which was argued before us. In so far, however, as the judgment of the learned trial Judge is categoric on the point which on all hands is a very important one, we

allowed Mr. Desai to argue that point also and we are recording our opinion in regard to that point as we have been invited to do. The interesting point which arises thus for pur consideration is whether the members of a joint and undivided Hindu family who are interested in a particular business carried on within jurisdiction can be said to carry on business within jurisdiction. Clause 12 " of the Letters Patent requires that in all other cases where the cause of action has not arisen wholly or in part within jurisdiction, the defendant at the time of the commencement of the suit should dwell or carry on business or personally work for gain within jurisdiction.

The words used are "that the defendant should carry on business within jurisdiction" and we have therefore got to determine what is the connotation of the words "carry on business." The words "carry on business" have been judicially interpreted. In 'KIRPA RAM v. MANOAL SEN' AIR 1922 All 3G7, the learned Judges of the Allahabad High Court observed (p. 369):

" 'Carrying on biisiness' means, in this section, having an interest in the business transactions at the particular place; a voice in what is done; a share in the gain or loss, as the case may be; and some control, if not over the actual method of working, at any rate, upon the existence of the business."

These observations of the learned Judges of the Allahabad High Court were quoted with approval in 'TA&A3AI v. CHOGMAL AIR 1932 Nag 114. The case before the Nagpur High Court was that of a person carrying on business of ginning factory under a pooling agreement which provided for keeping the factories dormant by rotation and the question arose whether the test of carrying on business was the continuity or intermittency of the business, or any other. The Acting Judicial Commissioner Niyogi held that the test was not the continuity or the intermittency of the business, but the fact of owning an interest in the business and receiving profits, and that therefore a person must be deemed to be carrying on business of ginning factory if under a special contract of combination entered into by him with other factories, his factory remained quiescent and he derived profits from the contract.

The intervals of inactivity did not imply either suspension or cessation of business. Even here the learned Judge observed (p. 115):

".... In the present case it is manifest that the respondents had an interest in the ginning and pressing business of Deulgaon Raja and had a share in the gain or loss, and as partners in the combination had some control however small over the business."

So that the criterion of having some control over the business was not eschewed and that was taken into account together with the fact of owning the interest in the business and receiving profits.

(33) The true test was laid down by their Lordships of the Privy Council in 'GOSWAMI SHRI GIRDHARIJI v. GOVARDHAN LALJI', 18 Bom 294 PC. That was a case of a Goswami receiving donations and offerings from his devotees when he was on a visit to Bombay. It was held that he was not carrying on any business in Bombay, and their Lordships observed (p. 298):

"The phrase 'carry on business', as has been often said, is a very elastic one, and is almost incapable of definition. The tribunal must in each case look to the particular circumstances. It appears to their Lordships that the Letters Patent intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who had business transactions with him."

The test, therefore, is as has been laid down by their Lordships of the Privy Council that a person can bo said to carry on business where he might contract debts and would be liable to be sued by persons who had business transactions with him.

(34) A joint family in Hindu law can own a business. The business can be conducted with the funds of the joint family and all the members of the joint family would be interested in that business. The persons who would be, however, carrying on the business, though for the benefit of the joint family, would be the 'karta' or the manager or the adult members of the joint family. The minor members of the joint family as also the female members who would be interested in the assets of the joint family would not be carrying on that business. The business would be carried on by those members of the joint family who are in conduct of the same. All the assets of the joint family would no doubt be liable for the debts of that business which would be carried on by the manager or the adult members of the family with the authority and with the full consent of the members of the family.

The personal liability, however, in regard to the transactions of that business would be that of the manager or the members of the family who actually conduct that business, the other members being only liable to the extent of their interest in the Joint family properties, such of them being liable also personally as came into direct contractual relationship with the outside parties or held themselves out as the contracting parties or subsequently ratified the transactions. The actual mode in which the personal liability would be incurred by them would be either by reason of a contractual relationship with outsiders or by reason of holding out or by subsequent ratification, but except for that, there would be no personal liability incurred by them and their only liability would be to the extent of their interest in the joint family properties. They would not be carrying on business in the sense that they would contract debts or would be liable to be sued by persons having business transactions with them. (See also Mulla's Principles of Hindu Law, 10th edn., p. 265).

(35) When the manager of a joint family or a-member or members of a joint family enter into partnership with strangers, though acting on behalf of the joint family, the position which obtains is that, not all the members of the joint family, but only such of its members as have in fact entered into partnership with the stranger become partners. On such a partnership being formed the relationship which is established is a contractual relationship, and the only parties who thus come into contractual relationship with each other are the outsider and the member or members of the joint family as the case may be. The members of the joint family who are not partners with the outsider have no voice or control over the business, they are not in a position even to dissolve the partnership and to realise the share of the joint family in the partnership.

