APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1896. *February 5.*

TRIMBAK GOPAL RAHALKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Revenue Jurisdiction Act (Bombay Act X of 1876), Secs. 4, Cl. (f), 5† — Survey and Settlement Act (Bombay Act I of 1865), Sec. 32‡ — Land Revenue Code (Bombay Act V of 1879), Secs. 38 and 39§ — Free pasturage — Land set apart by Government for grazing — Subsequent sale by Government of part of such land — Right of pasturage by the inhabitants of a village over Government waste lands — Right of Government over such land — Jurisdiction of civil Courts.

The land comprised in three survey numbers situate in the village of Mâhim were set apart by Government as free grazing land for the cattle of villagers. Out of this

* Appeal, No. 7 of 1895.

†Section 4, clause (*f*), and section 5 of the Revenue Jurisdiction Act (Bombay Act X of 1876) :—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters :—

(*f*) Claims against Government—

to hold land wholly or partially free from payment of land-revenue, or to receive payments charged on or payable out of the land-revenue, or to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force, or

respecting the occupation of waste or vacant land belonging to Government.

5. Nothing in section 4 shall be held to prevent the Civil Courts from entertaining the following suits :—

(*a*) Suits against Government to contest the amount claimed, or paid under protest, or recovered, as land-revenue, on the ground that such amount is in excess of the amount authorized in that behalf by Government, or that such amount had, previous to such claim, payment or recovery, been satisfied, in whole or in part, or that the plaintiff or the person whom he represents is not the person liable for such amount;

(*b*) suits between private parties for the purpose of establishing any private right, although it may be affected by any entry in any record of a revenue survey or settlement or in any village papers;

(*c*) suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter;

and nothing in section 4, clause (*g*), shall be held to prevent the Civil Courts from entertaining suits, other than suits against Government, for possession of any land being a whole survey number or a recognized share of a survey number;

and nothing in section 4 shall be held to prevent the Civil Courts in the districts mentioned in the second schedule hereto annexed from exercising such jurisdiction as, according to the terms of any law in force on the twenty-eighth day of March, 1876, they could have exercised over claims against Government—

(*a*) relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village officer or servant:

(*b*) to hold land wholly or partially free from payment of land-revenue;

(*c*) to receive payments charged on, or payable out of the land-revenue.

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land about 2,600 acres was sold by Government to one Manchersha (defendant No. 2) in 1891. The extent of the area over which village cattle grazed before the sale being thus curtailed, the plaintiff for himself and on behalf of the other villagers brought this suit against the Secretary of State and Manchersha, alleging that the land left for grazing after the sale of 2,600 acres was insufficient for the pasturage of the village cattle and praying (in the alternative) that Government should set apart so much of land as might be necessary for free grazing, &c., and that until such land as was necessary had been set apart, the plaintiff might be declared to have the right of using the land comprised in the three survey numbers as heretofore, and that an injunction might be granted accordingly.

Government alleged that the land that was left after the sale to Manchersha was sufficient for the *bonâ fide* needs of the villagers, and contended *(inter alia)* that the suit was barred under section 4, clause (*f*), of the Revenue Jurisdiction Act (Bombay Act X of 1876).

Held, confirming the decree of the lower Court dismissing the suit, that while the Courts consistently with the course of legislation may have jurisdiction to declare that the villagers of a specified village are entitled to rights of free pasturage over Government waste lands within the limits of their village, still they can go no further and enjoin the Collector to pursue any particular course in connection with them while he is acting *bonâ fide* in pursuance of the power which the provisions of the statute confer upon him.

The claim being against Government respecting the occupation of waste land belonging to Government, the civil Courts are precluded from entertaining it under section 4 of the Revenue Jurisdiction Act (Bombay Act X of 1876.) A question relating to the discontinuous occupation of the village wastes by the village cattle is as much a question of land-revenue as one relating to the permanent occupation of them or a portion of them by an individual.

APPEAL against the decision of J. J. Heaton, District Judge of Thána.

† Section 32 of the Survey and Settlement Act (Bombay Act No. I of 1865) :—

A Survey or Settlement Officer may set apart unoccupied lands in unalienated villages for free pasturage of village cattle * * * and lands assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner.

