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able to the officer then the protection offered by section 197 of the Criminal Procedure Code and the wisdom underlying the protection would vanish. All that the court should see in a case like this is whether the officer concerned has been accused of having committed the offence complained of when he was acting or purporting to act in the discharge of his official duty. In the present case there can be no doubt that Rai Kishanji was acting or at least purporting to act in the discharge of his official duty, when it is said that he used insulting language to the petitioner. The test is whether the officer at that particular moment was actually engaged in or purporting to be engaged in the discharge of his official duty.

For the reasons given above there is no force in this revision. The application is dismissed.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

DALJIT (DEFENDANT) *v.* KHACHERU AND OTHERS (PLAINTIFFS)*

1934 *August*, 13

Agra Tenancy Act (Local Act III of 1926), sections 242(3), 271 explanation 2—Question of proprietary title—Deed of partition or exchange of khudkasht *plots between two co-sharers —Suit in revenue court by one to eject the other from certain plots on basis of the deed as a trespasser—Plea of defendant that he was in proprietary possession of* khudkasht*—Whether appeal to District Judge.*

A deed of partition or exchange of plots was executed by two co-sharers, according to which certain plots would be the *khudkasht* of one alone and certain other plots would be the *khudkasht* of the other. Thereafter a suit was brought in the revenue court under section 44 of the Agra Tenancy Act by one of them to eject the other as a trespasser from plots which, by the deed, had been allotted to the plaintiff. The defendant

*Second Appeal No. 56 of 1931, from a decree of H. G. Smith, District Judge of Meerut, dated the 11th of December, 1930, reversing a decree of Bashir Ahmad, Assistant Collector, first class, of Meerut, dated the 26th of June, 1930.

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took a plea that the deed not having been followed by a revenue court partition was ineffectual and that he was in possession as a proprietor of *khudkasht*. *Held*, that a question of proprietary right was in issue within the meaning of section 242(3) of the Agra Tenancy Act and an appeal lay to the District Judge.

[*Per* RACHHPAL SINGH, J.—Explanation 2 to section 271 of the Agra Tenancy Act showed that the plea raised by the defendant that he was a proprietor holding the plots as his *khudkasht* would not be regarded as involving a question of proprietary right for the purpose of section 271, though there was clearly a question of proprietary right for the purpose of section 242; section 271 therefore had no application to the case.]

[*Per* SULAIMAN, C.J.—The mere fact that the defence is that the defendant holds land as *khudkasht* is not sufficient to bring the case within explanation 2 to section 271, when the plaintiff is denying the defendant's title as a co-sharer and the defendant is setting up such title. For the explanation to be applicable it must be an admitted fact between the parties that the land is in the actual possession of a proprietor. Where this fact is not admitted, explanation 2 would not apply, and in such an event the body of section 271 would be applicable.]

Mr. *S. B. L. Gaur*, for the appellant.

Mr. *L. M. Roy*, for the respondents.

RACHHPAL SINGH, J.:—This is a second appeal arising out of a suit instituted by the plaintiff under the provisions of section 44 of the Agra Tenancy Act.

The plaintiff alleged that under a registered deed of the 14th of June, 1927, an arrangement had been arrived at between him and the defendant under which certain plots were divided between them. The plaintiff's case was that by virtue of this agreement he became the owner of the plots in suit, and the defendant was holding them without his consent and was in possession as a trespasser. The defendant resisted the claim. He pleaded that as after the execution of the aforesaid deed there had been no partition of plots through the revenue court, the plaintiff was not entitled to maintain the suit. The suit was thrown out by the learned Assistant Collector

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who tried it. Against his decree there was an appeal to the District Judge of Agra who came to the conclusion that the plaintiff was entitled to a decree, and he accordingly decreed the appeal.

Rachhpal Singh, J.

The principal question for consideration in this appeal is whether an appeal to the court of the District Judge was competent. In order to decide the question we have to bear in mind that a deed was executed by the parties, under the terms of which the plots in suit were allotted to the plaintiff. The effect of the deed was that the parties exchanged some plots among themselves. They were co-sharers before, but under the terms of the deed each of them agreed to hold certain plots exclusively. The deed was registered and it conferred a title upon the plaintiff in respect of the plots. The position of the defendant after the execution of the deed was that he was holding the plots without the consent of the landholder and his possession was that of a mere trespasser who was liable to be ejected under the provisions of section 44 of the Agra Tenancy Act.

