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*Srinivasa,*  
*J.*

a proprietor by an inferior proprietor when that amount has been fixed by the Settlement Officer. This provision of the Land Revenue Act in my opinion clearly shows that the order of the Settlement Officer under section 79 of the Act determining the rent payable by the under-proprietors is conclusive between the parties. It is not open to the civil court or for the matter of that to a rent Court to question the correctness of the Settlement Officer's order. A similar view appears to have been taken by a Bench of the late Court of the Judicial Commissioner of Oudh in *Jai Patter Singh v. Ram Ra'an Lal* (1) with reference to the corresponding provisions of the old Oudh Land Revenue Act (XVII of 1876). I am therefore of opinion that the decision of the learned District Judge is correct and must be upheld.

The result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL

*Before Mr. Justice Ziaul Hasan*

BISHNATH AND OTHERS (ACCUSED-APPLICANTS) v. KING-EMPEROR (COMPLAINANT-OPPOSITE-PARTY)\*

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*Criminal Procedure Code (Act V of 1898), sections 225 and 537—Indian Penal Code (Act XLV of 1860), section 147—Charge—Failure to specify common object in the charge, whether only an irregularity covered by section 537—Omission to state particulars of offence—Failure of justice occasioned but accused not misled—Omission, if material—Criminal trial—Evidence not recorded in presence of accused—Trial, whether vitiated.*

Failure to specify the common object in a charge under section 147 of the Indian Penal Code is only an irregularity covered by section 537 of the Code of Criminal Procedure. *Ghaziuddin Khan v. King-Emperor* (2), relied on.

\*Criminal Revision No. 7 of 1935, against the order of Mr. K. N. Wanchoo, J.C.S., Sessions Judge of Rae Bareilly, dated the 20th of December, 1934.

(1) (1898) 1 O.C., 124.

(2) (1932) 9 O.W.N., 1109.

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Under section 225 of the Code of Criminal Procedure the omission to state the offence or the particulars in the charge can be regarded as material if it is shown not only that the accused were in fact misled by the omission but also that the omission occasioned a failure of justice. Even if the omission occasions a failure of justice, it is not material if the accused are not misled by the omission.

It is an elementary principle of criminal trials that all evidence should be recorded in the presence of the accused and any breach of this rule vitiates the trial altogether. Where, therefore, prosecution witnesses are examined-in-chief when an accused is absent, the trial is vitiated as against him even if the prosecution case against him is proved by witnesses in their cross-examination conducted in the presence of the accused. *Bigan Singh v. King-Emperor* (1), relied on.

Mr. K. P. Misra, for the applicants.

The Assistant Government Advocate (Mr. H. K. Ghosh), for the Crown.

ZIAUL HASAN, J.:—This is an application for revision of an order of the learned Sessions Judge of Rae Bareilly dismissing the applicants' appeal against their conviction and sentences under section 147 of the Indian Penal Code.

The first point taken before me was that the learned Sessions Judge was wrong in relying on the first information report which he himself characterised as illegible. I have, therefore, myself referred to that report but find that the names of all the five accused who are applicants before me are quite legible in that report.

The next point taken was that the trying Magistrate failed to specify in the charge under section 147 against the applicants, the common object of the accused. It was argued that this omission was fatal to the trial and was not covered by section 537 of the Code of Criminal Procedure. I do not think this contention has any force. In the case of *Ghaziuddin Khan v. King-Emperor* (2) a learned Judge of this Court held that failure to specify the common object in a charge under section 147 of the Indian Penal Code was only an irregularity

1) (1927) I.L.R., 6 Pat., 691.

(2) (1932) 9 O.W.N., 1109.

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covered by section 537 of the Code of Criminal Procedure. Moreover, section 225 of the Code provides—

“No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”

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J.

Under this section the omission complained of can be regarded as material if it is shown not only that the accused were in fact misled by the omission but also that the omission occasioned a failure of justice. Even granting that the omission in question has occasioned a failure of justice, which, in my opinion, it has not, it is perfectly clear that the applicants were never misled by the omission as no objection was raised in the trial Court. There is thus no substance in this ground.

The last ground taken was that so far as Sheobaran applicant is concerned, his trial was a nullity as the prosecution witnesses were examined-in-chief on the 3rd of September, when Sheobaran was absent. This objection in my opinion has force. The learned Judge seems to think that because the prosecution witnesses have proved the prosecution case, against Sheobaran in their cross-examination which was conducted in the presence of Sheobaran, the latter's conviction was right. I do not agree with this view. It is an elementary principle of criminal trials that all evidence should be recorded in the presence of the accused and any breach of this rule vitiates the trial altogether. This view is supported by the case of *Bigan Singh v. King-Emperor* (1). The result is that the conviction of Sheobaran must be set aside and as he has all but undergone the entire sentence, there is no necessity for a retrial.

The application is therefore allowed to this extent that the conviction and sentence of Sheobaran applicant is set aside. He shall be released at once. In other respects the application is rejected.

*Application partly allowed.*