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BIR CHUNDER MANIKYA v. MAHOMED AFSAROO-DEEN.

he is entitled to succeed. His remedy, if he has any, must be by a regular suit to enforce his lien under the mortgage. In the meantime we think the defendant was entitled to retain possession of the property. We accordingly reverse the decree of the lower Court, and direct that the suit be dismissed with costs of both Courts.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

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January 24.

IN THE MATTER OF THE PETITION OF SURAT DHOBNI.*

Evidence Act (I *of* 1872), *s.* 6—*Statement made to third person by person injured.*

The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of.

Held, that the evidence was admissible under s. 6 and s. 8, Illustration (*g*) of the Evidence Act.

IN this case the prisoner had been convicted by the Assistant Commissioner of Dibrugarh, under s. 324 of the Indian Penal Code, of having voluntarily caused hurt to her daughter-in-law by burning her with a red hot pair of tongs. The only evidence in support of the charge was a statement made in the presence of the prisoner by the daughter-in-law to a neighbour immediately after the commission of the offence. It appeared also that the prisoner did not deny that she had inflicted the injuries. The prisoner appealed to the Officiating Judge of the Assam Valley Districts, who held that the statement was so closely bound up with the occurrence itself that it was clearly a relevant fact and admissible in evidence under s. 6 of the Evidence Act and affirmed the conviction.

The prisoner preferred a petition to the High Court.

Baboo *Jogesh Chunder Roy* for the petitioner.

No one appeared for the Crown.

* Criminal Motion No. 275 of 1883, against the order of C. J. Lyall, Esq., Officiating Judge of the Assam Valley Districts, dated the 4th August 1883.

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IN THE MATTER OF THE PETITION OF SURAT DHOBNI.

The following judgments were delivered by the Court (MITTER and FIELD, JJ.)

FIELD, J.—The additional evidence which we directed to be taken by our order of the 11th December last has now been sent up by the Sessions Judge. In consequence of my learned colleague having some doubt, I have very carefully considered the question with which we have to deal. In the case of *Rex* v. *Osborne* (1), referred to in my learned colleague's judgment, Creswell, J., said: "What the prosecutrix said at the time of the committing of the offence would be receivable in evidence on the ground that the prisoner was present and the violence going on, but if the violence was over, and the prisoner had departed and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence." That was a case of rape, and I do not understand Creswell, J., to have meant that in order to render the statement of the prosecutrix admissible in evidence, both the presence of the prisoner and the continuance of the violence must have co-existed with the making of the statement. I understand the learned Judge to have been speaking with reference to the circumstances of the case before him rather than to have been laying down any fixed rule which would require for its application the co-existence of the two circumstances just mentioned. In the case of *Rex* v. *Foster* (2), before three learned Judges—Park and Patteson, JJ. and Gurney, B.—the prisoner was charged with manslaughter, in killing a certain person by driving a cabriolet over him. A waggoner was called as a witness, and he said that he was driving his waggon and that he saw the cabriolet drive by at a very rapid rate, but did not see the accident, and then he went on to say that immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter. It was objected that what the deceased said in the absence of the prisoner as to what had caused the accident was not receivable in evidence, but the three learned Judges were agreed that under the circumstances it ought to be received. This appears to me to be a case more immediately in point than that of *Rex* v. *Osborne*.

(1) 1 C. and M. 624. (2) 6 C. and P. 325.

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IN THE MATTER OF THE PETITION OF SURAT DHOBNI.

It must, however, be borne in mind that these English cases can be referred to only by way of illustration. They are not in any way binding upon us, regard being had to the provisions of cl. 1 of s. 2 of the Evidence Act. What therefore we have really to consider is whether the evidence is admissible under the Indian Evidence Act, and having given to the matter my most careful consideration, I have come to the conclusion that it is admissible. It is clear from the additional evidence now submitted by the Sessions Judge that the statement made by the girl was made in the presence of the prisoner and almost immediately after the infliction of the injuries by the tongs. I think, therefore, that it falls within the purview of s. 6 [see Illustration (*a*)] of the Indian Evidence Act. I think further that it falls within s. 8, Illustration (*g*) inasmuch as the accused person was present and made no answer denying that it was she who had inflicted the injuries upon the girl. The witness upon a re-examination has added certain matter which we are both agreed that we ought not to consider, but excluding this matter, the case in my opinion falls within the illustration just quoted. The occasion was certainly one upon which the prisoner, if she had not inflicted the injuries upon the girl, would in all probability have denied the charge made against her by the girl, and the fact that she did not do so appears to me to have been an acquiescence in the truth of the charge so made by the girl. As to the sufficiency of the evidence, it is unnecessary for us to express any opinion. We are hearing this case merely in the exercise of our revisional jurisdiction, and the point to which we are agreed to limit ourselves is whether there is legal evidence upon which the prisoner might have been convicted, and this question I feel compelled for myself to answer in the affirmative.

MITTER, J.—I concur. I had some doubt upon the point fully discussed in the judgment of my learned colleague. But after considering the authorities referred to in it, I come to the same conclusion to which he has come.