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provides that when several defendants having substantially one defence to make employ several pleaders, they shall be allowed one set of costs only; and in such cases it will be for the plaintiff, at the time of hearing, to ask for a direction of the Court that separate costs be not allowed. Here the plaintiff did not ask for an order that separate costs be not allowed, and no such order was made, and in my opinion therefore plaintiff must pay a double set of costs. The judgment appealed from is right, and the appeal must be dismissed with costs.

LOKUR J. I agree.

Appeal dismissed.

Y. V. D.

APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Macklin.

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THE GOVERNMENT OF BOMBAY (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* GANPAT MANOHAR KULKARNI (ORIGINAL PLAINTIFF No. 1), RESPONDENT.*

Bombay Hereditary Offices Act (Bom. Act III of 1874), s. 15 cl. (4)—Widow of a deceased Watandar—Widow entered as representative watandar—Commutation of services, whether widow competent to enter into an agreement for.

A widow of a deceased watandar whose name has been entered as representative watandar is not a holder of the watan within the meaning of s. 15 of the Bombay Hereditary Offices Act, 1874 and, therefore, she is not competent to enter into an agreement for commutation of services under that section.

Bhikaji Laxman v. *The Secretary of State for India*,[1] followed.

APPEAL under the Letters Patent against the decision of Wassoodew J. confirming the decree passed by S. K. Patkar, District Judge at Ahmednagar, against the decision of N. K. Mastakar, First Class Subordinate Judge, Ahmednagar.

Suit for declaration.

*Appeal No. 18 of 1937 under the Letters Patent.

[1] (1925) 49 Bom. 554.

The watan in dispute was the Kulkarni Watan in the village of Mohari in the Ahmednagar District. In 1914, this watan was registered as regards a twelve annas share in the name of Gangubai, the widow of Manohar, and the remaining four annas share was entered in the name of Narayan Mahadav.

On January 24, 1914, commutation of the Kulkarni service was effected under the provisions of s. 15 of the Bombay Hereditary Offices Act, by agreement between Gangubai and the Collector in respect of twelve annas share standing in the name of Gangubai and for the four annas share with Narayan Mahadav.

On November 5, 1914, the Collector took possession of the watan and from that time paid cash allowance to Gangubai in accordance with the settlement.

In 1917, Gangubai adopted Ganpat (plaintiff No. 1). In September 1920, Gangubai died.

In December 1926, plaintiffs sued for a declaration that the commutation order in respect of the twelve annas share of plaintiff No. 1 and the four annas share of plaintiff No. 2 was illegal and void and for possession of watan lands as owners from defendant No. 1. Defendant No. 1 contended *inter alia*, that the commutation of service was duly effected under s. 15 of the Bombay Hereditary Offices Act; that the settlement made was binding not only upon the holders of the service, but upon all the watandars; that the jurisdiction of the Court to entertain the suit was barred under ss. 4A and 11 of Bombay Revenue Jurisdiction Act; and that the suit was barred under arts. 14, 44, 91 and 120 of the Limitation Act.

The Subordinate Judge following the decision of *Bhikaji Laxman* v. *The Secretary of State for India*,[1] held that Gangubai held a widow's estate and the negotiations with her not having been with a holder the

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commutation order based upon the consent so given by her was not authorised by s. 15 of the Bombay Hereditary Offices Act and was *ultra vires* and not binding on the share of twelve annas claimed by plaintiff No. 1. The suit in respect of that share was, therefore, decreed and was dismissed so far as it related to four annas share claimed by plaintiff No. 2.

On appeal by defendant No. 1, the District Judge confirmed the decree.

Defendant No. 1 preferred a Second Appeal to the High Court. The appeal was heard by Wassoodew J. who delivered the following judgment.

WASSOODEW J. The question raised in this appeal is whether the commutation of service effected with the widow of the representative watandar by the Collector, under s. 15 of the Bombay Hereditary Offices Act, is binding on the son subsequently adopted by her. Both the Courts below were of the opinion that the point was concluded by the authority of *Bhikaji Laxman* v. *The Secretary of State for India*,[1] where it was held that "the widow of a representative watandar holding an interest in watan property for the term of her life or until her re-marriage is not a 'holder' within the meaning of that term in s. 15 of the Hereditary Offices Act (Bom. Act III of 1874)," and therefore incompetent to consent to a commutation of service watan.

