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ment binding upon the respondent only, as the appellant was not in any way a privy to Dádá. There are three kinds of privity, namely, by blood, law, and by estate. If there is in this case any privity by estate, it is with the judgment debtor, and the execution creditor had no estate, since he merely attached and sold the property, and his obtaining the proceeds of the sale did not make him a privy. One might suppose that, under other modes of procedure, authorities might be found on the subject; but the absence of authorities is accounted for by the fact that the judgment debtor was not made a party. The debtor should have been made a party to the former suit, but the suit was not so framed. The judgment, therefore, is not an estoppel at all, nor is it admissible in this case as evidence. The question then is, can it have any other effect? Mr. Justice Holloway, of the Madras High Court, has treated of judgments *in rem* in the case of *Yarakalamma Anakala* v. *Naramma* (c), and we concur in the opinion he has there expressed. The result, therefore, is that neither as a judgment *inter partes*, nor as a judgment *in rem*, is the former decision of use in this suit. The appellant thus fails on the point he has taken; and we must, therefore, confirm the decree of the lower Court with costs.

Decree confirmed.

Regular Appeal No. 8 *of* 1868.

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THE GOVERNMENT OF BOMBAY ....*Appellant.*
DA'MODHAR PARMA'NANDA'S *et al.* ....*Respondents.*

Service Watan—*Resumption—Right of Females to hold Service* Watans —*Jurisdiction—Act* (*Bombay*) *VII. of* 1863.

The payment of a *hak* in respect of a *majumdári watan*, though charged on villages, is not "a share of the revenues thereof," within the meaning of Sec. 32 of (Bombay) Act VII. of 1863.

Government has no power to resume *majumdári watans* where it dispenses with the performance of services in respect of them, if the holders of such *watans* are ready and willing to perform such services.

(c) 2 Mad. H. C. Rep. 276.

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The law in the Bombay Presidency recognises the right of females to hold *majumdári watans*, males being appointed by them to perform the services.

THIS was a Regular Appeal from the decision of C. G. Kemball, District Judge of Súrat, in Original Suit No. 2 of 1867.

The action was instituted by Dámodhar Parmánandás and others to compel the Government of Bombay to continue to the plaintiffs two *majumdári watans* in the Broach and Wághrá tálukás, in the Súrat district, which *watans* were formerly held by their maternal grandfather, Nárandás Rasikdás, and resumed by Government on the death of Bái Lakshmi, his widow. The plaintiffs also claimed arrears from the date of resumption.

For the defence it was pleaded—1*st*, that the suit was barred by the law of limitation; 2*ndly*, that *majumdár* Nárandás and Bái Lakshmi having died without male issue, the *watans* lapsed to Government, and the plaintiffs had consequently no right of action; and 3*rdly*, that the plaintiffs had no right of action against Government.

The District Judge delivered the following judgment:—

"The issues for determination are—whether (1) this action is barred under the law of limitation; (2) Nárandás and his wife, Bái Lakshmi, having died without male issue, it is not competent to the plaintiffs to demand the continuance of the *watans* in question to themselves; and (3) this action is maintainable against Government.

"On all three issues I find in favour of the plaintiffs. No other issue was raised by either party.

"Though little evidence is offered as to the nature of the *hak* in dispute, it is well known that a *majumdár* is an hereditary officer of a *parganá*, whose duty, whatever it now may be, was formerly to keep all the accounts of the *talátis*, and to frame from them the general accounts of the *parganá*, his emoluments coming from fees on the villages, though now they are paid direct from the treasury. From the Bombay

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Printed Revenue Selections it is learnt that the office has been hereditary since the time of Rájá Todarmal, one of the *vazirs* of the great Mogul A'kbar.

"It appears that the *watan*, the subject of this action, was latterly held by one Nárandás, the son of Rasikdás, who died in A.D. 1826, leaving a widow, Lakshmi, and three daughters, Báis Nevá, Dáhi, and Kúvar; of these daughters Báis Dáhi and Kúvar are dead, Dáhi dying in 1846, and predeceasing her mother, Lakshmi, who died in 1855. Dáhi, however, left a son, Dámodhardás, one of the claimants; of the other two daughters Bái Nevá is childless, and Bái Kúvar has left two sons, Narbherám and Bhagtidás. On her husband's death Lakshmi succeeded to the emoluments of the *watan*; but, as there were no male children to Nárandás, the *watan* was, on her death, resumed by the orders of the Government, the surviving daughters receiving a small money pension in lieu during their lives. The sons of Kúvar and Dáhi sue to compel the continuance of the *watan*; and to this action it is replied, on behalf of Government, that the claim is without the law of limitations; that the *watan* lapsed to Government through failure of male issue to Nárandás; and that, by Act VII. of 1863 (Bombay), an action of this kind against Government cannot be maintained in the Civil Courts.

