

the circumstances of this case, set aside the decree of the court below for a judicial separation and in other respects affirm the decree of that court.

GRIFFIN, J.—I concur.

TUDBALL, J.—I concur.

BY THE COURT.—The order of the Court is that the decree of the court below in so far as it granted the petition of Mrs. Rhine for judicial separation be set aside, and that her petition be dismissed *in toto*. In other respects the decree will stand affirmed, but without costs as no one appears on the part of the respondent.

*Petition dismissed.*

## APPELLATE CIVIL.

1911  
February  
24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

KURMA SINGH AND ANOTHER (PLAINTIFFS) v. OHHALLU (DEFENDANT) \*  
*Act (Local) No. II of 1901 (Agra Tenancy Act), sections 10, 202—Exchange of lands on partition—Expropriatory tenant—Suit for possession in Civil Court—Res judicata—Procedure.*

By section 10 of the Agra Tenancy Act, 1901, where there is a transfer by private alienation, no rights of expropriatory tenants accrue if the alienation is by gift or by exchange between co-sharers.

Where circumstances exist to which section 202 of the same Act applies, the court has no option, but is bound to adopt the procedure laid down in that section.

The facts of this case were as follows:—

One Duli Chand, now represented by the appellants, brought a suit for possession of certain agricultural lands. It appears that the parties were co-sharers in certain zamindari, and under an arbitration award the zamindari was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge, in whose court the suit was instituted, by his decree, dated the 10th of

\* Second Appeal No. 947 of 1910 from a decree of L. Johnston, additional Judge of Meerut, dated the 22nd of April, 1910, reversing a decree of Muhammad Husain, additional Subordinate Judge of Meerut, dated the 30th of July, 1909.

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November, 1902, granted to Duli Chand a decree for proprietary possession of the land. An appeal by the defendant was dismissed, and Duli Chand got possession. The defendant then brought a suit in the Revenue Court under section 79 of the Tenancy Act, and his suit was decreed. Whereupon the present suit was brought. The suit was decreed by the first court (Additional Subordinate Judge of Meerut), but was dismissed on appeal by the District Judge. The plaintiffs appealed to the High Court. Mr. M. L. Agarwala, for the appellants.

Pandit Balleo Ram Dave (for The Hon'ble Pandit Sundar Lal), for the respondent.

STANLEY, C. J., and BANERJI, J. — The suit out of which this appeal has arisen was brought by Duli Chand, now represented by the appellants, for possession of certain agricultural lands. It appears that the parties were co-sharers in certain zamindari, and under an arbitration award the zamindari was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge in whose court the suit was instituted, by his decree, dated the 10th of November, 1902, granted to Duli Chand a decree for proprietary possession of the land. The defendant appealed to the District Judge and contended that the land had been his *sir* land before partition, that he had acquired the rights of an ex-proprietary tenant in regard to it and that he could not be ejected from it by a decree of the Civil Court. The learned Judge was of opinion that the decree of the first court only granted to the plaintiff proprietary possession of the land, and that it could not be determined in that suit whether the defendant had acquired the rights of an ex-proprietary tenant. The learned Judge observed, however, in his judgement that, as there was an exchange between co-sharers, the defendant could not under any circumstances claim the rights of an ex-proprietary tenant. This view of the learned Judge was in our opinion right. By section 10 of the Tenancy Act where there is a transfer by private alienation no rights of ex-proprietary tenants accrue if the alienation is by gift or by exchange between co-sharers. Here there was

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evidently an exchange between co-sharers, and therefore, under the provisions of section 10, no rights could accrue to the defendant as an ex-proprietary tenant in respect of land held by him as *sir*. Holding the view which we have mentioned above, the learned Judge dismissed the appeal of the defendant. The decree obtained by Dali Chand was put into execution and he obtained possession of the property. It is admitted that he took actual possession of it; whether he obtained it by execution of the decree or subsequently is immaterial. The defendant on being dispossessed brought a suit in the Revenue Court under section 79 of the Tenancy Act for recovery of possession alleging himself to be the ex-proprietary tenant of the land. His suit was decreed. Hence the present claim for possession.

The court of first instance decreed the claim, but the lower appellate court dismissed it, holding that the decision of the Civil Court in the former suit brought by the plaintiff operated as *res judicata*. This view of the learned Judge is, in our opinion, erroneous, and the learned vakil for the respondent has not tried to support it. In the former suit, as we have pointed out above, the appellate court clearly abstained from determining whether defendant was liable or not to be ejected from the land. Therefore the decision in the previous suit cannot operate as *res judicata* in this case.

As, however, the suit related to agricultural land and the defendant pleaded that he held such land as the tenant of the plaintiff, section 202 of the Agra Tenancy Act applied and the court in which the suit was brought was bound to require the defendant by order in writing to institute within three months a suit in the Revenue Court for the determination of the question whether defendant was the plaintiff's tenant or not. This the court of the first instance did not do.

Mr. Baldev Ram, for the respondent, contends that the decision of the Revenue Court in the suit brought by the defendant to recover possession is *res judicata* between the parties, and the procedure laid down by section 202 need not be adopted. We express no opinion on the question whether when a suit is brought in the Revenue Court by the defendant in accordance with the provisions of section 202, the decision in a former suit

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brought in the Revenue Court would or would not have the effect of *res judicata*. We think the court of first instance was bound to follow the procedure laid down in section 202, and this must now be done. We accordingly discharge the decrees of both the courts below and remand the case to the court of first instance with directions to re-admit the suit under its original number in the register and adopt the procedure laid down in section 202 of the Agra Tenancy Act. The appellant will have the costs of this appeal. All other costs will follow the event.

*Appeal allowed.*

1911  
March, 2.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Tudball.*

EMPEROR v. AGAM AND OTHERS.\*

*Criminal Procedure Code, sections 403, 415—Appeal—Sentence.*

Where certain persons were tried by a Magistrate of the first class, convicted of an offence under section 325, Indian Penal Code, and sentenced to a day's imprisonment and a fine of fifty rupees. *Held* that the circumstance that the accused were in fact neither sent to jail nor actually imprisoned would not prevent their being entitled to appeal to the Sessions Judge.

The applicants in this case were tried by a Magistrate of the first class, convicted of an offence under section 325 of the Indian Penal Code, and sentenced to a day's simple imprisonment each and to a fine of Rs. 50 each, in default of which they were to suffer a month's farther imprisonment. In addition they were bound over to keep the peace. They appealed to the Sessions Judge, who, however, held that, inasmuch as in fact the appellants had neither been sent to jail nor actually imprisoned, no appeal would lie. The appellants then applied in revision to the High Court.

*Mr. G. P. Boys*, for the applicants.

The Assistant Government Advocate (*Mr. R. Malcolmson*), for the Crown.

TUDBALL, J.—This is an application in revision against the decision of the Sessions Judge of Benares, made on the 12th of December, 1910. The applicants were tried by a Magistrate of

\*Criminal Revision No. 700 of 1910 from an order of G. A. Paterson, District Judge of Benares, dated the 12th of December, 1910.