relying, as he probably did, on his Exhibit 17 to prove his case, he may have neglected to summon as many witnesses as he otherwise would have done to show that Kazi Muhammad's mortgage had been paid off and his lien extinguished. We are of opinion that he ought to have an opportunity of proving his case by oral testimony if he can, and may summon such witnesses as he may be advised to call for that purpose, and may give such other (if any) evidence as may be available, such as books, accounts, &c., and as may be legally admissible.

There should be a distinct finding of the re-trying Court on the allegation that the plaintiff's case is fraudulent and collusive.

The seventh point in the memorandum of special appeal (*i.e.*, as to the plaintiff's vendor having been out of possession at the time of the sale to the plaintiff) not having been made in either of the Courts below, is too late.

We reverse the decree of the Assistant Judge, and remand this cause for re-trial by the District Court on the merits in accordance with the foregoing observations. Costs of both appeals and of the suit are to be within the discretion of the re-trying Court.

Decree reversed and cause remanded.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 18 *of* 1875.

March 27.

PARBHUDA'S RA'YAJI AND ANOTHER (ORIGINAL PLAINTIFFS, APPELLANTS) *v.* MOTIRA'M KALYA'NDA'S (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).

Pensions Act XXIII. of 1871—"*Toda-Grás*"—*Decree before the date of the Act.*

"*Toda-Grás*" *haks* are within the scope of the Pensions Act XXIII. of 1871; and a suit in respect of them cannot be instituted without the certificate required by Section 6 of the Act.

Where a mortgagee of such *haks* had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against those *haks*,

Held that the Act did not apply to such fresh suit.

Semble that the word "right" in Section 3 of Act XXIII. of 1871 is equivalent to the word *hak* in its restricted sense of "allowance" or "fee".

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THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge of the District of Surat, confirming the decree of the 1st Class Subordinate Judge of that place.

The material facts of the case are as follows:—The plaintiffs' father, as the mortgagee of certain *haks*, obtained against his mortgagor, Ajabsang, a decree, dated the 11th of September 1866, for the recovery of Rs. 2,569-10 from the mortgaged property and from Ajabsang personally, and in execution of such decree he attached Ajabsang's "Todá-grás" on the 28th of October 1871. Subsequently to the decree, but before the attachment, this "Todá-grás" was purchased by the defendant. The attachment was raised, at the instance of the defendant, on the 1st of February 1872. Hence the plaintiffs sued to have their right declared to the satisfaction of their father's decree by attachment of Ajabsang's "Todá-grás".

The defendant *inter alia* answered that he was not a party to the former suit, and was not, therefore, bound by the decree; that he had himself purchased the "Todá-grás" at an auction sale on the 8th of October 1867; and that the suit, having been instituted without the authority of such a certificate as is required by Section 6 of the Pensions' Act XXIII. of 1871, was not maintainable.

Both the Lower Courts allowed the defendant's objection and rejected the plaintiff's claim.

March 21.—The special appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlál Mathurádás, Government Pleader, for the plaintiff:—"Todá-grás" payment is not subject to the Pensions' Act. It is in the nature of immoveable property, the payment being originally recoverable by Grasiás from lands in villages. At any rate, it is not a grant of money or land-revenue made by the British or any former Government. "Todá-grás" was levied against and independently of the wishes of any Government. The Pensions' Act does not apply to the case of a contract, which I submit this is. The British Government in 1832, for reasons of state, entered into an express agreement with the Grasiás to pay this money them-

selves, on the latter undertaking not to recover it themselves or by their "Selots" or agents. In fact, the Government chose to become the Grasiás' agents for certain reasons of their own. The present case may well be compared with that of money had and received by the Government to the Grasiás' use. *Bábáji* v. *Rájárám*[1] is distinguishable from this. It was there held that the Legislature intended to apply the Pensions' Act to payments which were the bounty of Government. "Todá-grás" can never be construed in that sense.

My second objection is, that, even if "Todá-grás" be held to be within the scope of the Pensions' Act, the Act is not applicable to this case. It came into operation on the 8th of August 1871, and the plaintiff's father obtained his decree in 1866, and attached the '*hak*' before the date of the operation of the Act[2]. Section 1 of the Act expressly says that it is not to affect any suit in respect of a pension or grant of money or land-revenue which may have been instituted before such date. The Act was never intended to have retrospective effect, and this was held in *Gulábdás Jagjivandás* v. *Lalitárám Atmárám and others*[3]. The present suit was necessitated by an act of the defendant, who got the original attachment removed. So the former suit as well as this suit are part of the same proceedings: *Framji* v. *Hormasji*[4] and *Ratanchand* v. *Hanmantrav*[5].

Nayindás Tulsidás for the defendant:—"Todá-grás" payment is made out of the Government Treasury, and, independently of its origin, is clearly within the scope of the Pensions' Act, which covers such payments even though made for a good consideration.

(1) 1 Ind. L. R. (Bombay) 75.

(2) The learned Government Pleader was mistaken as to the date of the attachment. Though the decree was obtained in 1866, the *hak* was not attached till October 1871, more than two months after the Act had come into force. The error, however, is immaterial, as the case turns, not on the date of the attachment, but of the institution of the suit.

(3) Mis. Sp. Apl. No. 11 of 1872 decided on 12th August 1874 by WESTROPP, C.J., and KEMBALL, J.

(4) 3 Bom. H. C. Rep. 49 O. C. J. (5) 6 Bom. H. C. Rep. 166 A. C. J.