"The main question submitted for adjudication is, whether the fact of Nárandás having died without male issue warranted the resumption of the *watan* belonging to him; but it is necessary, before proceeding to its discussion, to dispose of the technical objections raised to the court's jurisdiction. * * * *

"With regard to the objection raised as to the incompetency of the Civil Courts to adjudicate upon such a cause, it appears to me that the Bombay Act No. VII. of 1863 is inapplicable to this claim. 1*st*, the preamble shows clearly that the Act has no application to resumption; and 2*ndly*, a *majumdári watan* can in no sense, I think, be termed 'lands' within the contemplation of para. (*b*) of Sec. XXXII.

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I, therefore, consider the objection to the jurisdiction of the court is untenable.

"I now come to the main question, whether or no the resumption of the *watan* was justified by the failure of male issue to Nárandás: in other words, whether, either by law or custom of the country, descendants of the grantee in the female line are debarred from succeeding to a *majumdári watan*. There is no question about plaintiffs being co-heirs of Nárandás, so that it will be needless for me to go into that point, the sole question for consideration being whether by the failure of male issue there is a consequent determination of the *watan*. Neither party has placed before me any evidence showing that it has been the invariable custom in Gujarát, either for *watans*, in default of male issue, to result back to the State, or for females to succeed in the natural course of things to service *watans*: so that I must determine as best I can whether there is anything in the nature of the *watan*, or in the relationship of the holders of the State, which renders the succession of females impossible.

"It was pleaded for Government, in answer to this action, that the *watan*, on the failure of male issue, lapsed as a matter of course to Government; and it has been argued before me that it is customary to exclude descendants in the female line from such offices; but though, in my opinion, the *onus* of proving the right of escheat was on the party pleading it, there is not a particle of evidence offered on behalf of Government to show either that at the time of the grant any restriction was imposed on the right of succession, or that it has been the invariable custom for only the male descendants to succeed. All I can learn is that the office of *majumdári* was intended, and has continued, to be hereditary., I observe it has been assumed on behalf of Government (*vide* the letter of the Revenue Commissioner for Alienations No. 1822 of 1858, exhibit No. 23) that district hereditary offices do lapse to Government through failure of male issue, but in what consists the right of escheat in such cases I am unable to discover. As I have before observed,

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no law inconsistent with the right of females to succeed has been shown to me, nor has it been proved to have been the custom of the State to resume *watans* of hereditary officers in default of male issue. It is mentioned in the letter above referred to, that the Peshwa's records prove that his Government considered such *watans* to have lapsed: from which it is meant to be inferred, I presume, that prior to the British rule females never did succeed; but I imagine that if it had been possible to establish this point as applying to Gujarát, some pains would have been taken to produce these records here. The question before me is not as to the expediency of continuing such *watans* to females, but whether Government has legal competence to resume a *watan* on failure of issue in male lineage from the original grantee: and in the absence of all opposing evidence I consider that the provisions of Sec. 11 of Act XI. of 1843 afford conclusive proof that the British Government were prepared to, and did at one time, recognise the right of females to succeed to hereditary offices; and this appears to have been the view taken by the Ṣadr Adálat and by the Legislature: *vide* Art. No. III., headed 'Females are entitled, under Act XI. of 1843, to an Hereditary District and Village Office,' page 593 of the Government Revenue Circular Orders. The first witness for the plaintiffs, Práṇshankar Raghunáthrái, Mámlatdár of Ulpár, mentions two instances of women succeeding to such hereditary offices, and he states that the Alienation Commission was appointed in 1855-56, and after that no daughter or daughter's son received such a *watan*; from which latter statement the only logical inference is that before the year 1855-56 it was customary for females to succeed. Objection has been made to the institution of this action by reason of Nevá's name not having been joined; but I do not consider that the non-joinder affects the plaintiffs' right of action.

"As a matter of right I find that whereas the office of *Majumdár* is clearly hereditary, no attempt has been shown to establish the right of escheat in the sovereign proprietor, either prior or subsequent to the British rule, on

failure of male issue; and, therefore, hold that the plaintiffs have made good their right to the continuance to them of the hereditary office, together with six years' arrears. Costs on the defendant."

The case was heard on the 11th of November 1868, before COUCH, C.J., and NEWTON, J.

