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aside the order of acquittal and convict them of the offence under section 161 read with section 116 of the Indian Penal Code and sentence Dinkar Rao to a fine of Rs.200 or two months' simple imprisonment in default, and Madan Mohan to a fine of Rs.100 or one month's simple imprisonment in default. If the fines are paid the bail bonds are cancelled.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

1933 *April*, 11

SUNDAR DEVI (PLAINTIFF) *v.* DATTA TRAYA NARHAR AND ANOTHER (DEFENDANTS)*

Civil Procedure Code, section 132; *order V, rules* 3, 4—Parda-nashin *lady—Cannot be compelled to attend court either as a party or as a witness.*

The exemption of *pardanashin* ladies from personal appearance in court, granted by section 132 of the Civil Procedure Code, is a right which no court has power to refuse, and applies to the parties as well as to witnesses. A *pardanashin* lady cannot be compelled to attend the court, either as a party under order V, rule 3 or 4 of the Civil Procedure Code, or as a witness.

The words "personal appearance" used in section 132 mean personal attendance. If a *pardanashin* lady observing strict *parda* is ordered to attend the court, it means that she is "compelled to appear in public". Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the court. This is against the spirit of section 132.

Mr. *A. Sanyal*, for the appellant.

Dr. *N. U. A. Siddiqi* and Mr. *Kedar Nath Sinha*, for the respondents.

RACHHPAL SINGH, J. :—This is a plaintiff's appeal arising out of a suit which she instituted against the

*First Appeal No. 433 of 1929, from a decree of Hari Har Prasad, Subordinate Judge of Jaunpur, dated the 5th of January, 1929.

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defendants Nos. 1 and 2 in the court of the Subordinate Judge of Jaunpur and which has been dismissed. The plaintiff is one Mst. Sundar Devi. Datta Traya Narhar, defendant No. 1, is a solicitor practising in Bombay. According to the plaintiff, Parmeshwar Din defendant No. 2 is an agent of the defendant No. 1.

On the 23rd of November, 1927, the defendant No. 1 obtained a decree from the Bombay High Court for a sum of money against Mst. Sundar Devi, plaintiff. The plaintiff, who resides in Benares, instituted a suit against the two defendants in the court of the Subordinate Judge of Jaunpur to obtain a declaration to the effect that the aforesaid decree, for the reasons given in her plaint, was not binding upon her. After the issues had been settled in the case, a commission was issued for recording the evidence of the plaintiff and one Mst. Lakhpati at Benares. The statement of the plaintiff was recorded. While Mst. Lakhpati was being examined it was suspected by the counsel for the defendants that there was some one else with Mst. Lakhpati Devi behind the *parda*, who was tutoring her. This suspicion of the defendants' counsel was brought to the notice of the Commissioner. The Commissioner went behind the *parda* and found one person ascending the staircase near the spot where Mst. Lakhpati had been sitting. The defendants' counsel stopped further cross-examination of Mst. Lakhpati and made a written application to the Commissioner to report the matter to the court. This application was made on the 22nd of September, 1928. The Commissioner sent the record to the court.

On the 20th of November, 1928, the defendants made an application to the court mentioning the above mentioned facts and praying that they should be given an opportunity to further cross-examine not only Mst. Lakhpati but also the plaintiff. They asked the court to order that both the plaintiff and Mst. Lakhpati should

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present themselves in Jaunpur where they might be further examined in *parda* either in court or some other suitable place. The court directed the plaintiff to file written objections by the 29th of November, 1928. No objections were filed on behalf of the plaintiff. But it may be pointed out that on the 11th of November, 1928, after the Commissioner had returned the commission, the plaintiff had made a petition to the court. In that petition, while denying the allegations of the defendants that there had been any tutoring of Mst. Lakhpati behind the *parda*, she expressed her readiness to tender Mst. Lakhpati for further cross-examination if so ordered. * * * * Ultimately the Subordinate Judge directed the plaintiff to attend the court on the 5th of January, 1929. In this order, he stated as follows: "The conduct of the plaintiff as reported by the Commissioner is highly objectionable. The only course open is now to direct the plaintiff, Mst. Sundar Devi, to attend in person on the 5th instant, when she will be questioned about the case on the points raised by the defendants. Further orders shall be made on that date. In case of non-appearance she will bear the legal consequences." On the 5th of January, 1929, the plaintiff did not appear. The learned Subordinate Judge dismissed the suit. The court below in its judgment says that "as she had not entered appearance as directed, the suit is dismissed for default of prosecution with costs." The present appeal has been preferred by the plaintiff against this order of dismissal of her suit.