The learned Assistant Government Pleader appearing on behalf of Government has argued that the present case is distinguishable on the facts inasmuch as the widow in *Bhikaji's* case[1] was not representing the watan estate, because prior to the commutation she had made an adoption and under an agreement with the father of the adopted son she was allowed to enjoy *kulkarniki* rights in certain specified part of the watan property during her lifetime and she was not

[1] (1925) 49 Bom. 554.

in possession in her right as the widow of the last owner. In *Bhikaji's* case[1] the learned Chief Justice after examining the definitions of 'watandar' and 'representative watandar' and also the operative part of s. 2 of Bom. Act V of 1886, came to the conclusion that the widow could not be described as a 'holder' within the meaning of s. 15, cl. (4), of that Act. That clause is as follows :—

"The word 'holder' for the purposes of this section includes any sole owner or the whole number of joint owners or any person dealt with as representative of the person beneficially interested or entered as such in the Government records at the time of the settlement."

Unquestionably, it does not make any difference between a male and female owner. But s. 2 of Bom. Act V of 1886 does make a distinction between them ; for it provides that the interest of a widow, mother or paternal grand-mother in any watan or part thereof, shall be for the term of her life or until her marriage only. Therefore, it would not be possible to hold that the legislature intended to include within the expression 'holder' a Hindu widow having a limited estate.

It has also to be remembered that the power to effect commutation involves the power to convert the watan into cash. It cannot be denied that a Hindu widow has a restricted power of alienation only under special circumstances. Although the facts in *Bhikaji's* case[1] were different from the facts here, there is no obscurity in principle which must be followed.

It is, however, pointed out that a widow under Hindu law is not strictly a tenant for life, but almost an owner of the property subject to certain restrictions and that she represents it completely [*Moniram Kolita* v. *Kerry Kolitany*[2]]. It is urged that that aspect of the case was overlooked in *Bhikaji's* case[1]. Reference was also made to

[1] (1925) 49 Bom. 554. [2] (1879-80) L. R. 7 I. A. 115, s. c. 5 Cal. 776.

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the following remarks in *Janaki Ammal* v. *Narayanasami Aiyer*[1] (p. 209):—

"Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but, to use the familiar language of Mayne's Hindu Law, paragraph 625, p. 870, 'so long as she is alive no one has any vested interest in the succession'."

That was a case where the next reversioner sued the widow on behalf of the reversioners for protecting the estate; and *vis-a-vis* such a reversioner the widow's position was considered by the Court. There can be no question of the application of those remarks to a case which has to be decided upon the interpretation of the term 'holder' in s. 15 of the Watan Act. In that connection I may say that the restrictions of the power of a Hindu widow against alienation are inseparable from her estate. I do not think it can be said that the commutation sanctioned with the consent of a Hindu widow cannot be questioned by the son adopted subsequently. This appeal, therefore, fails and is dismissed with costs.

AGAINST the decision, defendant No. 1 preferred an appeal under the Letters Patent.

M. C. Setalvad, Advocate General, with *B. G. Rao*, Assistant Government Pleader, for the appellant.

G. R. Madbhavi, for the respondent.

BROOMFIELD J. The question in this Letters Patent appeal is whether the widow of a deceased watandar whose name has been entered as representative watandar is a holder of the watan within the meaning of s. 15 of the Bombay Hereditary Offices Act so that she is competent to enter into an agreement for commutation of services under that section.

The facts so far as it is necessary to state them are as follows. There is a Kulkarni watan in the village of Mohari

[1] (1916) L. R. 43 I. A. 207, s. c. 39 Mad. 634.

in the Ahmednagar District. In 1914 this watan was registered as regards a twelve annas share in the name of Gangubai, the widow of Manohar, and as to the remaining four annas share in the name of one Narayan Madhav. We are only concerned with the twelve annas share of the watan. On January 24, 1914, commutation of the Kulkarni service was effected under the provisions of s. 15 by agreement between Gangubai and the Collector. Section 15 provides that the Collector may, with the consent of the holder of a watan, given in writing, relieve him and his heirs and successors in perpetuity of their liability to perform service upon such conditions as may be agreed upon by the Collector and such holder. It is not now disputed that the formalities prescribed by the Act in this behalf under s. 73 were complied with. The only question is whether Gangubai was competent to enter into the agreement, that is to say, whether she was a holder.

