

ORIGINAL CIVIL.

Before Ghose J.

KHITIPATI ROY

v.

DHARANI MOHAN MOOKERJEE.*

1920

July 7.

Examination on Commission—Purdanashin lady—Civil Procedure Code (Act V of 1908), ss. 132, 133, O. XXVI, r. 1.—Right of choice as to place of examination.

The defendant contended that his witness who is a purdanashin lady is entitled to be examined on commission at a place of her own choice or where she happened to be at the time of the issue of the commission.

Held, that she had no such right.

APPLICATION.

This was an application by the defendant for the issue of a commission to take evidence of amongst others of a purdanashin lady "either at Radhanagore in thana Khanakul in the district of Hooghly or at Calcutta." An order by consent for the issue of the commission was made in the first instance : for reasons which appear in the judgment, it was varied on an application by the defendant by striking out the words "at Ragunathpur in thana Khanakul in the district of Hooghly." It was contended on behalf of the defendant that he had no control over the purdanashin lady or her movements, and that the latter is not at all bound to come to Calcutta and was entitled to say that she preferred to be examined either at Calcutta or in her village house wherever she might consent to be

* Original Civil Suit No. 118 of 1920.

examined or happened to be at the time when the commission was issued :

Sir B. C. Mitter and *Mr. B. L. Mitter*, for the plaintiff.

Mr. A. K. Roy, for the defendant.

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GHOSE J. In this matter, an order was made in Chambers on the 14th June 1920 on the application of the defendant for the issue of a commission to Mr. S. P. Sarbadhicary, Barrister-at-Law, authorising him to swear or affirm and examine *vivâ voce* Sm. Golap Sundari Debi, widow of Hari Mohan Roy at Radhanagore in Khanakul in the district of Hooghly or at Calcutta, and Sm. Chamatkar Mohini Debi, wife of Surja Kanta Mukherjee, of No. 17, Ram Chandra Maitra's Lane, Shambazar in Calcutta, as witnesses on behalf of the defendant. This order was by consent of the parties represented by their respective solicitors.

On the 15th June Mr. M. N. Sen, attorney on behalf of Mr. P. N. Sen, the plaintiff's attorney, appeared in Chambers before me and asked for the revision of the order made on the previous day on the ground that the plaintiff's attorney when he consented to the order had not had before him full and sufficient facts bearing on the matter of the application for the issue of a commission. This application was rejected. On the 26th June the plaintiff's attorney gave notice of an application for the 2nd July for an order that the order of the 14th June for the issue of a commission to examine Sm. Golap Sundari Debi may be varied by striking out the words "at Radhanagore in the district of Hooghly."

Before this application could come on for hearing, it appears that the order of the 14th June

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was completed and filed on the 28th June and a copy thereof was served on the same day on the plaintiff's attorney.

The variation in the order of the 14th June is asked for on the ground that at the time when the plaintiff's attorney gave his consent he was ignorant of the fact that the said Sm. Golap Sundari Debi had no residence at Radhanagore, but had got a residence of her own at premises No. 71 Amherst Street in Calcutta where she usually stopped during the greater part of the year. I may mention in passing that in the order as drawn up, Raghunathpore has been substituted in place of Radhanagore. It is further alleged that the plaintiff's attorney was at the time unaware of the fact that the said lady had got a residence at Raghunathpore but that access to Raghunathpore was difficult by reason of the circumstances mentioned in the affidavit of the plaintiff affirmed on the 24th June. In that affidavit, the scarcity and insufficient character of accommodation at Raghunathpore has also been dealt upon.

The application is opposed by the defendant and on his behalf an affidavit of one Saradindu Nath Chatterjee affirmed on the 1st July has been used before me. The deponent in paragraphs 14, 15, 16, 17 and 18 of his affidavit deals with the question of difficulty of access to, and of accommodation at, Raghunathpore, alleged by the plaintiff and in paragraph 19 he points out that the defendant has no control over the said Sm. Golap Sundari Debi nor upon her movements and that the defendant "has no knowledge whether the said Sm. Golap Sundari Debi is at all bound to come down to Calcutta or when she may be expected to come down to Calcutta and that the original application for her examination either in her village house or at Calcutta had been made with a view to having her examined wherever she might

consent to be examined or happened to be at the time when the commission was issued." The plaintiff in his affidavit in reply sets out in elaborate detail what he conceives to be the manifold difficulties of access to and of accommodation at Raghunathpore.

I think on the evidence before me that there are reasonable grounds for coming to the conclusion that access to Raghunathpore is not free from difficulties at this season of the year and that the accommodation available at Raghunathpore is plainly insufficient; in other words, Raghunathpore would appear to be bare of elementary conveniences for sittings by the Commissioner which, in the circumstances of this case, are likely to be protracted. I am also satisfied that at the time when the order of the 14th June was made, these matters were not present in the mind of the plaintiff's attorney and that he consented to the order under a misapprehension. That an order by consent can be revised or varied in circumstances showing that the consent had been given under misapprehension or mistake is well settled and it is unnecessary for me to deal at length with the authorities.

Therefore I do not doubt that I have power to vary the order of the 14th June, even though the order has been completed and filed in this Court. The question now arises whether in the circumstances of this case I should vary the order of the 14th June or let it remain as it is.

I understood the learned counsel for the defendant to argue that the lady, Sm. Golap Sundari Debi, is entitled to say that she will refuse to be examined on commission except at the place of her own choice and that this is a right which she has under the law. Of course if she has any such right under the law, I should hesitate to vary the order of the 14th June; but has she any right such as to decline to be examined

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on commission in any place except at the place of her choice? If the law allows of her attendance being required at a place other than at Raghunathpore, I think, having regard to the circumstances brought out in the affidavits to which I have referred, it is necessary that the lady should be examined at a place where the plaintiff and his attorney and his counsel could attend without inconvenience to themselves.

Under section 132 of the Civil Procedure Code women, who according to the customs and manners of the country ought not to be compelled to appear in public, are exempt from personal appearance in Court. Under Order XXVI, rule 1 of the Civil Procedure Code, persons who are exempted from attending Court may be examined on commission.

I have looked into the cases decided from time to time under these and corresponding provisions of the Civil Procedure Code and I have been unable to discover a single case in which it has been laid down that women who do not desire to enjoy the sweets of unsecluded life have an absolute right to decline to be examined before the commissioner at any place other than at the place or places of their own choice. I am of opinion that they have no such right.

In this view of the matter, if the difficulties now brought to the notice of the Court by the plaintiff had been pointed out to me on the 14th June, I would not have made an order in the form in which I did. Learned counsel for the defendant has informed me that the defendant's attorneys have been and are enquiring whether it is not possible for the lady to be examined on commission at Calcutta. This, if I may say so, is what I would expect of a firm of attorneys such as the defendant's attorneys are. At the same time, it is my duty to see that the plaintiff is not exposed to the risk of having to attend on the

commission at Raghunathpore and to cross-examine the witness under the circumstances such as I have sketched above.

Reluctant as I am to vary an order by consent except in very special circumstances, I am constrained in this case to hold that the plaintiff has made out a sufficient case for the variation of the order of the 14th June. And I am not unmindful of the fact that the witness has a residence of her own in Calcutta.

The order of the 14th June will therefore be varied by striking out therefrom the words "at Raghunathpore in thana Khanakul in the district of Hooghly." The applicant must pay the costs of this application, as I think this application could have been easily avoided if greater care had been bestowed on the matter on the 14th June.

Attorney for the plaintiff: *M. N. Sen.*

Attorneys for the defendant: *Kalinath Mitter & Sarbadhicary.*

S. K. R.

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