The liability to the outside creditors is of the partnership and the partners thereof; though by reason of the fact that one of the partners therein is the manager of a joint family, the interest of the other members of the joint family in the joint family properties may be reached in execution of a decree, if

any, obtained against the manager. This, however, is by reason of the operation of the principles of Hindu law and not by reason of the application of any principles of the law of contract. The other members of the joint family arc not liable to be sued at the instance of the creditors of the partnership, though it may be that a creditor of the partnership who has obtained a decree against the manager may execute the decree which he has thus obtained, not only against the interest of the manager in the joint family properties but also against the interest of the other members of the joint family therein.

The liability to pay the debts properly incurred by a manager acting within the scope of his authority and for the benefit of the joint family is thus quite distinct from the liability to be sued in respect of debts which are incurred by the manager in the course of a business which he is conducting or carrying on for the benefit of the joint family. This is the true position as it has been laid down by the authorities, and we find the position clearly laid down to this effect in 'GANGAY-YA v. VENKATABAMIAH', 41 Mad 454 and 'CHO-CKALINGAM v. MUTHUKARUPPAN', ILB (1938) Mad 1019.

In 'GANGAVYA v. VENKATARAMIAH', it was observed (p. 456):

"It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Contract Act. I need only refer to 'SOKKANADHa VANNIMUNDAR v. SOKKANADHA VANNIMUNDAR', 28 Mad 344; 'RAMANATHAN CHETTY v. YEGAPPA CHETTY', 30 Mad LJ 241 and 'VADILAL v. SHAH KHUSHAL', 27 Bom 157. It is no doubt true that as between the members of the undivided family and the coparcenur who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits but this will not place them in any position of direct contractual relationship with the other partners of the firm.

"Nor would the fact that the entire assets of the joint family might be available to the creditors of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is, as pointed out by their Lordships of the Privy Council in 'ANNA-MALAI CHETTY v. MURUGASA CHETTY', 30 Ind App 220 (PC) more analogous to that of a trustee."

These observations of the learned Judges of the Madras High Court throw considerable light on the true position of the members of the joint Hindu family in those cases where a partnership is entered into between an outsider on the one hand and the manager of the joint family or a member or members of the joint family on the other. It is the manager of the joint family or the member or members of the joint family who enter into the partnership that carry on the business of the partnership. The family has no doubt an interest in the share which they enjoy in that partnership

business; but it is a far cry from that to say that the members of the joint family who are interested in that share carzy on the partnership business themselves. They do not enter into any transactions in the course of the partnership business. They do not contract debts or obligations in the course of that business. They are not liable to be sued in respect of the transactions of that business. They have a right no doubt as sub-partners or sub-sharers to go against the manager of the joint family or member or members of the joint family who have been put forward as partners with the outsider in that business.

It does not, however, therefore follow that they carry on the partnership business which is the business by and between the outsider on the one hand and the manager of the joint family or member or members of the joint family on the other. To the same effect are the observations in 'CHO-CKALINGAM v. MUTHUKARUPPAN ILR (1938) Mad 1019 (p. 1027):

"When Narayanan embarked upon the M. P. N. partnership he did so as representing the family. That did not, however, make the members of his family partners. It is well settled law that a contract of partnership by a manager does not 'ipso facto' make the other members of the family partners;... .But this does not mean that where a manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same Kind of business the members of the family are not liable to the extent of the family property for the debts binding on the manager in the partnership business."

These observations, however, touch the question of the liability of the other members of the joint family for the debts which are lawfully incurred by the manager in the conduct of the business on behalf of the joint family. They do not touch the aspect of the liability of these members of the joint family to be sued in respect of the debts incurred by the partnership or in regard to the transactions entered into by the partnership with third parties. An analogy is very appositely furnished by the position as it obtains between executors and legatees on the one hand and trustees and 'cestui que trust' on the other. An executor who is empowered under the will of the testator to carry on his business no doubt carries on the business for the benefit of the legatees.

But it is the executor who carries on the business and not the legatees, though the legatees would be interested in the business which the executor carries on in pursuance of the directions contained in that behalf in the will. A trustee who is empowered to carry on business similarly carries it on himself though he docs it for the benefit of the 'cestui que trust.' The 'cestui que trust' is no doubt interested in the business but he cannot be said to be carrying on that business. The same is the position as between partners and sub-partners. The manager of the joint family or the member or members of the joint family who enter into partnership with strangers though on behalf of the joint family carry on the partnership business themselves. The other members of the joint family are interested in that business and are at best in the position of sub-partners but they cannot be said to carry on that business.

