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recur very frequently. I would, therefore, solicit the opinion of the Honorable Court on the following question: 'Of what nature is the suit contemplated by s. 149 (3), Bengal Tenancy Act, and how should it be valued?'

"I should add that, although exception might perhaps be taken to Jagadamba Devi's plaint on the ground of misjoinder, I have refrained from considering the point, as it is not directly before me."

Baboo *Hari Mohun Chuckrabati* appeared on behalf of Jagadamba Devi.

No one appeared for the defendants.

The opinions of the High Court (TOTTENHAM and NORRIS, JJ.) were as follows:—

TOTTENHAM, J.—The suit in question under s. 149(3) Bengal Tenancy Act, is not a title suit, and need not be stamped as such. It is in the nature of a suit for an injunction under the Specific Relief Act, or else of a declaratory suit.

NORRIS, J.—I agree that the suit in question is not a title suit. I do not think it is necessary to express any opinion as to what sort of suit it is.

H. T. H.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

FEKOO MAHTO *v.* THE EMPRESS.*

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Confession—Confession of an accused person—Evidence, Admissibility of confession in—Question and answer—Memorandum in English by Magistrate—Criminal Procedure Code (Act X of 1882), ss. 164, 364 and 533.

It is not necessary that the English memorandum referred to in para. 3 of s. 364 of the Criminal Procedure Code should be made in respect of confessions recorded under s. 164, as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364.

A confession of an accused person was recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal

* Criminal Reference No. 8 of 1887, made by, and Appeal No. 163 of 1887 against the order passed by, J. Whitmore, Esq., Sessions Judge of Birbhum, dated the 17th of March, 1887.

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Procedure Code, while the case was under investigation by the police. No English memorandum of the nature referred to in s. 361 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence, and no evidence was given under the provisions of s. 533 of the Criminal Procedure Code, that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions.

Held, upon the authority of the decision in *Titu Maya* v. *The Queen* (1), that as the accused was not prejudiced by the questions and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld.

IN this case the accused was charged with the murder of his sister and her child. The evidence against him consisted mainly of two confessions made by him—the first on the 22nd November before the Sub-Divisional Magistrate, and the second on the 15th December before the Magistrate during the enquiry into the case. The first confession was recorded in Kaithi by a clerk in the presence of the Deputy Magistrate, in the form of a narrative and without the questions being recorded, and moreover no memorandum in English was written or signed by the Magistrate and appended to it as required by s. 364 of the Criminal Procedure Code. The second confession was recorded in the narrative form, but had the requisite memorandum. The other evidence and facts of the case are not material for the purpose of this report, the sole question being as to whether the two confessions were rightly admitted in evidence by the Sessions Judge. The accused was convicted and sentenced to death in respect of the murder of his sister, and to transportation for life for the murder of her child, and consequently the Sessions Judge referred the case to the High Court under the provisions of s. 374 of the Criminal Procedure Code. The accused also appealed.

The grounds upon which it was suggested that the two confessions were not admissible in evidence are sufficiently stated in the judgment of the High Court.

(1) I. L. R., 8 Calc., 618 (note.)

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No one appeared for the appellant.

Mr. *Kilby* for the Crown.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This case has been referred to this Court by the Sessions Judge of Birbhum under s. 374 of the Cirminal Procedure Code for confirmation of the sentence of death passed by him on the prisoner. The prisoner has also appealed against the conviction and sentence. He has been convicted of two murders—that of his sister named Basseja, and of her child. The sentence of death has been passed in respect of the murder of Basseja, and in respect of the other murder the prisoner has been sentenced to transportation for life. He appeals against both convictions.

The case depends, we may say, mainly upon the confessions put in evidence in the Sessions Court. There were two confessions made by the prisoner before the Magistrate. The first was apparently under s. 164 of the Criminal Procedure Code while the case was still under investigation by the police. This confession was made on the 22nd of November last. The other confession was made in prisoner's examination before the Magistrate during the inquiry after the case had been sent up by the police. This examination was under s. 364. The examination and the confession under s. 164 have the defect that the questions put to the prisoner were not recorded. The answers were given in narrative form. As regards the examination under s. 364 there is no other defect. In that case the Magistrate made a memorandum in English at the time the examination was recorded, and the proper certificate was signed by him. As regards the confession recorded under s. 164 we find that there was no English memorandum made by the Magistrate, but the certificate required by that section was duly recorded. Both the confessions were admitted in evidence in the Sessions Court, and the conviction is based mainly upon them. Now s. 533 provides that "if any Court before which a confession or other statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate

