land being taken for a public purpose cannot be questioned, neither can the Collector's act in taking possession. And we think, therefore, that, having held the award to be null, all we can do is, following the analogy of the procedure laid down in Sec. 31, to refer the parties to a fresh arbitration.

1271.
FA'TMA' BIBI' *v.* THE COLLECTOR OF SU'RAT.

As to costs, it is clear that the arbitrators of both parties have failed in their duty; but we think that while there may be an excuse for the plaintiff's arbitrator, there can be none for Government, whose officer, exercising the powers vested in him by Sec. 16 of the Act, should have seen that the arbitrators did their duty in accordance with the Act which Government was putting into force. We think, therefore, that each party should pay his or her costs in the first and second courts, and that Government should pay those in this special appeal.

Decrees of lower courts reversed.

Special Appeal No. 603 *of* 1870.

June 29.

BA'I SU'RAJ .....*Appellant.*
THE GOVERNMENT OF BOMBAY and BA'PUBHA'I KHUSHA'LDA'S *et al.* .....*Respondents.*

Special Appeal No. 609 *of* 1870.

BA'PUBHA'I KHUSHA'LDA'S *et al.* .....*Appellants.*
BA'I SU'RAJ and THE GOVERNMENT OF BOMBAY .....*Respondents.*

Majmudári Watan—*Female's right to inherit—Assignment of entire Proceeds to Officiator—Act XI. of* 1843, *Sec.* 13—*Reg. XVI. of* 1827, *Sec.* 20, *Cl.* 1.

Since the passing of Act XI. of 1843 a female can inherit a *majmudári watan.*

The Collector can assign the whole proceeds of a *watan* to the officiating person, who is entitled to retain such proceeds as his remuneration.

THESE were special appeals from the decision of W. H. Newnham, Acting District Judge of Súrat, in cross-appeals Nos. 88 and 103 of 1870, amending the decree of George Ayerst, Assistant Judge.

1871.

BA'I SU'RAJ v. GOVERNMENT OF BOMBAY et al.

BA'PUBHA'I KHUSHA'LDA'S et al. v. BA'I SU'RAJ & GOVERNMENT OF BOMBAY.

The plaintiff, Bái Súraj, sued the Collector of Súrat, as the representative of the Government of Bombay, and Bápubhái and others, to establish her right to a *majmudári watan*, and to recover six years' arrears of its emoluments (from Samvat 1920 to 1925—A.D. 1864 to 1869), alleging that the *watan* was entered in the name of her father, who received the allowance down to his death, in 1857; that thereafter her stepmother received it until her death, in 1859, and that since that year it was wrongfully entered by the Collector in the names of Bápubhái and others.

The Collector answered that there was no right of action against him; and that, as the *watan* was a service *watan*, the plaintiff could not claim arrears, under Sec. 13 of Act XI. of 1843.

The other defendants stated that there being no right of action against the Collector there was none against them; that the claim was barred by the law of limitation; that it could not be sustained, by virtue of an agreement passed by the plaintiff's father; that a female could not succeed to a *watan;* and that the remuneration paid by the Collector to the person who officiated should have been deducted from the arrears claimed by the plaintiff.

The court of first instance awarded her entire claim to the plaintiff.

The Collector and the other defendants appealed separately to the District Judge, who held that the claim was not barred; that the plaintiff, *though a female*, was *entitled to succeed*; and that the arrears, *minus* what had been paid to the officiator, should also be paid to her.

Against this decree two special appeals were preferred. The plaintiff in Special Appeal No. 603 appealed on the ground that the deduction made by the District Judge ought not to have been made; and the defendants, Bápubhái and others, in Special Appeal No. 609, objected to the entire decree.

The special appeals were heard by MELVILL and KEMBALL, JJ.

1871.

BA'I SU'RAJ v. GOVERNMENT OF BOMBAY *et al.*

BA'PUBHA'I KHUSHA'LDA'S *et al.* v. BA'I SU'RAJ & GOVERNMENT OF BOMBAY.

Shántárám Náráyan, for the plaintiff (appellant) :—This is a suit in the nature of a suit for damages against the Collector in respect of pecuniary loss sustained by the plaintiff. The defendants Bápubhái and others are trespassers, and are liable for all they have received. The *whole* of the proceeds of the *watan* could not, under Act XI. of 1843, be given to an officiating person.

Dhirajlál Mathurádás (Government Pleader), for the Collector:—The plaintiff's suit is not for damages. She is making a new case. The Collector's action in the matter simply was that he in 1860 ordered that the proceeds of the *watan* should be paid to the person who performed the duty of *majmudár*.