I am of opinion that the order of the learned Subordinate Judge is wrong and cannot be sustained. Section 132 of the Code of Civil Procedure lays down that women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal attendance in court. The exemption from personal appearance under this section is a right which no court has power to refuse, and

applies to the parties as well as witnesses. In a Madras case, *Vellai Nachiar* v. *Meiyappa Chetty* (1), it was held that the lower court was clearly wrong in seeking to compel the personal attendance in court of a *pardanashin* lady. I may say here that in a Calcutta case, *In re Bilasroy Serowgee* (2), a single Judge of that Court took the view that the word "appearance" means that a *pardanashin* lady shall not be compelled to come forth into view or to become visible to the public gaze and that the court, therefore, has powers to order a *pardanashin* lady to give evidence in court provided she is not compelled to become visible to the public gaze. With all possible respect to the opinion of the learned Judge, I am of opinion that the view taken by him is not correct. The words used in section 132 of the Code of Civil Procedure are that women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal attendance in court. The words "ought not to be compelled to appear in public" are important. If a *pardanashin* lady observing strict *parda* is ordered to attend the court, it means that she is "compelled to appear in public". Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the court. This is against the spirit of section 132 of the Code of Civil Procedure. In families in which ladies observe strict *parda* it is considered most objectionable for them to appear in public even with their faces covered. I am of opinion that the words "personal appearance" used in section 132 mean "personal attendance". In this connection we may look to rule 1, order XXVI of the Code of Civil Procedure which empowers a court to issue commission for the examination of witnesses who are exempted under this Code from attending the court. Among those so exempted are women who, according to the customs and manners of the country, ought not to be compelled to appear in

(1) (1924) 86 Indian Cases, 513. (2) (1929) I.L.R., 56 Cal., 865.

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public. A court has no power to insist that a *pardanashin* lady must attend and give evidence in court. It is the right of a *pardanashin* lady to refuse to attend the court and to say that if she is to be examined, her statement should be taken on commission. If the view taken by the Calcutta High Court in the aforesaid case were correct, rule 1 of order XXVI of the Code of Civil Procedure would become useless. I hold that the correct view is that under the provisions of section 132, clause (1) of the Code of Civil Procedure, a *pardanashin* lady cannot be compelled to attend the court either as a party or as a witness. I, therefore, decide that the learned Subordinate Judge acted wrongly in going against the provisions of section 132 of the Code of Civil Procedure in insisting on the personal attendance of the plaintiff in court.

It was urged by the learned counsel appearing for the defendants that the court had the power to order the plaintiff to attend under the provisions of rule 3, order V of the Code of Civil Procedure. I am of opinion that rule 3, order V of the Code of Civil Procedure is confined to those cases in which the court, before issues are framed, desires, for some reason, the personal attendance of a party. In the case under appeal that stage had passed. Nor do I think a court, acting under rule 3, order V of the Code of Civil Procedure, can compel the attendance of a party who is a *pardanashin*. Such an order would be against the provisions of section 132, clause (1) of the Code of Civil Procedure. It was also contended on behalf of the respondents that the court acted under rule 4, order X of the Code of Civil Procedure. I disagree with this contention. Under this rule a court can order the attendance of a party only where his or her counsel is unable to answer material questions. In the case before us the record does not show that the counsel appearing for the plaintiff was unable to answer any questions which the court put or wished to put to

him. I also think that under the provisions of rule 4, order V of the Code of Civil Procedure the court cannot insist on the personal attendance of a party who is a *pardanashin* lady.

Coming to the merits of the case, I am clearly of opinion that the order of the learned Subordinate Judge directing the personal attendance of the plaintiff was unwarranted. The statement of the plaintiff had been finished before the Commissioner. When Mst. Lakhpati was being cross-examined, the counsel for the defendants suspected that there was some one behind the *parda* along with the witness who was perhaps tutoring her. The cross-examination was stopped and the matter was reported to the court. The plaintiff put in an application denying the allegations of the defendants. That application is dated the 11th of November, 1928, and is on the record. If the learned Subordinate Judge thought that there was any substance in the allegations of the defendants, he could have directed her evidence being recorded again with such precautions and safeguards as seemed reasonable consistently with her right to be exempt from appearance in court. It was also open to him to refuse to admit the statement of Mst. Lakhpati in evidence, if he considered that a case had been made out for its exclusion. Where a fraud of the kind alleged by the defendant is established, the court has undoubtedly the discretion to exclude the evidence. But there was no justification for the learned Subordinate Judge to insist on the attendance of the plaintiff in court.

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For the reasons given above, I am of opinion that the decree passed by the court below is bad and must, therefore, be set aside. The appeal is allowed and the decree passed by the learned Subordinate Judge is set aside. The defendants will pay the costs of the appellants in this Court.

NIAMAT-ULLAH, J. :—I concur.