§ Sections 38 and 39 of the Land Revenue Code (Bombay Act No. V of 1879) :—

38. Subject to the general orders of Government, it shall be lawful for survey-officers whilst survey operations are proceeding under Chapter VIII, and at any other time for the Commissioner, to set apart lands the property of Government and not in the lawful occupation of any person or aggregate of persons in unalienated villages or unalienated portions of villages for free pasturage for the village cattle, for forest reserves, or for any other public or municipal purpose; and lands assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Commissioner; and in the disposal of land under section 37 due regard shall be had to all such special assignments.

39. The right of grazing on free pasturage lands shall extend only to the cattle of the village or villages to which such lands belong or have been assigned and shall be regulated by rules to be from time to time, either generally or in any particular instance prescribed by the Collector with the sanction of the Commisssioner.

The Collector's decision in any case of dispute as to the said right of grazing shall be conclusive.

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Certain lands in the village of Máhim (*viz.* Survey Nos. 835, 836 and 837) had been set apart by Government as free grazing land for the cattle of the village.

In 1891 Government sold about 2,600 of this land to one Manchersha (defendant No. 2).

Thereupon the plaintiff on behalf of himself and his co-villagers brought this suit (No. 1 of 1892) against the Secretary of State for India and Manchersha, alleging that the land left for the village cattle was insufficient for pasturage, and praying that Government might be ordered to set apart so much land as was necessary for pasturage, and that until that was done, the plaintiff and his co-villagers should be declared to have the right of using the lands comprised in the three survey numbers as heretofore, &c.

The Government pleaded, in defence, that the land left after the sale to Manchersha was sufficient for the needs of the villages, and further contended that the suit was barred under the provisions of section 4, clause (*f*) of the Revenue Jurisdiction Act (Bombay Act X of 1876).

The Judge found that the suit was barred by the provisions of the Revenue Jurisdiction Act (Bombay Act X of 1876); that the plaintiff and other permanent residents of Máhim had not acquired any rights over the lands in question such as to prevent the Government from dealing with it at its pleasure; that the suit was not maintainable for the perpetual reservation of the lands for grazing and other purposes mentioned in the plaint; that the claim was not time-barred, and that the Court could not make a decree directing a perpetual reservation of any land whatever. He, therefore, dismissed the suit.

The plaintiff appealed.

Scott (with *Daji A. Khare* and *Ganesh K. Deshmukh*) appeared for the appellant (plaintiff):—We represent the rayats of the village of Máhim. The villagers have a right of grazing their cattle over the land in dispute and of taking leaves and branches of trees therefrom. Our complaint is that Government has sold part of this land to defendant No. 2. There are three questions: there is one question of fact and the other two are points of law.

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The question of fact is whether the rayats have got land for grazing purposes. The points of law are whether the suit is barred under section 39 of the Land Revenue Code (Bombay Act V of 1879) and whether the suit is maintainable under section 4, clause (*f*), of the Revenue Jurisdiction Act (Bombay Act X of 1876).

The evidence establishes our prescriptive right, and it further shows that there is not now as much land available for grazing purposes as there was when Government made the grant. There are about 3,000 cattle in Máhim. This fact is admitted by the Collector in his written statement. Each animal requires about one acre and six gunthas of land for grazing purposes. The land is now quite insufficient.

The lower Court held that we cannot maintain the suit owing to section 4, clause (*f*), of the Revenue Jurisdiction Act and has relied on *Shridhar* v. *The Secretary of State for India in Council*[1]. That ruling is not applicable. That was a case for declaration of ownership, while in this suit we ask a declaration that we have certain rights. We do not claim the right of occupation, which means the right to possession to the exclusion of others.

[PARSONS, J.:—Is not the right of grazing a right of occupation ?]

We submit not. Government set apart land for grazing cattle and so long as the right of grazing cattle is not interfered with, we have got nothing to do with the occupation of the land. The term occupant is defined in the Land Revenue Code, and we submit that a person having only a right to land for grazing purposes cannot be called a holder of land under that definition. *The Secretary of State* v. *Mathurabhai*[2] shows that the present suit is maintainable.

