

event it would apparently conflict with the case of *Abdul Mazumdar v. Mohamed Gazi Chowdhry* (1), but it is no authority for the proposition that a person failing to obtain relief under section 108 is debarred from bringing a suit to get the decree set aside on the ground of fraud. When there is an appeal against a decision the effect of not appealing is that the decision holds good for what it is worth ; so far as concerns any other modes of relief available the person not appealing is in no worse position than if he had appealed and failed.

We must hold that the suit is maintainable, and that the decision of the Subordinate Judge is wrong. The decree is set aside and the case remanded under section 582 of the Civil Procedure Code for trial. The costs of this appeal will abide the result.

The appellant will be entitled to a refund of the value of the Court fee stamp.

B. D. B.

Appeal allowed and case remanded.

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PRAN NATH
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CHANDRA
MOITRA.

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Gordon.

HEM COOMAREE DASSEE (PETITIONER) v. QUEEN-EMPRESS
(OPPOSITE PARTY).*

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March 24.

Commission in Criminal Case—Commission to examine witness—Purdanashin lady—Code of Criminal Procedure (Act X of 1882), sections 6, 7, 503, 504, 505, 506, 507.—Presidency Magistrate, Power of.

It is doubtful, if a Presidency Magistrate in the Town of Calcutta has power to issue a commission under sections 503 to 507 of the Code of Criminal Procedure to examine a witness residing within his own jurisdiction ; but there is nothing in the Code to prevent a Presidency Magistrate examining a witness within his jurisdiction at some place other than the Court house.

Where a Presidency Magistrate refused, on the ground of want of jurisdiction, to grant a commission for the examination of a *purdanashin* lady, but offered to take her evidence in his Court when cleared for the purpose, or in his private room in the Court house, and she applied to the High Court for

* Criminal Revision No. 162 of 1897, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 17th of February 1897.

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a commission being granted, or for such other order as they might deem proper, the High Court on revision directed that if the lady would take a house or suite of rooms not far from the Magistrate's Court, and pay all the costs which the Magistrate deemed reasonable and proper, he should not enforce her attendance in Court, but examine her in the place so appointed, in the presence of the parties concerned, and in the manner in which *pardanashin* ladies are ordinarily examined.

On 17th February 1897 an application was made to the Chief Presidency Magistrate, in the course of a prosecution, by a *pardanashin* lady residing within the local jurisdiction of his Court, who had been subpoenaed as a witness, to be allowed to be examined on commission. The Chief Presidency Magistrate refused the application for a commission to issue on the ground that section 503 of the Criminal Procedure Code gave him no power to issue a commission to any one for the examination of a person residing within the jurisdiction of his own Court. He stated, however, that he would be prepared to examine her in the presence of the accused, either in Court at a time when it was cleared for the purpose, or, if the witness thought it more convenient, in his private room in the Court house. The witness, being dissatisfied with this order, thereupon obtained from the High Court a rule calling upon the Presidency Magistrate to show cause, why his order of 17th February should not be set aside, and on 15th March 1897 this rule came on for hearing.

Mr. *Dunne* shewed cause.—It is entirely a matter of discretion with the Court. The Presidency Magistrate is willing to have the Court room cleared or to hold the examination of the witness in his own room. It may be a real difficulty for her to be examined in this way, but at the same time the Court cannot allow a witness in a criminal case to be examined at any place she may choose to provide. In the case of *Queen-Empress v. Barton* (1) a commission was issued. The section includes commissions in Presidency towns and includes the High Court; although the language of the section is very curious. If the section were intended to apply only to the issuing of commissions to Magistrates outside the jurisdiction, then *Queen-Empress v. Barton* is wrong. If you cannot issue a commission under this section, then you cannot issue it at all; *Empress v. Bal Gangadhar Tilak* (2).

(1) I. L. R., 16 Calc., 238.

(2) I. L. R., 6 Bom., 285.

But assuming that a commission could issue, would this Court issue a commission? I submit not. It is a highly unsatisfactory method of taking evidence in a criminal case. [GHOSE, J.— If the lady can make arrangements for giving her evidence somewhere near, we do not see why the Presidency Magistrate should not go there.] That would form a precedent, as in the case of *In re Din Tarini Debi* (1). If the difficulty of her not appearing in public is met, what is her objection to coming to the Magistrate's room. The case of *In re Farid-un-nissa* (2) dissents. *In re Hurro Soondery Chowdhraim* (3). It is not desirable that there should be formed a precedent of this sort in criminal cases.

Mr. Hill (Mr. Farr with him) in support of the rule.—It is necessary to place a reasonable construction on the sections of the Code, if they will admit of it. It has always been held that section 503 is wide enough to enable District Magistrates to issue a commission to a witness resident in his own district. The section does not say that a witness must be outside the jurisdiction. The cases have not hitherto held that the section only relates to witnesses residing outside the jurisdiction of a Magistrate issuing the commission. Section 6 of the Code divides the Courts into five classes. Section 7 says that every Presidency Town shall be deemed a District. The Presidency Magistrate may be treated as a District Magistrate. *In re Din Tarini Debi* (1). In that case the witness was willing to take a house within the jurisdiction. The case of *Queen-Empress v. Barton* (4) was of a different character. There it was argued that no commission could issue because in England in a criminal trial no commission can issue. The reading of the sections relating to this subject has been that a commission may issue to a witness residing within the Town. It is necessary to consider the habits and customs of the people of the country. The two cases in the Allahabad Court were before Mr. Justice Straight, who knew the rules of the English Courts and was imbued with those ideas more than gentlemen with experience of this country would be. It would in this case be a hardship if the Court disregarded the horror a *purdana-shin* lady has of appearing in Court. In this case the witness is

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(1) I. L. R., 15 Calc., 775.

