

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.

1868.
THE GOVERNMENT OF BOMBAY
v.
DA'MODHAR PARMA'NANDA'S *et al.*

Special Appeal No. 438 of 1868.

Nov. 25.

BA'Í PREMĀ'VAR *Appellant.*
BHĪKA' KALLĪ'NJĪ *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, Báí, 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:—

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“The point for determination is, whether the decision of the lower court is in accordance with Hindú law and with the evidence.

“There seems to be no doubt whatever that the plaintiff is afflicted with leprosy and syphilis—indeed he does not attempt to deny the fact: so that the only issue to which the Munsif should have addressed his consideration was, whether the diseased state of a husband (Hindú) justifies his wife in refusing to reside with him. The Munsif appears to have considered that, under the circumstances, it would be cruel to order the female defendant to return to her husband, and, therefore, threw out the suit; but this does not appear to me to be a proper way of adjudicating upon the claim. The plaintiff is entitled to have it tried on its merits, apart from any question of expediency; and this can only be done by the Court's determining the question whether by the Hindú law, or the custom of the caste of the parties, a husband diseased, as the plaintiff is, is debarred from demanding that his wife shall live with him. I observe that the plaintiff prays that his wife may be compelled to have connection with him; but it is beyond the power of the Court to grant such a prayer. It may compel a man and wife to live under the same roof, but it cannot constrain them to have intercourse with each other, nor to live together on terms of conjugal affection, for reasons which are obvious.”

The defendant preferred a Special Appeal.

The Appeal was argued before COUCH, C.J., and NEWTON, J.

Nánábhái Haridás, for the appellant:—The decision of the lower court is opposed to Hindú law: 1 Strange, Hindú Law, 47; 2 *ibid.* 52, 53, Colebrooke's remarks; 2 Colebrooke's Digest 470, Bk. IV., v. 151; Grady on Hindú Law 12; and Manu, Ch. IX., sl. 78, 79.

Dhirajlál Mathurádas, for the respondent:—The Hindú law provides for a husband leaving his wife, but not for a husband being left by her: 2 Colebrooke's Digest, Bk. IV., v. 62, and *ibid.* 426 Bk. IV. v. 86.

COUCH, C. J. :—The effect of the plaint being to compel the defendant to go and live with the plaintiff as his wife, the suit is what is ordinarily called for the restitution of conjugal rights. It is found, as a matter of fact, that the plaintiff is suffering from leprosy and syphilis, and this is again found to be a disease of such a character that the defendant could not live with the plaintiff without very great danger to her health. In this case the parties are Hindús, and leprosy is regarded by them as most loathsome. The Judge says : “The Munsif appears to consider that, under the circumstances, it would be cruel to order the female defendant to return to her husband, and, therefore, threw out the suit ; but this does not appear to me to be a proper way of adjudicating upon the claim.” But we are of opinion that the Munsif took a very sensible view of the matter, since where there is cruelty the Court ought not to interfere. In the present case it is clearly admitted that the plaintiff is afflicted with leprosy, and there is no authority for a suit being maintained under such circumstances ; and we are of opinion that it ought not to be allowed. The Judge remanded the case, drawing a distinction between living as a wife and going and living in the house of the husband ; but we think there is no difference. If a wife goes at all to her husband, she must go in her position of wife, and not in that of a servant in her husband’s house. The Judge need not have gone beyond the plaint, and awarded what was not claimed, viz., that the wife should go to her husband as a servant.

We, therefore, reverse the decree of the lower appellate court, and confirm that of the court of first instance, with costs. The appellant to have the costs of this appeal.

NEWTON, J., concurred.

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