Ráo Sáheb *Vasudeo J. Kirtikar*, Government Pleader, appeared for respondent No. 1 (defendant No. 1):—The Judge held that the suit was one for occupation of land, and was, therefore, not maintainable. Grazing means occupation by cattle: therefore the claim is governed by clause (*f*), section 4, of the Revenue Jurisdiction Act. Civil Courts cannot take cognizance of such claims.

(1) P. J., 1893, p. 248. (2) I. L. R., 14 Bom., 213.

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Under the Land Revenue Code such matters are left entirely to the Collector. Before the Survey and Settlement Act was passed, Government had framed certain rules for the guidance of their officers, and under those rules they were permitted to set apart reasonable areas of land for free pasturage. See Survey and Settlement Manual, 1882, pp. 36, 37. The mere setting apart of certain lands for the convenience of the villagers does not give them any rights against Government.

If it be held that the present suit is maintainable, then the case will have to go back to the Judge for inquiry as to whether the land which is now left for grazing purposes is sufficient for the present requirements of the villagers.

Lang (Advocate General with *Manekshah J. Taleyarkhan*) appeared for respondent No. 2 (defendant No. 2) :—Section 4, clause (*f*), of the Revenue Jurisdiction Act governs the present case. Villages may increase or decrease, and, therefore, constant supervision of revenue officers is necessary.

Scott, in reply, as to the meaning of occupancy or *occupatio*, cited Mayne's Ancient Law, p. 246; Pollock and Wright on Possession, p. 12.

FARRAN, C. J. :—This is an appeal from the decree of the District Court of Thána dismissing a suit brought by the plaintiff on behalf of himself and the other villagers of Máhim in the Thána Collectorate against the Secretary of State and the defendant Manchersha Motabhai. The object of the suit was to preserve three Survey Nos. 835, 836 and 837 as free grazing land for the cattle of the villagers. In 1891, the Collector with the sanction of the Commissioner, Northern Division, sold about 2,600 acres out of the three numbers to the defendant Manchersha, and thus curtailed the extent of the area over which the village cattle had been before the alienation in the habit of grazing.

The plaint, as originally framed, alleging a customary or prescriptive right, prayed for a declaration that the plaintiff and the other villagers of Máhim had from time immemorial a right of grazing their cattle upon and taking leaves, sticks, loppings, &c., from the survey numbers in question, and for an injunction restraining the defendants from obstructing them in the enjoyment of such rights.

The amended plaint alleged that the land left for grazing after the sale of the 2,600 acres to the defendant Manchersha was insufficient for the pasturage of the village cattle; and that until sufficient land had been set apart for that purpose Government was not entitled to dispose of the residue, and prayed (in the alternative) that it might be declared that the plaintiff had the right to compel Government to set apart so much land as might be necessary for free grazing, &c., and that until so much as was necessary had been set apart, the plaintiff might be declared to have the right of using the three survey numbers as heretofore, and that an injunction might be granted accordingly.

The three Survey Nos. 835, 836 and 387 are admittedly unassessed Government waste land within the limits of Máhim and contain about 4,485 acres. There is not much other Government waste land within the limits of the village, but it is the case of Government that the Government waste land which is left (about 2,928 grazing acres) after the sale to the defendant Manchersha is sufficient for the *bonâ fide* needs of the villagers in the matter of free pasturage.

The legal contentions raised by the written statement of the Secretary of State are:—(1) That the claim of the plaintiff is barred by the last paragraph of clause (*f*) of section 4 of "the Bombay Revenue Jurisdiction Act, 1876." (2) That the proprietary rights of Government over the land are not affected by reason of its having been reserved for grazing under section 38 of Bombay Act V of 1879, or section 32 of Bombay Act I of 1865. (3) That under the above sections the right of disposing of the land vests in the Revenue Commissioner. (4) That the reservation of the land was permissive and temporary and not permanent. (5) That the enjoyment by the villagers was permissive and not as of right. (6) That if the villagers have acquired any rights, they are not rights over any particular land, but rights only to so much land for grazing as may be necessary for their cattle. (7) That the Revenue Commissioner is alone empowered to determine how much land is necessary, and the Court cannot interfere.

The issues raised were:

(1) Is the suit barred by anything in the Bombay Revenue Jurisdiction Act(X of 1876)?

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(2) Have the plaintiff and the other permanent residents of Máhim acquired any right over the land in suit such as to prevent Government from dealing with it at their pleasure ?