The question for consideration is whether in a case like this the appeal lay to the District Judge. Section 242, clause (3) runs thus: "In addition to the provisions of section 271, an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class or of a Collector in all suits, except suits under chapter XI, in which (*a*) a question of proprietary right has been in issue between the parties claiming such right in the court of first instance, and is in issue in the appeal; or (*b*) a question of jurisdiction has been decided and is in issue in the appeal." According to this clause, where the question of proprietary right has been in issue between the parties claiming such right in the court of first instance and is in issue in appeal, or a question of jurisdiction has been decided and is in issue in appeal, an appeal shall lie to the District Judge. At this stage it is necessary to consider what is the meaning of the expression "In addition to the provisions of section 271"

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used in clause (3) of section 242 of the Agra Tenancy Act. To me it appears that the meaning of this expression is that if a case comes within the provisions of section 271, then the question as to whether an appeal lies to the District Judge or to the Commissioner will depend on the procedure adopted in the case. Section 271 provides that if in any suit or application filed in a revenue court against a person alleged to be the plaintiff's tenant, or under section 44, the defendant pleads that he is not a tenant, but has a proprietary right in the land, and this question has not already been decided, then the courts are enjoined to follow the procedure laid down in that section. The revenue court shall frame an issue on the question of the proprietary right and submit the record to the competent civil court for the decision of that issue. The civil court shall decide the issue and send its finding on that issue to the revenue court. The revenue court shall then proceed to decide the suit, accepting the finding of the civil court on the issue referred to it. Sub-clause (4) of section 271 of the Agra Tenancy Act runs as follows: "Every decree of a revenue court passed in a suit in which an issue involving a question of proprietary right has been decided by a civil court under sub-section (2) of this section shall, (*a*) if the question of proprietary right is in issue also in appeal, be appealable to the civil court which has jurisdiction to hear appeals from the court to which the issue of proprietary right has been referred; (*b*) if the question of proprietary right is not in issue in appeal, be appealable to the revenue court." This sub-clause presupposes two things; one is that an issue regarding proprietary title was referred to the civil court, and the other is that there has been a finding on it. It may be that when an issue is sent down to the civil court, it may come to the conclusion that a question of proprietary right is involved in the case. In that case an appeal would lie to the civil court, that is to say, the District Judge; or it may be that the civil court's finding may be

that no proprietary right was involved in the case, in which case the appeal lay to the revenue court. Before the provisions of section 271 of the Agra Tenancy Act can be applied, it is to be proved that the case comes within the purview of that section. We find that in clause (1) of section 271 the expression used is: where "the defendant pleads that he is not a tenant, but has a proprietary right". This is to be read with explanation 2 attached to that section which is as follows: "A question of proprietary right does not include the question whether land in the actual possession of a proprietor thereof is held by such proprietor as his *sir* or *khudkasht* or as a tenant or sub-tenant."' Now ordinarily where a man says that he is in actual possession as proprietor, and is holding the land as his *khudkasht* or *sir*, then it may be said that the question of proprietary right is involved, but, it appears to me, that for some reason an arbitrary rule of law has been made by the legislature that for the purposes of considering whether a case comes within the provisions of section 271, where a defendant says that he is a co-sharer and holds the land as his *khudkasht* or *sir* then this will not be considered as "a question of proprietary right". The reason is that in some of the decided cases which are found noted in Agarwala's Agra Tenancy Act, 1933 edition, page 705, in note 2, it had been held that a plea of this nature involved a question of proprietary right. The legislature changed the law, with the result that these rulings are no longer good law. In the case before us the plea raised by the defendant was that he was a co-sharer in the village and was holding the plots as his *khudkasht*. Explanation 2 to section 271 clearly shows that such a plea will not be taken as involving a question of proprietary right. So it must be held that section 271 of the Agra Tenancy Act has no application to the case.

The plea that an appeal does not lie to the High Court cannot be accepted. That plea could have been valid only if it had been shown that a question of proprietary

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title within the meaning of section 271 was involved in the case. But, as I have already mentioned, section 271 is not applicable because explanation 2 of that section is opposed to the contention raised by the learned counsel for the appellant. Reliance was placed on behalf of the appellant on *Net Ram* v. *Har Govind* (1). I do not think that that case can be of any help to the appellant. The learned Judges in their judgment say that "having regard to the provisions of section 271, explanation 2, of the Agra Tenancy Act, the question involved in the case is not one of proprietary title and the appeal therefore lay to the Commissioner and not to the District Judge". It appears to me that the learned Judges assumed that a plea of proprietary title had been raised within the meaning of section 271 of the Agra Tenancy Act and had been found against the defendant, therefore they were of the opinion that the appeal lay to the Commissioner. In order to make the above mentioned decision applicable, it is necessary to establish the following points: (1) that the defendant raised a question of proprietary title, that matter was referred to the civil court; (2) that court held that no question of proprietary title was involved in that case. Under these circumstances the appeal would lie to the Commissioner. But the facts of the case before us are altogether different. Here, in view of explanation 2, section 271 of the Agra Tenancy Act it can not be said that the question raised by the defendant was one of proprietary title. This being so, section 271 has no application to the case. The present case would be governed by the general provisions of section 242 of the Agra Tenancy Act, under which in any case in which a proprietary question is involved an appeal would lie to the court of the District Judge. The difference has to be clearly understood. The term proprietary title is very wide, but, somehow, the legislature has decided that for the purposes of section 271 the raising of a question mentioned in explanation 2 will

