

1882
August 24.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF FARID-UN-NISSA.

“Pardah-nashin” woman—Examination by commission—Personal appearance in Court—Act X. of 1872 (Criminal Procedure Code), s. 330.

Semle that in criminal cases “*pardah-nashin*” women are not of right exempted from personal attendance at Court. Also that the word “inconvenience” in s. 330 of the Criminal Procedure Code (Act X. of 1872) empowers the Courts to allow examination by commission in criminal cases where a witness, according to the manners and customs of the country, ought not to appear in public.

The complainant in a case of defamation, alleging that she was a “*pardah-nashin*,” applied to be examined by commission. *Held* that the fact that she was a complainant, and not merely a witness, materially altered her position as regards the question whether she ought not to be exempted from personal appearance in Court, and that, under the circumstances, she ought not to be examined by commission, but ought to attend personally to be examined in Court.

Direction to the Magistrate to make such arrangements for the examination of the complainant in Court as should secure her privacy, consistent with the recording of her evidence, according to law, in the presence of the accused.

Witnesses in criminal cases should not be examined by commission except in extreme cases of delay, expense, or inconvenience.

THIS was an application for revision, under s. 297 of the Criminal Procedure Code (Act X of 1872), of an order by Mr. A. McConaghey, Magistrate of the Bareilly District, dated the 28th June, 1882. The applicant, who had brought a charge against a Mr. Purcell of defamation, applied to the Magistrate to be examined in support of such charge by commission, as she was a “*pardah-nashin*,” that is to say, a woman who did not appear in public. The Magistrate refused the application, and directed that, if she wished to proceed with the prosecution, she should appear in Court to be examined.

Mr. Hill and Mir Zahur Husain, for the petitioner.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown,

STRAIGHT, J.—I have listened with the very greatest interest and attention to the learned counsel, who has so ably and earnestly urged all that possibly can be said in support of his client’s petition. I always have been and always shall be, to the fullest extent pos-

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sible, consistently with common sense, ready and willing to make every concession I can, in the administration of justice, to the customs and prejudices of Hindus and Muhammadans alike. And in dealing with a question of the kind now before us, I bear in mind that intellectual progress and enlightenment, which does so much to dissipate primitive fancies and superstitions, has necessarily not as yet achieved the same amount of advancement in these Provinces as it has in the Presidency Towns and Lower Bengal. I admit to the full the necessity for still preserving a tenderness and sympathy for native ideas and notions, some of which to the European mind might seem absurd, and indeed it is my duty to do so. Although I am not prepared to adopt in its integrity the principle enunciated in the Calcutta ruling quoted by Mr. Hill (1), that in criminal cases "*pardah-nashin*" women are of *right* exempted from personal attendance at Court, I should be loth to differ with the two experienced Judges who recorded that opinion, by holding that the word "inconvenience" in s. 330 of the Criminal Procedure Code does not empower the Courts to allow examination by commission in criminal cases, where a witness, according to the customs and manners of the country, ought not to be compelled to appear in public. But the matter now before me appears to be of an exceptional character, and while I agree, as Mr. Hill ingeniously urged, that the petitioner, though a complainant, is none the less a witness, I nevertheless think that the fact of her being a person who has set the criminal law in motion materially alters her position as regards the question under consideration. As I pointed out in the course of the argument, she had the alternative of bringing a suit, and if she had adopted that course, s. 640 of the Civil Procedure Code would have protected her. But she has thought proper to cite her alleged defamer in a Criminal Court, and it is his right and privilege to have her evidence taken in his presence in such Court. Were it otherwise, it is impossible to conceive the dangers and mischiefs that would arise, the false charges that would be preferred, the malicious prosecutions to which persons would be subjected.

The petitioner invokes the criminal law to punish, and I think that in such a case she should be required to guarantee the *bona*

(1) I. L. R.; 4 Calc. 20.

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vides of her prosecution, and that it has really been instituted by her of her own free will and not at the instigation of some other person, by attending at the Magistrate's Court. I most unhesitatingly say that the taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a thing is unknown to English practice, and out here ought not to be adopted save in extreme cases of delay, expense, or inconvenience. The Criminal Courts of this country have difficulty enough to deal with the false charges made, and the perjured testimony given by prosecutors and witnesses, whose demeanour and truth they have personal opportunity of estimating, without having their labours complicated with the written evidence of parties not before them. I think the order of the Magistrate in the present case was substantially right, and I refuse the prayer of the petitioner. I, however, direct the Magistrate, if the complainant is found to be a "*pardah-nashin*" lady, and if she elects to attend and support her charge, to allow her to be brought into his room at the Court-house in her palki, or if this is not feasible, to make such other arrangements, as may enable her to remain in it and strictly preserve her privacy, and subject her to the least inconvenience or annoyance, for the purpose of recording her evidence according to law, in the presence of the accused, after identification by some approved female witnesses.

APPELLATE CIVIL.

1882
August 25.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

ZAUKI LAL (PLAINTIFF) *v.* JAWAHIR SINGH AND OTHERS (DEFENDANTS).*

Questions for Court executing decree—Separate suit—Civil Procedure Code, s. 244.

Certain persons, claiming by right of inheritance to C, sued B, N, A, K, and others for possession of certain immoveable property, and obtained a decree dated in August 1876 for possession of the same. In the course of the litigation which ended in that decree Z purchased certain immoveable property from B, N, A, and K. Z was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited the same from D, that it

* Second Appeal No. 28 of 1882, from a decree of Maulvi Zain-ul-ab-din, Subordinate Judge of Sháhjahánpur, dated the 5th September, 1881, affirming a decree of Mir Jafar Husain, Munsif of Sahaswan, dated the 29th June, 1881.