

FULL BENCH.

1880
July 23

Before Sir Robert Stuart, Kt, Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

RAJ BAHADUR (PLAINTIFF) v. BIRMHIA SINGH (DEFENDANT).*

Jurisdiction of Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 44, 93—Landholder and Tenant—Res judicata—Improvements by Tenant—Well.

A suit in which the matter in dispute is whether a landholder is entitled to demolish a well constructed by a tenant is not one cognizable in the Revenue Courts but in the Civil Courts.

The decision of a Revenue Court, in a suit by a landholder against a tenant under s. 93 (b) of Act XVIII of 1873 for the ejectment of the tenant on the ground of misconduct in constructing a well, that the tenant could not be ejected from his holding without compensation being given to him for his outlay in constructing it, is not a determination of the landholder's right to demolish the well as having been constructed by a person not having a right to construct it, and consequently such a decision is not a bar to a suit by the landholder in the Civil Court for the demolition of the well as having been so constructed.

S. 44 of Act XVIII of 1873 implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and therefore, where a well constructed by a tenant benefits the land held by him, a suit by the landholder in the Civil Court for its demolition as having been made without his consent is not maintainable.

THE plaintiff, a landholder, instituted the present suit against the defendant, his tenant, in the Court of the Munsif of Fatehpur, on the 4th July, 1878, claiming that the defendant might be restrained from constructing a well upon the land occupied by him; that the materials for constructing the well might be removed from the land, and the land restored to its former condition; and that Rs. 10 might be awarded to him as compensation; claiming on the ground that the defendant was wrongfully constructing the well without his consent. The defendant set up as a defence to the suit that the well had been actually constructed before the suit was brought, and for that reason should be allowed to remain; that the well had been constructed with the consent of the plaintiff's agent, and the land was not injured by its

* Second Appeal, No. 211 of 1880, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 11th December, 1879, affirming a decree of Pandit Kashi Narain, Munsif of Fatehpur, dated the 4th September, 1878.

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construction but was benefited and improved thereby; and that the suit was not cognizable in the Civil Courts but in the Revenue Courts. It appeared that the plaintiff had formerly applied to the Revenue Court, under s. 93 of Act XVIII of 1873, for the ejection of the defendant on the ground that he had committed a breach of the conditions of his tenancy in building the well without the plaintiff's consent. This application was refused by the Revenue Court on the 6th June, 1878, on the ground that the defendant had improved the land by the construction of the well, and under s. 44 of Act XVIII of 1873 could not be ejected without payment of compensation. The Munsif held that the present suit was cognizable in the Civil Courts, and dismissed it for reasons which it is not material to state. On appeal by the plaintiff the District Judge affirmed the decree of the Munsif on the ground, amongst others, that the matter in dispute was *res judicata*, with reference to the decision of the Revenue Court of the 6th June, 1878. The material portion of the District Judge's decision was as follows: "The case is really the same as that already disposed of by the Revenue Court. The present suit does not seek to set aside that order, and the order being passed by a Court competent to do so, must be held to be binding to the effect that defendant cannot be dispossessed, and the well dug by him must be considered to be a work effected for the improvement of the land in his possession. What plaintiff fears is that he will have to pay compensation in a larger amount than is agreeable to him, before he can turn his tenant out. Defendant is shown to be a tenant with rights of occupancy in respect of the land on which the well is built. He had proceeded to dig to some depth into the ground and had incurred an outlay of more than Rs. 59, as reported by the peshkar of the tahsil in the revenue suit, before his landlord tried to stop him in his act. If any tenant has the power to dig a well for the improvement of his cultivation, as I conceive he has by the text of s. 44, Act XVIII of 1873, and to receive compensation therefor before he can be evicted, it stands to reason the landlord is barred relief in the form now put, in his suing to have the well dug up and destroyed. He or his agent should have taken earlier measures by way of an injunction to stop the construction of the well before his tenant had incurred much time and outlay upon it.

The permission of the agent is said to have been given to the tenant, and though this is denied by both the landlord and his agent, they must stand by their own *laches* in not representing the cause sooner. He has his remedy against his tenant, by enhancing his rent for the land improved. I decline to interfere, and dismiss the appeal with costs."

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On appeal by the plaintiff to the High Court it was contended on his behalf that the matter in dispute was not *res judicata*, and that, unless the defendant proved that he had constructed the well with the plaintiff's consent, he was liable to the plaintiff's claim. The Division Bench (PEARSON, J., and OLDFIELD, J.,) before which the appeal came, on the 13th June, 1880, referred it to the Full Bench for disposal.

Munshi *Hanuman Prasad*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Lala Latta Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :

PEARSON, J. (OLDFIELD, J., and STRAIGHT, J., concurring).—The first point for consideration is whether this suit is barred by s. 93, Act XVIII of 1873. I hold it to be not so barred, for the matter in dispute is whether the plaintiff is entitled to demolish the well constructed by the defendant, and that is not a matter in respect of which a suit could be brought in the Revenue Court.

The next question is whether the suit is barred because the matter in dispute is a *res judicata*, in reference to the Revenue Court's decision in the former suit brought under cl. (b), s. 93 of the Rent Act, by the plaintiff for the ejection of the defendant on the ground of misconduct in constructing the well, and I answer the question in the negative. The decision that the tenant could not be ejected from his holding without compensation being given to him for his outlay in constructing the well does not determine the plaintiff's right to demolish the well as having been constructed by a person not having a right to construct it. If the lower appellate Court has meant to rule that the suit is barred by

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the decision above mentioned, the first ground of appeal must be allowed to be valid.

But as regards the merits of the case, I am of opinion that s. 44 of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and it is not pretended that the well constructed by the defendant is not calculated to benefit the land. The plaintiff's suit therefore fails and has been properly dismissed. I would dismiss the appeal with costs.

STUART, C. J.—Mr. Justice Pearson has prepared a judgment in this reference which I have perused and considered, and in which I entirely concur, both as regards the order he proposes and the reasons he assigns for that conclusion.

Appeal dismissed.

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July 28.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BILASO (PLAINTIFF) v. DINA NATH AND OTHERS (DEFENDANTS).*

Hindu Law—Mitakshara—Joint undivided property—Widow's rights—Partition.

A Hindu widow, entitled by the Mitakshara Law to a proportionate share with sons upon partition of the family estate, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at the sale in the execution of a decree of the right, title, and interest of one of the sons in such estate before voluntary partition.

A certain dwelling-house was originally the ancestral property of one Beni and his brother Udai. Beni died leaving issue two sons, the defendants Lali Mal and Puran Mal, and a widow, the plaintiff, the mother of the defendants Lali Mal and Puran Mal. After the death of Beni and of Udai the share of the heir of Udai of the house, *viz.*, one moiety, was purchased by the defendant Dina Nath, who obtained a partition of this share. Subsequently the defendant Dina Nath purchased the rights and interests of the defendant Puran Mal in his father's moiety of the house in the

* Second appeal, No. 165 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 5th December, 1879, modifying a decree of Pandit Indar Narain, Munsif of the city of Bareilly, dated the 28th August, 1879.