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With regard to the second objection, the word suit may be construed to include an appeal, but not another suit, which it has become necessary for the plaintiffs to institute in this case.

The judgment of the Court was delivered by

MELVILL, J. :—"Todá-Grás" *haks* are thus described by the Judicial Committee of the Privy Council in *Mahárání Fatesangji* v. *Desái Kalliánrávjaji*[1]: "It is sufficient to state that these annual payments, though originally exacted by the *Grasiás* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black-mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; and that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue." The Assistant Judge has held that payments of this description fall within the definition of "a grant of money or land-revenue" in Act XXIII. of 1871. We are not prepared to say that he is wrong. In opposition to this view it has been contended that the purpose of Act XXIII. of 1871 is simply "to keep the distribution of what is regarded as bounty of Government wholly in the hands of its executive officers": *Bábáji* v. *Rájárám*[2]; and that the payment of "todá-grás" *haks* by Government is not, and never was, an act of bounty. It was, no doubt, stated in the Legislative Council, in introducing the Bill that the leading principle of the main provisions of the law was that, as the bestowal of pensions and similar allowances was an act of grace or state policy on the part of the ruling power, the Government reserved to itself the determination of all questions affecting the grant or continuance of these allowances. But, whatever may have been the intention, the Act itself seems to us to have been so framed as to oust the jurisdiction of the Civil Courts in regard to other allowances than those originating in an act of grace or state policy. Section 4 speaks of allowances granted for a consideration, and in substitution for some claim or right. Section 3 defines the expression "grant of money or land-revenue" as including "anything payable on the part of Gov-

(1) 10 Bom. H. C. Rep. 261. (2) 1 Ind. L. R (Bombay) 75.

ernment in respect of any right, privilege, perquisite, or office." These words are, as the Assistant-Judge observes, exceedingly large: so large, indeed, that, if the word "right" were taken in its fullest sense, the Courts could entertain no claim against Government for any payment whatever, inasmuch as every claim must be founded on some right on the part of the claimant. The word "right" must be construed in some limited sense; and the context suggests the idea that the Legislature may have intended it as an equivalent to the word *hak*, taking the latter word in its narrow sense of "allowance" or "fee", and not in its broader sense, which is co-extensive with that of our word "right." If that be so, the question of the applicability of the Act to "todá-grás" *haks* is at once settled. But, without insisting upon what may be only a fanciful interpretation, we are of opinion upon the best consideration which we are able to give to the terms of the Act, that it was the intention of the Legislature to reserve to the Government the decision of all questions relating to such allowances as "todá-grás" *haks*.

The plaintiffs may, however, escape, by a different way, from the operation of this Act. The Act was not intended to be retrospective, and Section 1 provides that it shall not affect any suit in respect of a pension or grant of money or land-revenue which may have been instituted before the date on which it came into force. Now, the plaintiffs' father, who was a mortgagee of the *hakdár*, obtained a decree in 1866, and under that decree he attached the *hak* which had been, subsequently to his decree, purchased by the defendant. The attachment was raised on the application of the defendant, and thereupon, under Section 246 of Act VIII. of 1859, the plaintiffs brought the present suit. This was the only means open to them of giving effect to the decree. To say that they should not bring this suit, or that they should not do so without the permission of the revenue authorities, would be to deprive them of the benefit of the former suit, or, at least, to throw difficulties in the way of their obtaining that benefit; and to that extent the former suit would be affected. This seems to have been the view taken by this Court in Miscellaneous Appeal No. 11 of 1872 on the 12th August 1874. We are of opinion that, on

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this ground, the plaintiffs are entitled to claim exemption from the operation of Act XXIII. of 1871.

The Assistant Judge has found that on the merits the plaintiffs are entitled to succeed. The respondent has not appealed against this finding, nor filed any statement of objections under Section 348 of Act VIII. of 1859. We must, therefore, reverse the decrees of the Courts below, and enter judgment for the plaintiffs, with costs on the defendant throughout.

Decree reversed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 277 *of* 1868.

1868. August 6.

JOTI BHIMRA'V (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) *v.* BA'LU BIN BA'PUJI AND ANOTHER (ORIGINAL DEFENDANTS, SPECIAL RESPONDENTS).

Mirás—Razinámá—Abandonment of mirás right—Ejectment.

A *Mirásdár* who has given in a *razinámá* is entitled to eject the tenant put in possession of his *mirás* lands by the Collector, provided he sue within the period of limitation, and the *razinámá* contain no stipulation whereby he expressly abandons his *mirás* rights.

THIS was a special appeal from the decree of the Acting Assistant Judge of Satara. The plaintiff, a *Mirásdár*, passed a *razinámá* resigning his *mirás* lands. The Collector thereupon put the defendants in possession of the lands so resigned. In a suit afterwards brought by the plaintiff to recover possession of these lands, the Assistant Judge held that a *Mirásdár* could not oust a tenant who had been put in possession by the Collector, and accordingly decreed in favour of the defendants.

The special appeal was heard by WARDEN and GIBBS, JJ.

PER CURIAM:—The Court consider that the Assistant Judge was in error in holding that a *Mirásdár* cannot oust a tenant who has been put in possession by a Collector (*vide Salu v. Ravji*, 1 Bom. H. C. Rep. 41). Not only has this Court decided to the above effect, but it has also held that a *Mirásdár* who has given in a *razinámá* has the right to recover his land if he