(3) Is a suit maintainable for the perpetual reservation of the land in suit for grazing and the other purposes mentioned in the plaint ?

(4) Is plaintiff entitled to a perpetual reservation of so much land as may be necessary for the grazing of the village cattle ?

There was also an issue as to limitation, but no argument has been addressed to us upon that subject, and it may be treated as abandoned.

The District Judge decided all the above issues in accordance with the defendant's contentions.

Though the evidence taken on commission which has been read to us (Exhibit 108) shows that the villagers of Máhim for the last fifty or sixty years have grazed their cattle over the survey numbers in question, as well as over other Government waste land in the village, there is nothing in that evidence to indicate the nature of the right or supposed right under which they did so, nor is there anything in it to establish a distinction between the practice of the villagers of Máhim in respect of the grazing of their cattle over Government waste land and that of other villages where a similar practice prevails. Our decision must, therefore, rest upon the law generally applicable to Government waste land similarly circumstanced and not upon any special or peculiar custom prevailing in the village of Máhim.

Now it is found by the District Judge, and his finding has not been controverted in the arguments addressed to us, that prior to the survey settlement in 1862-63 the villagers of Máhim had free grazing land, forming part of the Government waste, attached to the village ; but that the evidence did not show whether it consisted of the identical land comprised in the three survey numbers in suit or not. These numbers are partly salt marsh and partly grass land. At the survey in 1862-63 they were set apart for free grazing, being described in the survey register (Exhibit 16) as "unassessed Government *warkas* lands allowed for free grazing." Until the sale to Manchershah in 1891 the villagers

continued to graze their cattle over them. These are the facts with which we have to deal in determining the questions of law raised by the defendant's contentions.

The judgment in the case of *The Secretary of State* v. *Mathurabhai*[1] lays down three propositions :

(1) That a right such as that of pasturage by the inhabitants of a village over Government waste lands could have been acquired by prescription against the East India Company and can be so acquired against the Secretary of State as representing the Crown.

(2) That a right of free pasturage over Government waste lands has been recognized by Government as a right belonging to some villages, and where it exists must have been acquired by custom or prescription.

(3) That in the absence of special circumstances the recognized custom of the country under which that right is enjoyed did not confer the right of pasturage on any particular piece of land.

The judgment further indicates that the extent of this right was to be measured by a consideration of how much grazing land was sufficient for the purposes of the village. This customary right, it is contended before us, is of too indefinite and varying a character to be in accordance with the rule laid down in the English authorities that customary easements must like all other customs be reasonable and certain. "That easements claimed by custom may be sustainable in point of law, they must be possessed of the same characteristics as those which are essential for the validity of custom generally. They must be reasonable and certain"—Goddard on Easements, p. 241 (edition, 1884). On this ground it is argued that the alleged right varying from time to time with the extent of the village and the number of the cattle which it possesses cannot be a right which Courts of law can recognize and enforce. Whether this argument be correct or not, it appears to us to afford a reason why the Legislature should leave in the hands of the revenue authorities, rather than with the civil Courts, the power to determine and regulate the extent of the right for the time being. Assuming, however, the right to

(1) I. L. R., 14 Bom., 213.

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have existed in this form in the present case before the introduction of the survey settlement in the village, we have to consider whether it has been to any and what extent controlled or regulated by legislation. The judgment in *The Secretary of State* v. *Mathurabhai* does not deal with this subject.

Previous to the recent revenue legislation the Bombay Government had assumed that it possessed the inherent right to make rules for the regulation of the pasturage of its waste land and to control the user of it by the villagers. Rule 16 of the Rules made in 1848-49 by Government for the guidance of the revenue officers directs the grazing of unassessed Government land to be sold by auction annually, "a reasonable proportion being set aside for the free pasturage of such villages as have hitherto enjoyed the right." Government Resolution No. 1036 of 1853 directs that land assigned at the settlement as free common is not to be resumed without the sanction of the Revenue Commissioner —Survey and Settlement Manual, 1882, p. 36.

