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March, 1.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BHAGWAN DAS AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD YAHIA (PLAINTIFF).*

Landholder and tenant—House in abadi*—Well sunk by tenant inside his house—Mandatory injunction—Discretion of Court.*

In this case the High Court refused to grant a mandatory injunction at the suit of the zamindar for the removal of a well recently constructed inside their house by tenants of a house in a town; the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were only liable to ejectment in the event of the site occupied by them being cleared of buildings.

IN this case the plaintiff was the zamindar of a patti in the town of Mariahu. The defendants were tenants of a house in the patti, but they had never paid rent, and were apparently only liable to ejectment in the possible event of the site occupied by them becoming denuded of buildings. The defendants started to build a well inside their house. The plaintiff thereupon instituted the present suit praying for an injunction restraining the defendants from building their well and directing them to restore the land to its original condition. The court of first instance held that the defendants were entitled to build the well and accordingly dismissed the suit. On appeal, however, the lower appellate court reversed this decision. The defendants appealed to the High Court.

Mr. *S. A. Haidar* (with him Dr. *Satish Chandra Banerji*), for the appellants:—

A tenant who occupies a house in the village *abadi* can make improvements in his house. He can do any reasonable thing which will add to the comforts and conveniences thereof; *Balkishen* v. *Muhammad Ismail Khan* (1), *Bholai* v. *The Rajah of Bansi* (2). A well is a reasonable improvement; it is a necessary adjunct or appurtenance to a house. The plot of land was given by the zamindar for the purpose of a house. The sinking of a well inside the house is not an act inconsistent with that purpose, and is not destructive of or permanently injurious to the land. The wajib-ul-arz gives to each tenant the unrestricted power to build or to

* Second Appeal No. 533 of 1912 from a decree of Prem Behari Lal, Subordinate Judge of Jaunpur, dated the 13th of February, 1912, reversing a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated the 4th of September, 1911.

(1) Weekly Notes, 1898, p. 44. (2) (1881) I. L. R., 4 All., 174.

demolish within his compound at his own pleasure. This power includes the right of sinking a well therein as an appurtenance to the house. The construction of a well in a house is so common that it must be presumed that such a contingency was contemplated at the time when the wajib-ul-arz was framed. If the zamindar had intended to disallow wells there would certainly have been an express provision in the wajib-ul-arz prohibiting them.

Mr. *C. Dillon* (with him Nawab *Muhammad Abdul Majid* and Dr. *S. M. Sulaiman*), for the respondents :—

In an agricultural village, such as the village Mariahu was at one time, the grant of a piece of land to build a house thereon does not carry with it a right to sink a well. The main purpose is that of agriculture. The wajib-ul-arz contains provision by which tenants are empowered to make *pakka* wells. The sinking of wells would be permanently injurious to the rights of the zamindar. If it be held that the appellants can, as a matter of right, sink a well, then each and every tenant can do likewise, and there would be nothing to prevent a tenant from constructing more wells than one if he so chose. This would be destructive and permanently injurious to the zamindar's land. The case in the Weekly Notes for 1898, cited by the appellants, lays down that a tenant may make improvements in his house only so long as he can do so without injury to the rights of the zamindar. The second case cited by the appellants is not in point, as it relates to wells constructed on land used for agricultural purposes. A tenant has only a limited interest in the site of the house occupied by him, and can not make permanent alterations in that site.

Mr. *S. A. Haidar*, replied.

GRIFFIN, J.—The plaintiff in this case is the zamindar of a patti in the town of Mariahu, where the defendants reside. The plaintiff brought this suit for an injunction to restrain the defendants from constructing a well in their house and for an order directing them to remove the materials and to restore the land to its original condition. The defendants are shop-keepers whose family has been in occupation of the premises for generations without paying any rent. They pleaded that they had a right to construct the well on their premises, that the well had been constructed for their own comfort and convenience, and that the suit was brought out of malice. The court of first instance dismissed

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the suit, holding that the construction of the well inside the house was not such a user as affected the zamindar's rights injuriously, and that the well was a necessary adjunct to the comfort of the occupants of the house. The lower appellate court on appeal held that the plaintiff zamindar was entitled to the relief asked for on the ground that the construction of the well was an interference with the plaintiff's right as zamindar. The lower appellate court having decreed the suit the defendants come here in second appeal. The courts below find that the occupiers of houses in Mariahu have a right to transfer houses subject to payment of one-fourth of the sale price to the zamindar. We have heard the learned counsel for the parties at considerable length. The question, as it appears to me, for decision, in this appeal is whether the plaintiff has made out a case for issue of an injunction. The plaintiff is the zamindar of the patti where the defendants' house is situated. His rights as zamindar appear to be limited by the rights which occupants of houses have acquired by custom against the zamindar so long as the houses are in the occupation of the family. The houses only escheat to the zamindar in case of the family dying out. I am unable to hold that the construction of the well on the premises of the defendants is a breach of any obligation existing in favour of the plaintiff whether expressly or by implication. A well on the premises is an undoubted adjunct to the convenience of the occupants, and it is difficult to see in what way the zamindar's interests are injuriously affected by its construction; while its removal would undoubtedly cause inconvenience to the defendants. If there be an invasion of the zamindar's rights it is of so slight and doubtful a nature as not to call for interference, more particularly in view of the fact that the chance of the zamindar entering into possession of the house is very remote. There appears to be some reason for holding, as held by the court of first instance, that the plaintiff was actuated by malice in instituting the present suit. Taking all the circumstances into consideration I am of opinion that this is not a case in which the injunction asked for should be granted. I would therefore allow the appeal and dismiss the plaintiff's suit.

