1927.

PANDIT GOBARDHAN MISSIR v. SHAMA KANT LALL.

KULWANT SAHAY, J.

under section 42 of the Specific Relief Act against any one who formally claims to use the land as a public right and thereby endangers the title of the owner. These observations apply to the facts of the present case and the proper decree, therefore, that ought to be made in the present case is not a decree in terms of the prayers contained in the plaint as has been done by the learned Subordinate Judge, but a decree declaring the title of the plaintiff and awarding him possession as against the defendants 1—4 alone. This decree will not be binding either on the dharmasabha or on the Hindu community as a whole, but will be binding as against the defendants 1—4 personally.

The decree of the Subordinate Judge must, therefore, be modified to this extent. In other respects the decree will stand. The value of such a decree in favour of the plaintiff will not be much and the plaintiff-respondent, therefore, is not entitled to the costs of this appeal. The order for costs in the Court below will stand.

MACPHERSON, J.—I agree.

Appeal allowed.
Decree modified.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Ross, JJ.

RAMGULAM TELI

v.

KING-EMPEROR.*

1927.

Dec., 2.

Code of Criminal Procedure, 1898, (Act V of 1898), section 162, scope of—stage at which accused is entitled to copy of statement made before the police during investigation.

*Criminal Revision no. 751 of 1927, from an order of G. Chandra, Esq., Special Magistrate, Bettiah, dated the 26th of October, 1927.

1927.

RAMGULAM TELI v. KING-EMPEROR.

As soon as a witness is produced in Court and the accused applies for a copy of his statement before the Police recorded in writing, the Court is bound under section 162, Code of Criminal Procedure, 1898, to refer to the writing and to direct that the accused be furnished with a copy thereof; it is not necessary that before the copy be given some foundation be laid in cross-examination for the suggestion that the evidence given in Court is contradicted by the previous statement recorded under section 161, Code of Criminal Procedure, 1899.

Chedi Prasad Singh v. *King-Emperor* (1), followed.

Madari Sikdar v. *Emperor* (2), *Peramasami Ragudu*, In re (3) and *Saadat Mian* v. *King-Emperor* (4), not followed.

Dadan Gazi v. *Emperor* (5), referred to.

Per JWALA PRASAD, J.—" The words

" the court shall refer to such writing "

are obviously for the purpose of enabling the Court to exercise discretion under the second proviso, and not for the purpose of restricting the right of the accused to obtain a copy the discretion wherein was expressly taken away by the legislature, and hence the Court cannot refuse the granting of a copy till the accused has by his cross-examination showed that there is a contradition between the statement in Court and the statement referred to before the police."

The facts of the case will appear from the judgment of Ross, J.

S. P. Verma (with him *S. N. Sahay*, *K. N. Lal* and *Gopal Prasad*), for the petitioners.

Sir Sultan Ahmad, Government Advocate, for the Crown.

Ross, J.—This is an application to quash the commitment of the petitioners to th eCourt of Session on the ground that the Magistrate has not complied with the provisions of section 162 of the Criminal Procedure Code.

(1) (1927) 8 Pat. L. T. 613.
(2) (1927) I. L. R. 54 Cal. 307.
(3) (1926) 27 Cr. L. J. 100.
(4) (1926) I. L. R. 6 Pat. 329.
(5) (1906) I. L. R. 33 Cal. 1023.

It appears that the petitioners applied for copies of the statements of the witnesses before the police. The order-sheet is not clear as to the precise stage at which the application was made, but it was at all events before the cross-examination opened. The learned Magistrate following the decision in *Madari Sikdar* v. *Emperor* (1) held that before copy could be given some foundation must be laid in cross-examination for the suggestion that the evidence given in Court is contradicted by the previous statement recorded under section 161, Code of Criminal Procedure, and refused the application.