Bombay Act I of 1865, which gave legislative sanction to the introduction of the survey settlement, by section 32 enacted as follows:—"A Survey or Settlement Officer may set apart unoccupied lands in unalienated villages for free pasturage of village cattle * * * and lands assigned specially for any such purpose shall not be otherwise appropriated or assigned without the sanction of the Revenue Commissioner." The Act thus recognizing the claims of certain villages to free pasturage over Government waste substituted for the undefined rights previously existing a right to have a certain portion of such land set apart to meet it, leaving the amount of the land to be set apart to be determined by the Survey Officer, but liable to be subsequently varied by the Collector with the sanction of the Commissioner.

The Bombay Land Revenue Code, 1879, repeats the same provisions, section 38 providing that it shall be lawful for the Survey Officer while survey operations are proceeding to set apart lands, the property of Government, for free pasturage for the village cattle, and that lands specially assigned for such purpose shall not be otherwise appropriated or assigned without

the sanction of the Commissioner, while section 39 enacts that "the right of grazing on free pasturage lands shall extend only to the cattle of the village or villages to which such lands belong or have been assigned, and shall be regulated by rules to be from time to time either generally or in any particular instance prescribed by the Collector with the sanction of the Commissioner. The Collector's decision in any case of dispute as to the said rights of grazing shall be conclusive. Although we see nothing in this course of legislation which excludes the jurisdiction of the civil Courts to declare the existence on the part of villagers of a right of free pasturage, yet sections 38 and 39 give legislative sanction to the rules, which the Collector, with the sanction of the Commissioner, may frame for the regulation of such rights and with the like sanction to the alienation of lands subject to the same.

While, therefore, the Courts consistently with this course of legislation may have jurisdiction to declare that the villagers of a specified village are entitled to rights of free pasturage over Government waste lands within the limits of their village, it is difficult to see how they can go further and enjoin the Collector to pursue any particular course in connection with them, while at all events he is acting *bonâ fide* in pursuance of the power which the provisions of the statute confer upon him. We have referred to this legislation in order to determine the present position of the villagers with reference to free pasturage.

It remains to consider whether Act X of 1876 deprives the civil Courts of the jurisdiction to deal with their claims against Government in respect of it. The only claim which, it appears to us, the plaintiff on behalf of the villagers of Máhim can now advance against Government is to have the Government waste land set apart at the survey settlement for free pasturage reserved for that purpose: any former indefinite rights which they may have been entitled to being now merged in the provisions which the statute has made to meet them or being lost by lapse of time. The question is whether that is "a claim against Government respecting the occupation of waste land * * belonging to Government." If it is, section 4 of the Act precludes the civil Courts from entertaining it. We are of opinion that it is.

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It is contended for the appellant that occupation in that clause means exclusive occupation such as would, if continued, give a right to the land itself. Mr. Scott has pressed upon us the meaning of the word as it was used in the Roman Law, where "*occupatio*" is recognized as one of the means by which property is acquired *in rebus nullius*, and which Mr. Maine has treated of in his work on Ancient Law, Chapter VIII. That certainly is a legal and technical meaning of the word, but we think that in the Act which we are construing we ought not to give such a restricted meaning to it. In popular language it has a more extended sense. Webster gives "use" as one of its meanings. The Act treats questions respecting the occupation of Government waste land as questions relating to the "land revenue," and the object of the Act is to exclude such questions from the jurisdiction of the civil Courts and to leave them to be dealt with by the revenue authorities except when they are of the definite nature described in the proviso to section 4 and in section 5. A question relating to the discontinuous occupation of the village wastes by the village cattle is as much a question relating to the land revenue as one relating to the permanent occupation of them or a portion of them by an individual. Claims to establish either right against Government appear to us to be claims respecting the occupation of waste lands. A claim to have lands set apart for free pasturage for the villagers appears to us to fall within the meaning of the clause. It can hardly be contended that the person to whom the grazing of the waste land is sold annually is not entitled to an occupation of it within the meaning of the clause. The land reserved for the villagers' pasture is in a position very clearly analogous to land so left for grazing. No outside cattle are allowed to pasture upon it. See *The Collector of Thana* v. *Bal Patel*[1]. This case, we think, is governed by the ruling in *Shridhar* v. *The Secretary of State for India in Council*[2]. The appeal will be dismissed, and the decree of the District Court confirmed with costs.

Decree confirmed.

(1) I. L. R., 2 Bom., 110.

(2) P. J., 1893, p. 248.