On November 5, 1914, the Collector took possession of the watan and from that time he paid the cash allowance in accordance with the settlement. In the year 1917 Gangubai adopted the plaintiff. In September, 1920, Gangubai died, and the suit which has given rise to this appeal was filed in 1926 by the adopted son along with the heir of Narayan Madhav to recover possession of the watan lands and for an order that Kulkarni services should be taken from them as before.

The only definition of the word "holder" in the Watan Act is contained in cl. (4) of s. 15 which is as follows:

> "The word 'holder' for the purposes of this section includes any sole owner or the whole number of joint owners or any person dealt with as representative of the persons beneficially interested or entered as such in the Government records at the time of the settlement."

Three cases are referred to, the case where there is a single owner, the case where there are several joint owners and the settlement takes place with all of them, and the case where there are several persons beneficially interested and the

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agreement takes place with their representative. In this case at the material time there was only one person, viz. Gangubai, who had any interest in the twelve annas share of the watan with which we are concerned. The learned Advocate General who appears for the appellant, the Secretary of State, does not suggest that the latter part of the definition has any application here. He says that Gangubai was the owner within the meaning of the definition, and he says further that as the definition is not exhaustive it is not necessary to show that Gangubai was the owner. She was the holder of the watan inasmuch as it was in her possession and no other person could be described as the holder, and therefore the definition should be taken to apply to her.

All the Courts below have followed a decision of this Court in *Bhikaji Laxman* v. *The Secretary of State for India*[1] taking the view that the widow of a watandar cannot be a holder for the purposes of s. 15 and that a commutation settlement effected with her is not valid. The suit by the adopted son has therefore been allowed and that gives rise to this appeal by Government.

It was held in *Bhikaji Laxman* v. *The Secretary of State for India*[1] that the widow of a representative watandar holding an interest in watan property for the term of her life or until her re-marriage is not a "holder" within the meaning of that term in s. 15 of the Hereditary Offices Act. The learned Advocate General argues that the case is clearly distinguishable on the facts, and that is so. The facts in that case were these. One Bhikaji Laxman was the sole representative *kulkarniki* watandar of seventeen villages and after his death his widow Laxmibai was registered as sole representative watandar. Laxmibai then adopted a son and at the time of the adoption an agreement was made with the boy's natural father that she was to enjoy the right of *kulkarniki* service in five of the seventeen villages for the

[1] (1925) 49 Bom. 554.

term of her natural life for maintenance. Subsequently the name of the adopted son was entered in the register as a watandar for twelve out of the seventeen villages, but Laxmibai's name was retained for the other five. Then in 1913 the adopted son died leaving a widow and two minor sons and after that in 1915 Laxmibai applied to the Collector to commute the right of service with respect to the five villages and the Collector made a commutation order. After the death of Laxmibai in 1917 the widow and minor sons of the adopted son sued to set aside the commutation order.

But, though the facts of that case were different in that there was a special agreement as to the widow's tenure by which it was provided that she was to enjoy the five villages for the term of her natural life for maintenance, so that it might be argued that her position was not the ordinary position of a Hindu widow, and moreover she had already adopted a son, it does not appear that this Court in dealing with the case placed any special reliance on these facts. The learned Chief Justice pointed out that it did not follow from the fact that the widow was a representative watandar that she was a holder of the watan within the meaning of the definition in s. 15 and he referred to the provisions of s. 2 of Bom. Act V of 1886 which are these :

"Every female member of a watan family other than the widow, mother or paternal grand-mother of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any watan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such watan, or part thereof, or interest therein.

The interest of a widow mother or paternal grand-mother in any watan or part thereof shall be for the term of her life or until her marriage only."

He went on to say (p. 560) :—

"Therefore the interest of the widow in a watan is to be compared to the interest of a Hindu widow in her husband's estate. I doubt whether it was ever intended that the Government should be able to treat the widow as a watandar for the purpose of sanctioning the commutation of the watan service. In my opinion a widow holding an interest in watan property for the term of her life or until her marriage

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is not a 'holder' within the meaning of that term in section 15 of Act III of 1874."