We are definitely of the opinion that even though it may be a business in which the members of the joint family may be interested as sub-partners or sub-sharers, they certainly do not carry on the business which is carried on only by the manager of the joint family or the member or members of

the joint family who enter into the partnership with the outsider though for the benefit of the joint family.

(36) There may be cases no doubt where the whole joint family enters into partnership with a stranger. But there all the members of the joint family who are capable of entering into partnership become partners with the outsider. The joint family is not a legal entity known to law, with the result that within the compendious description of the joint family, only those persons are comprised who are capable of entering into contractual relationship as partners and they only become partners with the outsider. Minor members of the joint family can never become partners with any outsider because an infant according to our law is incapable of entering into a contract. They may be admitted to the benefits of a partnership ; but that is the only extent of their interest therein. If such an event happens, then it is not the joint family which enters into partnership with the outsider.

It is the individual members of the joint family who are capable of entering into contractual relationship that become partners with the outsider, and all the results of the partnership known to the law follow. The death of one of the partners dissolves the partnership. Each one of the partners has a controlling voice in the partnership and there would be liabilities 'inter se' between the outside partner on the one hand and the partners belonging to the joint family on the other. But in those cases where, apart from the whole of the joint family thus becoming a partner with the outsider, it is only the manager of the joint family or a member or members of the joint family who enter into partnership with the outsider, the position remains as we have indicated above. The manager of the joint family or a member or members of the joint family who thus become partners are not the agents of the, other members of the family for the purpose of carrying on the business within the strict sense of the term as recognised by law.

It has been laid down that a person in order to carry on the business need not do it personally. He can also do it through an agent duly authorised in that behalf. But that person must be an agent in the strict sense of the term, and the Privy Council has laid down that the manager of a joint Hindu family is not an agent within the meaning of this condition. It is too late in the day to protest against these observations of their Lordships of the Privy Council. Even though they may be obiter, it is clear that the other members of the joint family cannot be said to carry on the business through or by the agency of the manager of the joint family or member or members of the joint family who are put forward thus as partners in the partnership business with the outsider.

(37) In this behalf it would be interesting to note the following observations made by the learned Judges of the Madras High Court in 'MURU-GESA CHETTI v. ANNAMALAI CHETTI', 23 Mad 458 which ultimately went to the Privy Council in 30 Ind App 220 (p. 472):--

"..... These circumstances negative the view that the appellant had any interest in the oil trade, much less that he assisted In carrying it on. Even if it were otherwise, and if the appellant would have been entitled to claim an interest in the oil business on the ground that it was carried on by one who was the manager of his family at the time, it would not warrant our holding that the appellant carried on business within the meaning of section 17 of the Code of Civil Procedure, inasmuch as the person acting as agent within the jurisdiction should, in our view, be an agent in the strict and

correct sense of the term, so as to bring the principal within the operation of the said Section 17, Code of Civil Procedure, as interpreted by this Court. We do not, however, wish to be understood as saying that a member of a joint family, who actually consents to a trade being carried on on his behalf or by his conduct puts himself in the position of a joint trader, would, while he was living outside the jurisdiction, not be carrying on business within the jurisdiction. Such is not the present case as we have already stated."

Though the learned Judges there make a distinction between an ordinary member of the joint family and a member who actually consents to a trade being carried on on his behalf or by his conduct puts himself in the position of a joint trader, in which latter event the person would be deemed to be carrying on business within jurisdiction, the mere fact of a person being interested in the joint family business and not taking up the position of a contracting party or holding himself out as a contracting party would not make any difference to the position. Such a person cannot be deemed to be carrying on business which is carried on by the manager of the joint family or a member or members of the joint family in partnership with the outside partner.

(38) For the reasons above mentioned, therefore, we have come to the conclusion that merely because, as alleged in paragraph 23 of the plaint, the plaintiff and defendant No. 1 as a member of a joint and undivided Hindu family and in partnership with outsiders, carried on the business of Kam-lal Ganpatrai in Bombay, and the shares in the said business were ancestral joint family in their hands, the other defendants cannot be said to have carried on business in Bombay at the date of the institution of the suit.

(39) On all the grounds aforesaid, I agree with the order proposed by my Lord the Chief Justice.

Curiam, J.

(40) The appellant wanted the Court to assume jurisdiction both with regard to moveable and immoveable properties, with regard to immoveable properties the appellant has substantially failed. But ho has succeeded in getting Mr. Justice Shah's order reversed as far as the Vikhroli property and the moveables are concerned. We think that the fairest order with regard to costs will be that the respondents must pay to the appellant half the costs of the appeal and half the costs of the hearing before Mr. Justice Shah.

(41) Mr. Justice Shah, in view of the fact that he held that the Court Had no jurisdiction, dismissed the summons taken out by the plaintiff for discovery and inspection. The learned Judge Will now pass the proper order on that summons.

(42) Order accordingly.