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plaint to the effect that since 1842 the Government has received the deshmukh's allowances as something distinct from revenue from the ryots on his behalf and as his agent, under circumstances which would make them liable to him as for money had and received.

It appears, therefore, to their Lordships that no ground has been made for disturbing the judgment of the Court below, and they must humbly advise Her Majesty accordingly. They would have been extremely sorry if they had had to remand the cause, because though it might have been satisfactory to have fuller information on some points raised in the argument, they are satisfied, upon the materials before them, that a fuller trial would equally result in the conclusion that the suit is within "The Pensions Act, 1871," and that the plaintiff must seek his remedy by the procedure thereby provided.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal, and to confirm the judgments below, with the costs of the appeal.

*Decree affirmed.*

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## [APPELLATE CIVIL.]

*Before Sir M. R. Westropp., Knight, Chief Justice, and Mr. Justice Nándbhái Haridás.*

April 4.

THE COLLECTOR OF THA'NA' (DEFENDANT AND APPELLANT) *v.* BA'L PA'TEL (PLAINTIFF AND RESPONDENT).*

*Right to free pasturage—Bombay Act I. of* 1865, *Section* 32.

Plaintiff erected a hut on public ground, in a village in the district of Thána, and lived there annually for a few months, while his cattle grazed on the public grazing ground in that village. He was not the owner or lessee of any land in the village. On being prevented, by the Collector of Thána, from thus grazing his cattle, plaintiff brought a suit against that officer for a declaration of his right to graze his cattle within the limits, not only of that village, but of any other village in the District of Thána.

*Held* that plaintiff was not entitled to any such right.

The phrase "village cattle" in Section 32 of Bombay Act I. of 1865 does not include the cattle of any roving grazier, who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

*Special Appeal No. 279 of 1876.

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THIS was a special appeal from the decision of W. M. Coghlan, District Judge at Tháná, affirming, with slight amendment, the decree of H. J. Parsons, Assistant Judge at the same place.

The facts of the case are shortly these. The plaintiff Bál Pátel was a cattle-breeder, and it was his practice to stop with his cattle during the monsoon at the village of Veluk, in the district of Tháná, where he lived in a hut erected by himself on the public ground of the village.

At the end of the monsoon he went for a short time above the Ghâts, and, on his return, worked his way towards the sea at Kelvá Máhim, a táluka in the district of Tháná, and came back to the village of Veluk at the beginning of the monsoon. It did not appear that the villagers of Veluk had ever taken any steps to prevent the plaintiff from following this course, but he had never obtained the leave of the Revenue Commissioner to adopt it.

On the 6th March 1874, the Collector of Tháná issued an order to the Mámlatdár of Sháp ur, directing him to take steps for preventing persons from grazing their cattle in the manner in which plaintiff grazed his. On the 20th April 1874, the Mámlatdár issued a circular to the village officers in his táluka, directing them to carry out the Collector's order.

Plaintiff's cattle, accordingly, were driven away from the pasture land in Veluk. He, therefore, instituted the present suit for a declaration that he, like the other inhabitants of the village of Veluk, was entitled by custom to graze his cattle in that and the other villages in the district.

The Assistant Judge held that the Collector's order was illegal, and that the plaintiff was entitled to a declaration of his right as set forth by him in his plaint. He accordingly gave judgment in plaintiff's favour, with costs against the defendant. That decree was affirmed in appeal with a very slight modification. The Collector, thereupon, presented the present special appeal to the High Court.

*Farran, Ráo Sáheb V. N. Mandlik* (Acting Government Pleader) with him, for the appellant :—The Collector's order has been wrongly held to be illegal. The Lower Courts have erred in

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declaring that Government have not the right, both on their own account and in the interest of the public, to prevent the lands reserved by their orders for free pasturage for the people of a particular village from being misappropriated by others.

*Máhádev Chimnáji Apte* for the respondent :—So long as the respondent was an inhabitant of the village of Veluk he was entitled to use the village grazing grounds. The other inhabitants of Veluk have raised no objection to his so doing.

WESTROPP, C.J. :—The plaintiff (respondent) alleges himself to be a villager of Veluk in the district of Thána, and in virtue thereof by his plaint prays that it may be declared (*inter alia*), not only that he has a right to graze his cattle within the limits of Mouje Veluk but also within the limits of any other village of the district of Thána. The claim to graze his cattle in villages other than Veluk is, on the very face of it, preposterous, and on scrutinizing his claim to graze his cattle in the village grazing ground of Veluk, we perceive that it is quite as ill-founded as his alleged right so to utilize the grazing commons in the other villages of the district of Thána. It is admitted that he is not the owner of a single square foot of ground in the village of Veluk, but it appears that he has erected a hut on public ground belonging to that village, where he sojourns for a few months while his cattle are engaged in exhausting the grass set apart for the real villagers. Bombay Act I. of 1865, Section 32, enacts that the land, thereby authorized to be set apart for "free pasturage for the village cattle" and for certain other purposes therein specified, "shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner." It is perfectly absurd to suppose that the term "village cattle" includes the cattle of any or every roving grazier who may choose to squat for a few months on the public grounds of the village, and to allow his cattle to prey upon the lands set apart for the villagers. And the Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose assent it is not pretended has been obtained by the plaintiff. So far from condemning the Collector for his intervention, we think that his conduct was praiseworthy in putting an end to such an abuse as appears to have

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grown up in his collectorate, and in insisting upon the preservation of the village grazing grounds and the Government forests for the purposes for which they are properly reserved. We deem the suit of the plaintiff to be characterized by no ordinary effrontery, and we reverse the decrees of the Courts below with costs of suit and both appeals, which must be paid by the plaintiff to the defendant.

*Decrees reversed.*

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## [APPELLATE CIVIL.]

*Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Melvill.*

July 4.

SUBHA'BHAT BIN BABANBHAT (PLAINTIFF AND APPELLANT) *v.* VA'SUDEVBHAT BIN SUBHABHAT AND OTHERS (DEFENDANTS AND RESPONDENTS).*

*A sale convertible into a mortgage.*

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,

*Held* that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale.

*Howard* v. *Harris*, (1) *Ránoji* v. *Chinto*, (2) *Shankurbhái* v. *Kassibhái*, (3) referred to and distinguished.

THIS was a special appeal from the decision of W. H. Crowe, District Judge of Kanara, affirming the decree of J. L. Fernández, Subordinate Judge at Coompta.

The plaintiff Subhábhat brought this suit against Vásudevbhat and four others to redeem a mortgage of certain immoveable property described in the plaint. He alleged that the property originally belonged to one Haribhat, from whose representatives—

(1) 1 Vern. 190; S. C. 2 Wh. and Tud. L. C 947, 3rd Ed.

(2) 1 Bom. H. C. Rep. 199.

(3) 9 Bom H. C. Rep. 69.

* Special Appeal No. 23 of 1877.