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taken by this Court, and I do not feel myself justified in departing from that view. On this short ground I would decree the appeal and remand the case under section 562 of the Code of Civil Procedure.

Appeal decreed and cause remanded.

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May 18.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.
DHARAMRAJ KUNWAR (PLAINTIFF) *v.* SUMERAN SINGH AND ANOTHER (DEFENDANTS).*

Act No XII of 1881 *(N.-W. P. Rent Act), section* 44*—Landholder and tenant—Improvements—Wells—Power of tenants to construct wells without consent of landholder.*

Held, that having regard to section 44 of the N.-W. P. Rent Act, 1881, an occupancy tenant may, if such well be an improvement within the meaning of the section, construct either a kacheha or pacca well on his holding without any reference to the consent of the zamindar. *Raj Bahadur* v. *Birmha Singh* (1) and *Muhammad Raza Khan* v. *Dalip* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. *B. E. O'Conor*, for the appellant.

Mr. *J. Simeon* for the respondents.

STRACHEY, C. J.—The plaintiff in this case claimed an injunction involving the demolition of a pacca well constructed by the defendants on land which the plaintiff claimed as his own. He claimed a right, as owner of the land, to have the well demolished. The defendants pleaded that they had constructed the well on land belonging to themselves. It has been found as a fact that the defendants are occupancy tenants of the land on which they constructed the well. It is common ground that they constructed it without the consent of the plaintiff, who is the zamindar. That is how the case stood in the Court of first instance. The question as stated by that Court is:—"Can an occupancy tenant construct a well on his holding without the permission of

* Second Appeal No 170 of 1897, from a decree of J. J. McLean, Esq., District Judge of Jaunpur, dated the 7th December 1896, confirming a decree of Babu Bhawani Chandar Chakarvarti, Munsif of Jaunpur, dated the 25th August 1876.

(1) (1880) I. L. R., 3 All., 85. (2) Weekly Notes, 1892, p. 103.

his landlord?" The answer given to that question by the first Court is, that an occupancy tenant can do so. The Court, in support of that view, referred to the case of *Muhammad Raza Khan* v. *Dalip* (1). The Munsif says, first, with regard to that case that "the facts of the two cases are exactly alike." I understand him to mean that the suits in that case and the present were of exactly the same character; that the wells sought to be demolished were both masonry wells; that in each case the parties stood in the relation of landholder and occupancy tenant, and that in each the well was constructed by the occupancy tenant without the landholder's permission. Then the Munsif goes on to say that in the precedent cited, "in spite of the condition in the wajib-ul-arz that it can be done with the zamindar's permission, the ruling has laid it down that such permission need not be sought and obtained." I understand him to mean that the precedent is an *a fortiori* case, and shows that the landholder's permission for the building of the well is immaterial, even where there is a clause in the wajib-ul-arz prohibiting the construction of wells without the landholder's consent. I do not think that the Munsif was referring to any wajib-ul-arz produced in the case before him. Certainly no wajib-ul-arz is mentioned or relied on in the plaint, which bases the claim, not on any instrument of the kind, but on the plaintiff's right as owner to remove a construction improperly placed on his land. No wajib-ul-arz, and no evidence referring to any wajib-ul arz, is to be found anywhere on the record. The plaintiff appealed to the District Judge, and in his second ground of appeal there is what appears to be the first reference to any wajib-ul-arz as applicable to this case. That plea in the memorandum of appeal referring to the wajib-ul-arz appears to have been suggested by the Munsif's allusion to the ruling reported in the Weekly Notes and to the wajib-ul-arz therein referred to, and the plea is that the ruling "is not applicable to the present case with reference to the conditions of the wajib-ul-arz." With reference to this plea the lower appellate

(1) Weekly Notes, 1892, p. 103.

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Court appears to have taken it for granted that there was a wajib-ul-arz in the present suit, the terms of which were exactly similar to those of the wajib-ul-arz in the case reported in the Weekly Notes, and that Court concurred with the first Court in dismissing the suit on the authority of that ruling. Now the plaintiff has presented a second appeal to this Court. The learned Judge before whom that appeal came has referred it to a Division Bench because he disagrees with the judgment of Mr. Justice Mahmood in the case cited. His view is that Mr. Justice Mahmood treated the occupancy tenant's power to make wells as being larger than the law allows or than would be reasonable. He expresses the opinion that so far from its being unreasonable and opposed to public policy, that an occupancy tenant should not be able to build a pacca well without the consent of the zamindar, it would be throwing an unreasonable burden on the zamindar if the occupancy tenant's rights were not conditional on the zamindar's consent being obtained. Now it is quite clear that section 44 of the N.-W. P. Rent Act does recognize the right of an occupancy tenant to construct wells without the landholder's consent. The last paragraph of that section shows by necessary implication that an occupancy tenant is entitled to compensation in respect of improvements, including wells, made without the consent of the landholder, and can resist ejectment from the land without payment of such compensation. It is not a question of reasonableness or of public policy: the occupancy tenant's right is distinctly conferred by statute. Even under section 44 of the N.-W. P. Rent Act, 1873, which contained no such provision as the last paragraph of section 44 of the present Act, the Full Bench of this Court in *Raj Bahadur* v. *Birmha Singh* (1) gave effect to the same right by dismissing a suit brought by a landholder against an occupancy tenant for an injunction restraining the defendant from constructing a well on his occupancy holding. Mr. Justice Pearson, with whom the rest of the Court concurred, said:—"I am of opinion that section 44

