1914
March, 3.

MISCELLANEOUS CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

GITA RAM AND OTHERS (DEFENDANTS) *v.* KIRPA RAM (PLAINTIFF).*

Land tenures in Kumaun—Custom—Pasture land—Grant of pasture land disputed—Second appeal—Finding of fact—Civil Procedure Code (1908), *section* 100.

According to the special law relating to land tenures in Kumaun, land which was not allotted to villagers for purposes of cultivation was held to belong to the Government and might be granted to individual villagers for cultivation or the planting of trees. But if such land were *gauchar*, or pasture land, a grant could only be made if it was not inconsistent with the general wishes and well-being of the village community; and it was open to any villager to bring a suit to dispute the validity of such grant.

Held, on such a suit being filed, that the finding of the appellate court that the grant in question was inconsistent with the general wishes and well-being of the community was a finding of fact and could not be disturbed in second appeal.

THIS was a reference under Rule 17 of the Rules and Orders relating to the Kumaun division, 1894.

The facts of the case appear from the order of reference which was as follows :—

"This is an application made by the respondent plaintiff for a declaration that certain land granted to the defendants as *nayabad* by Mr. Stowell in 1911, was *gauchar* and could not be so granted. The grant was opposed at the time by the plaintiff, but his objections were set aside and a grant was made. The present suit was instituted so long after this that the defendants respondents had built a wall around and planted trees on the land.

"According to Stowell's Manual on Land Tenures and the *nayabad* rules as published in the Kumaun rules the law appears to be as follows :—

"The cultivators of every village in Kumaun have certain plots of land assigned to them for cultivation. These plots are called *nap* land, because they have been measured and generally numbered. The rest of the land within the limits of the village remains Government land and can only be encroached on by the villagers for the purpose of cultivating or for planting trees with the executive permission of Government. When executive permission is asked it may be given at the discretion of Government if the land is not what is called *gauchar* (pasturage) land, that is to say, land used by the villagers for pasturage. If, however, it is *gauchar* land, then permission may only be given in favour of any particular cultivator when it is consistent with the general wish and well-being of the village community, that is to say, when its appropriation for cultivation will not injuriously diminish the pasturage. If it should be given without due regard to this consideration, the villagers or any of them may sue the favoured villager for a declaration that the permission is invalid,

* Civil Miscellaneous No. 550 of 1913.

apparently on the ground that the whole village community has acquired customary rights in such land whereby the Government's right of disposal is defeated.

"In this particular suit Mr. Stowell gave permission to the non-applicant (to Government). The court of first instance (i.e. the Assistant Commissioner) held that, although the land in question was useful for grazing purposes to the whole community and although the total amount of land that could be so used was very limited in extent, still he was not prepared to say that the permission given to appropriate the very small portion of land, i.e. just under two acres, would injuriously affect the villagers as a whole.

"In first appeal the Deputy Commissioner held that the fact of the scantiness of the pasturable area in the village coupled with the consistent and determined efforts of the villagers in the past to resist any appropriation of it and lastly with the fact that the situation of the land made it likely that it would long ago have been appropriated but for a strong reason to the contrary, was sufficient to indicate that the permission in this case was inconsistent with the general wish and well-being of the community.

"The Commissioner on second appeal held that the Deputy Commissioner should not on merely circumstantial grounds have decided against the propriety of Mr. Stowell's order. He was also influenced in his decision by the fact that the appellant before him had spent large sums upon improving his grant.

"The Government is advised that the latter reason is not a very strong one. The grant was made in July 1911. The plaintiff referred the matter to the executive official for re-consideration of Mr. Stowell's order in November 1911, and was directed by him to file a suit, which he did in June 1912. In any case the decree might have been given to the plaintiff conditional on their refunding the expenditure. The limitation for bringing the suit appears to be six years under article 120 of the Limitation Act. As to the former reason, the Government is advised that no presumption in law could arise in favour of the correctness of Mr. Stowell's action in making the grant. The grant was only a grant of Government rights, and if the Government right had, before the grant was made, been defeated by a kind of customary easement in favour of the village community, the grant was worth nothing.

"The Government is also advised that, apart from the merits of the case, it is open to question whether the second appeal to the Commissioner involved any question of law and was, therefore, entertainable by him.

"I am to ask that the Hon'ble Court may be moved to favour the Government with its opinion as to whether under section 100 of the Civil Procedure Code a second appeal lay to the Commissioner and if so, whether his decision was correct.

"I am also to inquire what orders, if any, as to costs should in the opinion of the Hon'ble Court be passed in this suit."

Munshi *Gobind Prasad*, for the applicants.

Dr. *Satish Chandra Banerji*, for the opposite party.

CHAMIER and PIGGOTT, JJ.—This is reference under Rule 17 of the Rules and Orders relating to the Kumaun division of

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1894. The circumstances leading up to the reference are stated fully in the order and need not be repeated. We are asked to give our opinion as to whether a second appeal lay in this case to the Commissioner and if so, whether his decision is correct. Both parties before us admit that the law is as stated in the reference. The main question for decision in the case was whether or not the grant of certain land by Mr. Stowell in 1911 was inconsistent with the general wishes and well-being of the community. The land is admitted to be *gauchar*, or grazing land. There is a large quantity of other land in the village, part of which is no doubt available for grazing purposes, but part is not available for such purposes as it consists of "rocky slopes." The Assistant Collector seems to have been acquainted with the village in question, but he was not prepared to hold that the grant of two small plots, measuring together about two acres, to the defendant, would affect the other villagers injuriously. On appeal the Deputy Commissioner, for reasons given by him, was of opinion that there was enough to show that the grant was inconsistent with the general wishes and well-being of the community. He relied on the fact that the amount of land suitable for grazing purposes in the village was small, on the constant and determined efforts of the villagers to resist any appropriation of it, and lastly on the situation of the land itself and its proximity to the *abadi*. It seems to us that the question which he decided was one of fact and that his decision ought not to have been disturbed by the Commissioner in second appeal. A point was taken in the memorandum of appeal to the Commissioner which was admissible under section 100 of the Code of Civil Procedure, namely, that the matter was *res judicata*, but there were no materials on the record for the decision of such a question and it does not appear to have been pressed. The other grounds of appeal were not admissible.

Our answer to the reference is that the appeal should have been dismissed by the Commissioner when he discovered that the plea of *res judicata* could not be substantiated. We see no reason why costs should not follow the event.

Opinion in favour of defendants.