White (with him *Dhirajlál Mathurádás*), for the appellant:—The only question is whether the *watans* in this case come under the definition of "land" as given in Bombay Act VII. of 1863. Sec. XXXII., cl. (*b*), of the Act says "land" means *inter alia*, shares of the revenue of villages. Here the *watans* are charges on revenues, which are paid out of the treasury. If, therefore, the *watan* is land within the meaning of the Act, the Civil Courts will have no jurisdiction, under cl. 4 of Sec. II. of the Act; but if the Act does not apply, the *watans* will be cash allowances, and then a different law will apply. The *watans* are attached to the office, the duty of which is to keep accounts, but the service is now discontinued. There is nothing in the nature of a grant for past services or anterior rights, and, therefore, the payment should cease with the service. The *watans* being for service to be rendered, only the male descendants of the grantee can succeed to them, since females cannot perform the service: Act XI. of 1843. The deceased Nárandás left three daughters. Two of them are dead, and one is surviving, and the plaintiffs are the sons of one daughter. So they can claim a share only, and not the whole *watan*, including the share of the other daughter, Nevá, who is surviving.

Pigot (with him *Shántárám Náráyan*) for the respondents:—The *hak* was charged on the revenues of the tálukás, but the British Government paid it out of their treasury. It is not a share of revenues under Act (Bombay) VII. of 1863, since we notice that the Legislature has taken care to exclude from the Act the expression "immoveable property." So long as we are willing and ready to perform the service, Government is

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entitled to discontinue the payment: *Beema Shunker Balcrishna* v. *Jamasjee Shaporjee and others* (*a*). We have produced evidence of custom to show that *haks* have descended through females. As regards the share of Nevá, she has relinquished it in our favour; and as the objection is only now taken, we should be allowed an opportunity to make her a party.

Cur. ad. vult.

COUCH, C. J.:—In this case three questions have been raised by the appellants, viz., (1) whether Act VII. of 1863 applied to the case: if so, the Court would not have jurisdiction; (2) whether the Government is entitled to discontinue the payment of the *haks* on the ground that no services are performed; and (3) whether this was a *watan* limited to male descendants of the original grantee.

The determination of the first question depends upon the construction to be put on Sec. XXXII. of (Bombay) Act VII. of 1863, which provides that "lands" shall be understood to include "villages, portions of villages, shares of the revenue thereof, and landed estate of every description." We are of opinion that the payment in this case, though charged on the villages, is not a share of the revenues of the villages, and that, therefore, the Act does not apply, and consequently the Civil Courts had jurisdiction to try the suit.

As regards the second question, the answer is that it not only appears on the evidence that there are some services to be rendered, but that the plaintiffs are ready and willing to perform them. That being so, the Government cannot resume the *haks*, and even if the Government chooses to dispense with the services, that will not deprive the parties of their *haks* if they are willing to perform the service.

With reference to the third question, we have to observe that the law in this Presidency recognises that females can hold *watans*, males being appointed to perform the service, and that it is, therefore, incumbent upon the Government to show that this is a special case. But it is not shown in any

(*a*) 2 Moo. Ind. App. 23.

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way that the *watans* in dispute were granted in a peculiar manner, and that the condition was that they might be resumed on failure of male heirs.

Now as to the share to which the plaintiffs are entitled, they represent persons entitled to a half-share. The Judge was, therefore, wrong in awarding to the plaintiffs the whole of the *watans*. At first sight two-thirds would appear to be the proper share of the plaintiffs, but in fact they are entitled to only half of the *watans*. We accordingly amend the decree of the lower court by awarding half of the *watans*, and half of the arrears claimed. The costs of this appeal to be paid by the appellants.

Nov. 25.

Special Appeal No. 438 of 1868.

BA'I PREMKU'VAR ....Appellant.
BHIKA' KALLIA'NJI ....Respondent.

Hindú Law—Suit for Restitution of Conjugal Rights—Leprosy.

To a suit brought by a Hindú husband against his wife for the restitution of conjugal rights, the fact that he is, at the time of such suit, suffering from a loathsome disease, such as leprosy, is a good defence.

THIS was a Special Appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 61 of 1868, reversing the decree of Kávasji Edalji, Munsif of Súrat.

The original suit was instituted by Bhiká to compel his wife, Bái Premkúvar, to go and live with him in his house as his wife.

The defence was that the plaintiff for two years had been, and still was, suffering from virulent leprosy and syphilis.

The Munsif threw out the claim, on the ground that it would, under the circumstances, be cruel to compel the wife to live with her husband.

The District Judge reversed the decree of the Munsif, and remanded the case for re-trial, for the reasons stated in his judgment :—