(1) (1880) I. L. R., 3 All., 85.

of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them." In this case, as in that, "it is not pretended that the well constructed by the defendant is not calculated to benefit the land." The effect of the last paragraph of section 44 of the present Act is to confirm the view taken by the Full Bench, and to make it clear that, in the case of tenants at fixed rates and occupancy tenants, the well, if an improvement, as defined by the section, may be made without the landholder's consent. The learned Judge remarks that Mr. Justice Mahmood's decision would throw an intolerable and enormous burden on a zamindar in compelling him to make compensation for so-called improvements. I think, with all respect, that he has overlooked the explanation to section 44, which shows that for a merely "so-called" improvement the landlord would not be liable to pay compensation. Unless the well or other work fulfils the definition of "works by which the annual letting value of the land has been and at the time of demanding compensation continues to be increased," it is not an improvement within the meaning of the section at all, and the landlord can eject the tenant without paying compensation for it. The section only compels compensation where the landlord has received a real *quid pro quo*, and only prevents the landlord from appropriating the land without compensating the tenant for the real and permanent improvements in it which he owes to the tenant's industry. Now in the case decided by Mr. Justice Mahmood, that learned Judge held that the right conferred by section 44 on the occupancy tenant would not be taken away by a clause in the wajib-ul-arz of the village, recording a custom which required the zamindar's consent,—which the section itself dispenses with,—on the ground that such a custom would be unreasonable and opposed to public policy. On the facts of this case it is not necessary for us to express any opinion on that portion of Mr. Justice Mahmood's judgment, though I entirely agree with his view of section 44 and of the Full Bench ruling of this Court. We have been asked to send

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down an issue in this case with reference to the wajib-ul-arz to which the lower appellate Court refers in its judgment. On consideration I think that we ought not to do so. The plaintiff's claim, as I have shown, was not, as brought, in any way based on any wajib-ul-arz, and to allow him now to take his stand on any custom or contract recorded in the wajib-ul-arz apart from the general rights of the zamindar would, in my opinion, be allowing him to change the whole foundation of his suit. I think that the appeal should be dismissed with costs.

BANERJI, J.—I am of the same opinion. Section 44 of the Rent Act recognizes the right of an occupancy tenant to make improvements, including the construction of a pacca well, without the consent of the landlord. The last paragraph of the section clearly implies that it is only in the case of a tenant other than a tenant at fixed rates or an occupancy tenant that the consent of the landlord to the making of the improvement is necessary so as to entitle the tenant to compensation on ejectment. The section therefore confers on an occupancy tenant an unlimited right to make improvements in the shape of pacca wells. What the effect of a condition in the wajib-ul-arz making the right of an occupancy tenant to build a well dependent on the consent of the landlord will be on the provisions of section 44 it is not necessary, in my opinion, to consider in this case. The case as set up in the plaint had no reference to any provisions of the wajib-ul-arz. The case alleged in the plaint was that the land on which the well had been built belonged to the plaintiff: that the defendants had no concern with that land, and that they had therefore no right to construct the well. It was not alleged by the plaintiff that by reason of the provisions of the wajib-ul-arz the defendants were precluded from building a well without the plaintiff's consent. It was upon this case that the parties went to trial in the Court of first instance, and it was this case which the Court of first instance decided against the plaintiff. It was for the first time in the appeal before the lower appellate Court that the plaintiff urged that, having regard

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to the provisions of the wajib-ul-arz, the defendants were incompetent to build the well. In my opinion the lower appellate Court ought not to have allowed the plaintiff to put forward a case in appeal which she had not set up in the Court of first instance. The consideration of any question having reference to the provisions of the wajib-ul-arz does not therefore arise in the appeal before us. As the learned Chief Justice has pointed out, the fact of an occupancy tenant being allowed to construct a well without the consent of the landlord would not, having regard to the provisions of section 44, impose on the landlord any "intolerable or enormous burden." The decree of the Court below is, in my opinion, right, and I agree in dismissing the appeal with costs.

Appeal dismissed.

FULL BENCH.

1899
May 27th.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* HORI.*

Act No. VIII of 1897 *(Reformatory Schools Act), section* 16 - *Rules of the Local Government framed under section* 8, *sub-section* (3) *of the Act — Order sending a boy of the Dalera caste to a Reformatory School — Jurisdiction of High Court to interfere with orders under section* 16 — *Interpretation of statutes.*

Held, that the High Court has power to interfere in appeal or revision with an order for detention in a reformatory school passed in subtitution for transportation or imprisonment when such order is made without jurisdiction and is not an order warranted by Act No. VIII of 1897.

Section 16 of Act No. VIII of 1897 only precludes the interference of a superior Court with the orignal Court's order so far as it (1) determines the age of a youthful offender or (2) directs the substitution of detention in a reformatory school for transportation or imprisonment, where such substitution is not made without jurisdiction and is not otherwise illegal, having regard to the provisions of the Act. *Queen-Empress* v *Himai* (1), and *Queen-Empress* v. *Gobinda* (2)

*Criminal Revision No. 117 of 1899.

(1) (1897) I. L. R., 20 All., 158. (2) (1897) I. L. R., 20 All., 159.