The meaning of section 162 seems plain. The witness has to be called for the prosecution, that is to say, he must be produced in Court; and if then the accused applies for a copy of his statmeent before the police recorded in writing the Court is bound to refer to the writing and to direct that the accused be furnished with a copy thereof, subject to the proviso that if the Court is of opinion that any part of such statement is not relevant to the subject matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, then the Court shall record such opinion and exclude such part from the copy furnished to the accused. When this copy has been given any part of the statement, if duly proved, can be used in the manner provided by section 145 of the Evidence Act to contradict the witness by the writing, *i.e.*, his attention must be called to those parts of it which are to be used for the purpose of contradicting him before the writing can be proved. So ar as the decisions in *Madari Sikdar* v. *Emperor* (1) and *In Re Peramasami Ragudu* (2) go beyond this interpretation of the section, I respectfully dissent from them. There is nothing in the section which requires that the cross-examination shall have been opened; nor do I see how the defence can be in

(1) (1927) I. L. R. 54 Cal. 307. (2) (1926) 27 Cr. L. J. 100.

1927.

RAMGULAM TELI v. KING-EMPEROR.

ROSS, J.

a position to contradict the witness by his previous statement or to lay any foundation for the suggestion that there is a contradiction before it has seen the statement. Nor indeed is the Magistrate in a position to say whether there may not be a material contradiction between the two statements. All that the section requires is that the witness should be produced in Court and the right conferred upon the accused by the section arises. The Magistrate was, therefore, in error in the procedure that he followed in this matter.

The further question remains as to what the consequence of the Magistrate's having failed to grant the copy applied for should be. The commitment has already taken place, and the learned Government Advocate states that the learned Sessions Judge has ordered that copy of all the statements of the witnesses should be granted to the accused. In these circumstances I think that no useful purpose would be served by quashing the commitment. I would therefore discharge the rule.

JWALA PRASAD, J.—I fully agree.

The question is at what stage an accused is entitled to a copy of the statement of a witness recorded by the police during investigation. In other words, what is the true interpretation and scope of the proviso to clause (*1*) of section 162 of the Code of Criminal Procedure. In the old Code the proviso stood as follows:

"provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, *the Court shall on the request of the accused, refer to such writing, and may then*, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof."

The words italicised in the aforesaid passage have been changed into

"*the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof etc.*".

The discretion which vested in the Court formerly of granting such copies has now been taken away, and

it has now become imperative upon the Court to grant copies to the accused at his request. The aforesaid words

" if the Court thinks it expedient in the interests of justice "

in the old section have been substituted by the second proviso to the new section under which the Court has a discretion to exclude from the copy any part of such statement which in the opinion of the Court

" is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests:"

otherwise the accused's right to obtain copy is absolute for the limited purpose of using the statement contained therein to contradict the witness in the manner provided by section 145 of the Indian Evidence Act. The Court at the request of the accused is bound to

" refer to such writing and direct that the accused be furnished with a copy thereof."

If these words are read along with the second proviso referred to above, the meaning becomes clear that at the request of the accused the Court shall refer to the writing and direct copies to be furnished provided that under the second proviso to section 162 the Court may exclude any part of the statement if it is of opinion that the statement asked for is not essential in the interests of justice, or is not relevant to the subject-matter of the enquiry or trial, or that it is inexpedient in the public interests. Therefore, the words

" the Court shall refer to such writing "

are obviously for the purpose of enabling the Court to exercise discretion under the second proviso, and not for the purpose of restricting the right of the accused to obtain a copy the discretion wherein was expressly taken away by the Legislature, and hence the Court cannot refuse the granting of a copy till the accused has by his cross-examination showed that there is contradiction between the statement in Court and the statement referred to before the police, which

1927.

RAMGULAM TELI v. KING-EMPEROR.