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recording the statement, it shall take evidence that such person duly made the statement recorded." We have had some little doubt as to whether the confession recorded under s. 164 was admissible without the evidence referred to under s. 533, because there was no English memorandum made at the time that it was recorded. But upon examination of the section we think that it was not necessary that any such English memorandum should be made in respect of that confession. Section 164 provides that such confession shall be recorded and signed in the manner provided by s. 364. Section 364 sets out the manner in which examinations of accused persons should be recorded. It appears to us that the manner in which such examinations should be recorded is fully set out in the first two paragraphs of that section. The provision for an English memorandum is contained in the third paragraph. That paragraph provides that the Magistrate or Judge shall be bound "to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record." This shows that the memorandum is not itself the record of the examination. What is tendered in evidence is the examination or confession recorded in the manner provided by the first two paragraphs of s. 364. The confession of the 22nd November was recorded in the manner prescribed excepting, as we have said, that the questions put were not committed to writing. But that this omission is not fatal where the accused is not prejudiced by it is shown by a Full Bench decision in *Titu Maya* v. *The Queen* reported in a note to the case of *In the matter of the petition of Munshi Sheikh* (1). The case itself was decided by a Division Bench of this Court, but the note to it contains the Full Bench decision referred to by us. That being so, we do not think that it was necessary for the Judge in the present case to take evidence under s. 533 in respect of either the confession under s. 164 or the examination under s. 364. And that these confessions were substantially true we think there is no reason-

(1) I. L. R., 8 Calc., 616.

able cause to doubt. The interval between the two was more than three weeks, during which time the prisoner was in custody. But on the 25th December when examined during the inquiry he fully confirmed the statement made by him on the previous 22nd November, and stated that it was all true. The circumstances under which the murder was discovered and suspicion fell upon the prisoner are set out in the judgment of the Sessions Court, and were such that we think it highly probable that the prisoner, a simple peasant, would suppose it to be useless to deny his guilt and would make a full confession. There seems to us no reason to discredit the other evidence in the case, which evidence shows that the prisoner followed up his confession by pointing out the precise scene of the murder, and by pointing out and giving up various articles which had been in the possession of the deceased, and some of which the prisoner had concealed after her death.

In the Sessions Court the prisoner retracted his confession, and told two stories in connection with it. One was that the confession recorded was not made by him at all, and the other that it was extorted from him by torture, the torture alleged being branding with a hot iron on the arm. Neither of these stories we think can be believed. The first story that he *did not make the confession is absolutely negatived by the* Magistrate's certificate. As to the other story it is simply incredible that the police sending in a prisoner to have his confession recorded should have branded him with a hot iron in such a manner that the fresh marks would be conspicuous. Besides that this story of the torture was never told by the prisoner till he was on his trial in the Sessions Court. We find therefore no reason to doubt the truth in the main of the confessions made by the prisoner upon which his conviction is chiefly based. In addition to the confession there is evidence to show that the prisoner was the last person with whom the deceased was seen alive, and upon his trial in the Sessions Court when examined he admitted what he had at one time denied, that the deceased came to his house, and that he had seen her out of the village, the motive of her removal being

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the threat on the part of his caste fellows to excommunicate him if he allowed her to continue in his house.

Finding no reason for differing from the Sessions Judge, we must confirm the sentence of death, and dismiss the appeal.

H. T. H. *Appeal dismissed and conviction upheld.*

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

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April 4.

HORENDRA CHUNDRA GUPTA ROY AND OTHERS, MINORS, BY THEIR MOTHER AND NEXT FRIEND BUSUNTO KAMARI GUPTA (PLAINTIFFS) *v.* AUNOARDI MUNDUL AND ANOTHER (DEFENDANTS.)*

Limitation Act (XV of 1877), Sch II, Art. 127—Suit for possession by purchaser from sharer in joint family.

Art. 127 of Sch. II of Act XV of 1877 does not apply to a suit where the plaintiff is a stranger who has purchased a share in joint family property from one of the members thereof.

THIS was a suit to recover possession of a share in a taluk after establishing the right of the plaintiffs thereto. The share in question was alleged to have been purchased by the plaintiffs' father from one Chikani by a deed of sale, dated the 1st Cheyt 1280 (13th March, 1874), and to have formed portion of the property of Chikani's husband Baru, and to have been inherited by her on his death. The principal defendant, Aunoardi Mundul, the son of Baru, and step-son of Chikani, contested the suit, claiming the property to be his and in his possession, and impugning the deed of sale as a fraudulent document. He further contended that the suit was barred by limitation.

The plaint was filed on the 23rd January, 1885, and in the deed of sale there was an admission that Chikani, the vendor, was not then in possession. The first Court found as a fact, and this was not questioned in the lower Appellate Court, that Baru, from whom Chikani was alleged to have inherited, died not later than 1277 B.S., and both the lower Courts found that the plaintiffs

* Appeal from Appellate Decree No. 1565 of 1886, against the decree of H. T. Mathews, Esq., Judge of Mymensingh, dated the 28th of April, 1886, affirming the decree of Baboo Mohendro Nath Ghose, Munsiff of that District, dated the 25th of January, 1886.