Nánábhái Haridás, for the defendants Bápubhái and others :—The plaintiff, being a female, has no right to succeed. The late Sadr Diváni Adálat so interpreted the law, as appears from their decision of the 19th of May 1832.*

With regard to the plaintiff's appeal (No. 603), Mr. Justice MELVILL, in delivering the judgment of the court, said :—On a comparison of the plaint with the statement of the plaintiff's *vakil*, exhibit No. 24, we think it clear that this suit was never intended to bear the complexion which the plaintiff's counsel now endeavours to give to it, namely, that of a suit for damages against the Collector in respect of pecuniary loss sustained by the plaintiff. If that were intended to be the nature of any part of the claim, then we can only say that so much of the claim is, against the Collector, barred : for the so-called tortious act which caused the loss, namely, the recognition of the defendants as proprietors of the *watan*, occurred in 1859. As against the other defendants, the same consideration to a certain extent applies. If the claim be for damages for a tortious act, then the claim is barred, for the tortious act was the obtaining of the estate, which took

* Sec. 20 of Reg. XVI. of 1827. It was ruled that, the spirit and letter of the Regulation as here laid down providing for the emolument being strictly considered as the official remuneration of the person filling the office, a female could not hold a *majmudári watan* : Sadr Diváni Adálat, 19th May 1832, *In re Mt. Gulab* v. *Abheram and others.*

1871.
BA'I SU'RAJ v. GOVERNMENT OF BOMBAY et al.
BA'PUBHA'I KHUSHA'LDA'S et al. v. BA'I SU'RAJ & GOVERNMENT OF BOMBAY.

place in 1859. If, on the other hand, the claim be for mesne profits, or for money had and received to the plaintiff's use, then it is open to the objection that no money was in point of fact, so far as appears on the record, received by any of the defendants. The whole proceeds of the *watan* were, by order of the Collector, paid to one Tápidás, as officiating officer, and he has not been made a party to the suit. Tápidás had a legal right to retain the whole proceeds as against the defendants, and there is nothing to show that he did not do so. The plaintiff's counsel has urged that these are merely technical objections, and that equity and justice are in his client's favour. We do not think that it is so as regards that portion of her claim which relates to the proceeds of the *watan* for the years 1864 to 1867. During these years the whole of the receipts were paid for the service rendered, and were certainly not more than sufficient to remunerate the officiator for the performance of those services. The plaintiff during these years never thought it worth while to come forward, being no doubt perfectly well aware that she could not perform the service herself, and that if she appointed a deputy the Collector would assign to him all the proceeds of the *watan*. In other words, she acquiesced in the performance of the service by Tápidás, and now, having had the benefit of the performance of that service, she wishes to deprive him of the remuneration, and herself to obtain the whole proceeds of the *watan* without having rendered any service for it. It is difficult to see how such a claim can be recognised as being in accordance with justice and equity.

This appeal must, therefore, be disallowed.

With regard to the appeal of the defendant Bápubhái (No. 609) against the plaintiff and the Collector, we hold, as appears to have been held in *The Government of Bombay* v. *Dámodhar Parmánandás et al.* (*a*), that, since Act XI. of 1843 was passed, a female can inherit a *majmudári watan*, and that the Ṣadr Diváṇi Adálat's * interpretation of 19th May 1832 is no longer operative. The reason for that inter-

(*a*) 5 Bom. H. C. Rep., A. C. J. 202.
* *Vide suprà*, p. 85, *in notis*.

pretation, namely, that the allowance must be regarded as strictly the official remuneration of the person filling the office*—Sec. 20 of Reg. XVI. of 1827—is no longer applicable, now that a female is allowed to appoint a deputy to perform service, and *à fortiori* it is inapplicable in cases like the present, in which no service is to be performed at all. As to the question of custom, the Judge has found on the evidence that no custom excluding females exists. It is no answer to this to say that it is shown that such custom did exist previously to 1843. Custom ordinarily follows the law, and so long as a female could not succeed by law, it almost necessarily followed that she could not succeed by custom. As to the exhibit No. 8, it is sufficient to say that, although the Judge has not referred to it, there is no reason to believe that he did not consider it, and it is not binding on the plaintiff either as an admission or as an agreement.

We, therefore, confirm the decree of the District Judge.

Decree affirmed.

Special Appeal No. 142 *of* 1870. July 6.

KESHAV HARKHA' .....*Appellant.*
GANPAT HIRA'CHAND .....*Respondent.*

Privacy—Invasion of Privacy—Custom of Gujarát—Opening of Windows overlooking Neighbour's Premises.

Where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed, according to the custom legally recognised in Gujarát.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Appeal No. 77 of 1868, reversing the decree of the Principal Sadr Amín of Ahmedábád.

* "The allowance so derived by a sole proprietor or occupant of an hereditary district or village revenue office shall in future be considered strictly as the official remuneration of the person filling the office, and, as such, shall not be subject to alienation by any incumbent:" Sec. xx., cl. 1, Reg. XVI. of 1827.