(1) [1929] A.L.J., 289.

not be considered to be such a question in order to bring the case within the provisions of section 271. It may seem a sort of anomaly that for the purpose of bringing the case within section 242 we should hold that a particular plea gives rise to the consideration of a proprietary title, but for the purpose of section 271 a particular form of an assertion of a proprietary title will not be deemed, in view of explanation 2, to be one in which a question of proprietary title has been raised. But this is in accordance with the law as laid down by the legislature in explanation 2; and so the courts have to follow the law as it stands. In view of explanation 2 the defendant appellant can never argue that his case was governed by section 271 of the Agra Tenancy Act.

Another contention raised was that the alleged partition was invalid and ineffectual unless it was confirmed by a competent authority. A reference was made to the provisions of section 131 of the Land Revenue Act. This contention has no force. Chapter VII of the Land Revenue Act is applicable to the partition and union of mahals and it does not in any manner affect the rights of co-sharers to enter into a binding agreement under which they may agree to hold certain plots exclusively.

In my opinion the appeal in this case rightly lay to the District Judge. I would accordingly dismiss the appeal with costs.

SULAIMAN, C.J.:—I fully agree that section 242(3) directly applies to this case. The dispute between the parties was one of proprietary right; the plaintiff denying that the defendant had any proprietary interest whatsoever, and the defendant asserting that he had. In these circumstances it seems obvious that a question of proprietary right had been in issue between the parties in the court of first instance and was in issue in appeal.

Strictly speaking, section 271 has no application to the question whether an appeal lay to the District Judge or not. But I agree that explanation 2 to that section would never apply to a case where the proprietary right itself

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is in dispute between the parties. It applies to a case where, land being in the actual possession of a proprietor, the question is whether such proprietor holds it as his *sir* or *khudkasht* or as a tenant or sub-tenant. For the explanation to be applicable it must be an admitted fact between the parties that the land is in the actual possession of a proprietor. Where these facts are not admitted, explanation 2 would not apply, and in such an event the body of section 271 would be applicable. The mere fact that the defence is that the defendant holds land as *khudkasht* is not sufficient to bring the case within the explanation, when the plaintiff is denying the defendant's title as a co-sharer and the defendant is setting up such title. It is further to be noted that an appeal lies to the District Judge under section 243(3) in addition to the provisions of section 271. I may also add that no plea has been taken in any of the courts below nor is it taken before us that the revenue court should have framed an issue and sent it to the civil court for determination. Had such a plea been taken it would have been for the trial court to say whether there was a previous decision of a court of competent jurisdiction or not. In any case, when all the materials were before the District Judge and an appeal lay to him he would have been competent to dispose of the appeal under section 268 of the Act.

As to the question of the supposed partition, the position is equally clear. It is not the plaintiff's case that there has been a revenue court partition within the meaning of chapter VII of the Land Revenue Act which has split up their liabilities for the payment of Government revenue. All that has happened under a registered agreement is that the interest of one party has been extinguished in one plot in lieu of the extinction of the right of the other party in another plot. The transaction is more of the nature of an exchange than a revenue court partition. The lower appellate court was therefore justified in recording a finding that the

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defendant has lost all interest as proprietor and that the plaintiff is the proprietor under this registered deed. The plaintiff can therefore treat the defendant who is holding on possession without his consent as a trespasser without title.

Sulaiman, C.J.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

1934 *August*, 13

EMPEROR *v.* LURKHUR*

Whipping Act (IV of 1909), section 5—Juvenile offender—Whipping must not be in addition to any other sentence.

A comparison of sections 4 and 5 of the Whipping Act makes it quite clear that in the case of an adult a sentence of whipping may be imposed in addition to any other punishment, but in the case of a juvenile offender a whipping can be imposed only in lieu of and not in addition to any other punishment, so that no other punishment can be combined with whipping.

Mr. *D. Sanyal*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BAJPAI, J.:—The applicant Lurkhur was tried by the Assistant Sessions Judge of Allahabad with the help of a jury for an offence under section 376 of the Indian Penal Code and found guilty. The learned Judge then pondered over the question of sentence. He thought that a sentence of whipping should be passed in view of the fact that the accused inflicted pain on the girl who was raped. The age of the boy was ascertained by the learned Judge to be 13 years and 6 months and the age of the girl was 9. It is clear that the Judge intended that the sentence of whipping should undoubtedly be passed. He says: "I am compelled to pass the sentence of whipping. . . ." He was further of the opinion that the accused should also be given a small sentence of

*Criminal Revision No. 413 of 1934, from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 10th of April, 1934.