The decision was based therefore not on the special terms of the agreement made with Laxmibai at the time of the adoption of a son by her nor on the fact that she had adopted a son but on the provisions of Act V of 1886 by which the interest of a widow succeeding to a watan is limited to the term of her life or until her marriage. Whether this decision is binding upon us or not in view of the difference in the facts of the two cases we think that we ought to follow it unless some good grounds are shown for thinking that the reasoning on which it was based is wrong. We are not satisfied that it is wrong.

On behalf of the appellant reliance has been placed on some Privy Council cases e.g. *Janaki Ammal* v. *Narayanasami Aiyer*[1] and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2] for the proposition that a Hindu widow is not a mere tenant for life. Her right is of the nature of a right of property. She is in a sense an owner although her powers as owner are limited and she may in certain circumstances represent the estate. But these cases were not cases under the Watan Act and, as Mr. Justice Wassoodew pointed out in his judgment in second appeal, these propositions have no necessary application when the question is simply the construction of the definition in s. 15. Moreover, as the learned Judge also suggested, the commutation of service is in a sense an alienation of the watan and the fact that a Hindu widow's powers of alienation are restricted may properly be said to have some bearing on the question whether a widow was intended to be included in the definition of "holder" in this section. The learned

[1] (1916) L.R. 43 I. A. 207, s. c. 39 Mad. 634.
[2] (1906) L. R. 34 I. A. 87, s. c. 34 Cal. 329 P. C.

Advocate General pointed out that even a male watandar cannot alienate beyond his lifetime in view of s. 5 of the Watan Act. But he can alienate in perpetuity with the sanction of Government, whereas a Hindu widow could not in any case alienate beyond her lifetime.

Another point to be noted in this connection is that the interest of the widow or other female heir who succeeds to a watan is defined by statute. It is limited to the term of her life or until her marriage, and, although Macleod C. J. in *Bhikaji Laxman* v. *The Secretary of State for India*[1] appears to have thought that her position was analogous to that of a Hindu widow in her husband's estate, it is not by any means clear that all the incidents of a Hindu widow's estate are necessarily present. For that reason also it is doubtful whether the Privy Council cases on which reliance is placed have any real bearing in the present case. There is, we think, considerable force in the argument of the learned advocate for the respondent that a widow who has only a life interest in the property as provided in Act V of 1886 cannot properly be described as an owner of the property.

In cl. (1) of s. 15 it is provided that the commutation of service is to relieve the holder of the watan and his heirs and successors in perpetuity of their liability to perform service, and cl. (3) says that every settlement made or confirmed under this section shall be binding upon both Government and the holder of the watan and his heirs and successors. Now though the widow may succeed to the watan on the death of her husband, on her death she is succeeded not by her heirs but the heirs of her husband. Mr. Madbhavi argues and we think with considerable force that this also is an indication that the words "holder of

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a watan" in s. 15 do not include the widow of a deceased holder.

The point taken by the learned Advocate General that it is not necessary to show that Gangubai was an owner and that a person may be holder of a watan within the meaning of s. 15 without being an owner at all is a new point which does not seem to have been argued before the Courts below. We think it is clear that the word "holder" whether it be necessarily restricted to an owner or not cannot at any rate mean any one who happens to be in possession of the property. Therefore the argument that if the widow in this case is not the holder of the watan there is no holder at all does not impress us very much. On the whole we can see no good reason to differ from the view taken in *Bhikaji Laxman* v. *The Secretary of State for India*[1] that the definition does not include the widow of a deceased watandar.

It is said that it may cause considerable inconvenience if Government have to wait until the death of the widow before they can make arrangements as regards commutation of service. As against that it may be said that it might also lead to inconvenience and injustice if arrangements of this kind were permitted to be made with widows who may perhaps be prepared to barter away valuable rights for payment in cash. In any case we do not consider that it is open to us to go into questions of this kind. It is a simple question of the construction of the definition in cl. (4) of s. 15 and if Government consider that the word "holder" in that definition ought to include female watandars the proper course is to get the definition amended by the legislature.

The appeal is dismissed with costs.

MACKLIN J. I agree.

Decree confirmed.

J. G. R.

[1] (1925) 49 Bom. 554.