JWALA PRASAD, J.

would assume that the accused has already got an insight into the police record without having got a copy. It is impossible for the accused, without having got a copy of the statement and without knowing the contents thereof, to lay the foundation in cross-examination for showing that there is contradiction, and it will open a wide door for obtaining surreptitious copies. The words

"refer to such writing"

do not in any way restrict the right of the accused to obtain the copy, nor is the writing to be referred to for the purpose of seeing whether there is any contradiction or not between the statement made in Court and the statement recorded by the police officer. Again, the trial Court is not the sole tribunal for determining whether in substance and in fact there is a contradiction or not. It might be a contentious matter, and the accused has a right to have the opinion of a higher tribunal in the matter. There is nothing in the section to show that the accused should by his questions lay the foundation in cross-examination for the granting of a copy as was held in *Madari Sikdar* v. *Emperor* (1) and *In re Peramasami Ragudu* (2) and by one of the Judges of a Division Bench of the Patna High Court in *Saadat Mian* v. *King-Emperor* (3). This is not to be found in the section itself, and I do not think we can add those words to it in order to restrict the right of the accused to obtain the copy. The section has expressly provided the time when the accused is to obtain the copy and that is

"when any witness is called for the prosecution in such inquiry or trial".

The learned Government Advocate submitted that the word "when" should be read as "after" and the word "called" as "examined in chief". Even if

(1) (1927) I. L. R. 54 Cal. 367. (2) (1926) 27 Cr. L. J. 100.

(3) (1927) I. L. R. 6 Pat. 329.

this interpretation is accepted, it would simply mean that after the witness has been examined in chief; but it would not go further than that, namely, that the accused should have laid the foundation in cross-examination for showing that there was contradiction in the statement made in Court and that before the police officer in order to entitle him to apply for and obtain the copy. The word "when" may mean "after", but that does not matter much. The sole question is what is the meaning of "called for the prosecution." The word "called" is not a word of art and is, therefore, used in its ordinary sense. It has various meanings: to shout or cry out, to commend or request to come or be present, to summon, cite; in law the expression "to call for the plaintiff" means to cry aloud his name in open Court. On his failure to answer to which the trial is at an end and he becomes nonsuited: (*vide* The Imperial Dictionary, Webster's International Law Dictionary and Bouvier's Law Dictionary).

The words "called for the prosecution" in the present section are the same as in the old section 162. In *Dadan Gazi* v. *Emperor* (1) a Division Bench of the Calcutta High Court construed the aforesaid words to mean the time when the witness appears before the Court. As to the procedure for granting copies, their Lordships say "The proper procedure is for the accused, at the time the witness, whose statement is so recorded, appears before the Court, to ask the Court to refer to such writing, and if necessary, furnish the accused with copies". That appears to be the plain meaning of the word "called," and we have no right to add to the word so as to restrict its meaning by holding that the witness for the prosecution should not only have been produced in Court, but that his examination in chief should have been finished and the accused should have commenced his cross-examination and by his questions laid the foundation for

(1) (1906) I. L. R. 33 Cal. 1023.

1927.

RAMGULAM TELI v. KING-EMPEROR.

holding that the statements made by the witnesses are contradictory to those recorded by the police.

I, therefore, respectfully dissent from the contrary view taken in the cases referred to above, and agree with the view expressed by Sen, J. in *Chedi Prasad Singh* v. *The King-Emperor* (1).

JWALA PRASAD, J.

I also agree with the order passed by my learned brother in all these cases.

S. A. K.

Rule discharged.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

SATYENDRA NARAYAN

v.

SHYAMSUNDER SINGH.*

1927.

Dec., 5.

Bengal Tenancy Act, 1885, (*Beng. Act VIII of* 1885), *sections* 5(5), 120(2) (*a*)—*deeds executed subsequently to* 1*st March*, 1883, *recitals in, whether admissible—tenant, area held by, being less than* 100 *bighas—presumption as to raiyati* interest, whether arises.

Recitals in deeds executed subsequently to the 1st March, 1883, are relevant evidence and have to be taken into consideration in deciding whether lands are proprietor's private lands or not.

Although there is a presumption in favour of the interest of a tenant being that of a tenure-holder if the land exceeds 100 standard bighas, there is no such presumption under the

*Appeal from Appellate Decree no. 724 of 1925, from a decision of Babu Narendra Nath Chakravarty, Subordinate Judge of Monghyr, dated the 23rd December, 1924, modifying a decision of Babu Dwarka Prasad, Munsif of Begusarai, dated the 18th August, 1923.

(1) (1927) 8 Pat. L. T. 613.