CHAMIER, J.—I agree that this appeal should be allowed. The appellants are the owners and occupiers of a shop and an adjoining

house in qasba Mariahu. The respondent is the zamindar of the qasba. The question for decision is whether the appellants are entitled to sink a well inside the shop without the permission of the respondent. It has been found by the courts below, and it is now admitted by the appellants, that the respondent is the exclusive owner of the land on which the house and shop stand, but that the appellants are entitled to retain possession as long as the buildings remain on the land. The Munsif held that the appellants were entitled to sink the well without the respondent's permission. On appeal the Subordinate Judge held that they were not.

It must be taken that the predecessors of the appellants obtained the land from the zamindar for the time being, for the purpose of erecting buildings thereon, and that they agreed expressly or impliedly not to use the land for any other purpose. Therefore, if the acts now complained of are inconsistent with the purpose for which the land was given to the appellants' predecessors, the respondent is entitled to a mandatory injunction. It was not suggested by counsel for the appellants that a mandatory injunction was not a suitable form of relief or that any other relief would meet the case. In this connection I may note that it was admitted before us that the respondent objected to the construction of the well as soon as he came to know of it.

Two provisions in the wajib-ul-arz have been referred to. One of them certainly has no bearing upon the case. It relates to the digging of wells by *kashtkars*, and evidently was not intended to apply to the *abadi*. The other says that a *kashtkar*, or *ryot*, can build and pull down as he pleases within his own inclosure (*andar ahate apne ke bana o bigar sakta hai*). I doubt whether this was intended to authorize the construction of wells. It was probably intended to authorize a *kashtkar* or *ryot*, to make structural alterations inside his premises without reference to the zamindar.

But I am not prepared to hold that the sinking of a well within the premises was an act necessarily inconsistent with the purpose for which the land was granted. A well is one of the amenities or conveniences of an Indian house, and I consider that the grant of land for building purposes carries with it the right of making a well for the convenience of the occupiers. I would therefore restore the decree of the Munsif.

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BY THE COURT.—The appeal is allowed, the decree of the lower appellate Court is set aside and that of the court of first instance restored. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

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March, 3.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

ABDUL GHAFUR (PLAINTIFF) *v.* GHULAM HUSAIN AND ANOTHER (DEFENDANTS) *

Civil Procedure Code (1908), order XXI, rule 88—Execution of decree—Sale in execution—Pre-emption—Title of pre-emptor defeasible.

Held that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre-emption under order XXI, rule 88, of the Code of Civil Procedure, 1908. *Kamta Prasad* v. *Mohan Bhagat* (1) and *Nabihan Bibi* v. *Kauleshar Rai* (2) followed.

THE facts of this case were briefly as follows:—A certain mahal was divided into two pattis, namely, (1) patti Fakir Bakhsh, in which the plaintiff was a co-sharer, and (2) patti Mumtaz-ud-din, in which the defendant was a co-sharer by virtue of shares purchased by him under two sale-deeds, dated the 11th of August, 1910. A share in the latter patti was put up, on the 20th of September, 1910, to sale by auction in execution of a decree. The plaintiff bid for the property, and the defendant, offering the same bid, claimed the right of pre-emption under order XXI, rule 88, of the Code of Civil Procedure. The sale was confirmed in the defendant's favour. Then the plaintiff brought a suit for a declaration that the defendant had no right of pre-emption, and for possession of the property. Both the lower courts dismissed the suit, hence this second appeal. Shortly before the institution of this suit, but subsequent to the date of the auction sale, the plaintiff had brought two suits for pre-emption in respect of the shares purchased by the defendant in patti Mumtaz-ud-din on the 11th of August, 1910: both these suits were decreed and the decrees had become final.

Dr. *Satish Chandra Banerji* (with him Pandit *Braj Nath Vyas*), for the appellant:—

* Second Appeal No. 39 of 1912 from a decree of Muhammad Shafi, Judge of the Court of Small Causes exercising of the powers of a Subordinate Judge of Allahabad, dated the 15th January, 1912, confirming a decree of Sumer Chand, First Additional Munsif of Allahabad, dated the 29th of August, 1911.

(1) (1909) I. L. R., 32 All., 45. (2) (1907) 4 A. L. J., 351.