(2) I. L. R., 5 All., 92.

(3) I. L. R., 4 Calc., 20.

(4) I. L. R., 16 Calc., 239.

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willing to take a house or a suite of rooms not far from the Magistrate's Court for the purpose of being examined.

The judgment of the Court (GHOSH and GORDON, JJ.) was as follows :—

The petitioner before us, Hem Coomaree Dassee, a *purdanashin* Hindu lady of rank, residing in the town of Calcutta, was subpoenaed by the Chief Presidency Magistrate of Calcutta to appear in his Court for the purposes of giving evidence in a certain criminal case. Thereupon, she presented a petition to the Magistrate, stating that she had never appeared in any Court or other public place, and asking that a commission might be issued for her examination. The Magistrate, on the 17th February last, rejected her application, upon the ground that, under section 503 of the Code of Criminal Procedure he had no power to issue such a commission, she being a resident within his jurisdiction. He recorded, however, at the same time that he "shall be prepared to examine the lady in the presence of the accused, either in Court at a time when it shall be cleared for the purpose, or, if thought more convenient, in his private room in the Court house."

Dissatisfied with this order of the Presidency Magistrate, the petitioner applied to this Court for a commission being granted, or for such other order as to this Court might seem meet and proper. And a rule was issued calling upon the Magistrate to shew cause why his order of the 17th February last should not be set aside.

Section 503 of the Code is as follows :—

"Whenever, in the course of an enquiry, a trial, or any other proceeding under this Code, it appears to a Presidency Magistrate, or District Magistrate, a Court of Session, or the High Court, that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense, or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance, and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides to take the evidence of such witness," and so on.

If the lady had been a resident outside the limits of the town,

of Calcutta, there could be no doubt that the Presidency Magistrate would have authority under the section to issue a commission for her examination ; but it seems to be doubtful, having regard to the collocation of the words in the last portion of the first paragraph of the section, whether he has such authority when the witness is a resident within his jurisdiction. It will be observed that a commission can be issued only to a District Magistrate "or Magistrate of the first class" within the local limits of whose jurisdiction such witness resides. Section 6 of the Code differentiates "Presidency Magistrates from "Magistrate of the first class," and section 10 defines who the "District Magistrate" is.

Our attention has been called to several cases ; but in none of these cases, except in that of *Empress v. Bal Gangadhar Tilak* (1), does the precise question now raised before us seem to have been raised. In some of these cases, the Court to which the application for a commission was made was a Court in the Mofussil, and not in any Presidency town [as, for instance, in the cases of *In re Hurro Soondery Chowdhraïn* (2), *In re Faridunnissa* (3), *In re Basant Bibi* (4)]. No doubt the case of *Din Tarini Debi* (5) is one which came from the town of Calcutta, but it will be observed from a consideration of the case that the rule that was issued by this Court was simply to show cause, why it should not be ordered that the lady concerned should not be required to appear in Court to give her evidence (as the Presidency Magistrate had ordered), and it does not seem to have been discussed whether the Presidency Magistrate had the power to issue a commission within his jurisdiction, though no doubt in one portion of their judgment the learned Judges said "the question is whether a commission ever issued in regard to *purdanashin* ladies in his Court (Presidency Magistrate's Court). Of that he makes no mention. He also says that this lady travels from Govindanga to Calcutta, but he does not say that she does so publicly. So far therefore as cause has been shown by the learned Presidency Magistrate, it does not seem that the facts stated by him affects the reasons upon which such commissions have been granted." They then

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(1) I. L. R., 6 Bom., 285.

(2) I. L. R., 4 Calc., 20.

(3) I. L. R., 5 All., 92.

(4) I. L. R., 12 All., 69.

(5) I. L. R., 15 Calc., 775.

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gave certain directions as to how the evidence might be taken without compelling the lady to appear in the Court premises, and, as we understand the order of this Court, the learned Judges contemplated that the Magistrate should himself take the evidence, though no doubt in the last paragraph the word "commission" was used.

In the case of *Queen-Empress v. Barton* (1), an order for the examination of witnesses by commission in the town of Calcutta was issued by this Court to a Presidency Magistrate, and the evidence so taken was admitted in evidence, but there also the question now before us was not raised or discussed.

In the case of *Empress v. Bal Gangadhar Tilak* (2) the question no doubt was raised, but it will be observed that the Court had then to consider the language of section 76 of the High Court Criminal Procedure Act of 1875; and it was held that there was nothing in the language of that section to support the contention that the Court was not authorized to grant a commission to examine a witness, who was within its own jurisdiction. The language of that section is somewhat different from that of section 503 of the Code, with which we are now concerned; and the question is whether the section authorizes the Presidency Magistrate to issue such a commission within his own jurisdiction.

We have considered the provisions of sections 503 to 507, and the cases that have been cited in the course of argument; and it seems to us doubtful, as already observed, whether a Presidency Magistrate has the power that is now claimed for him by the petitioner.

But however that may be, there is nothing to prevent a Presidency Magistrate from examining a witness within his jurisdiction at some other place than the Court house, and it is quite within our province, having regard to the revisional powers conferred by the Charter of this Court, to direct the Magistrate as to the mode in which the evidence of the petitioner may and should be taken.

The Presidency Magistrate has no doubt shown some consideration to the petitioner by offering to examine her in the manner

(1) I. L. R., 16 Calc., 238.

(2) I. L. R., 6 Bom., 285.

indicated in his order ; but having regard to her rank and position in Hindu society, and to the fact that she (as stated) never appeared in any Court or other public place, we think that the offer made by the Magistrate is not, in the circumstances of the case, quite adequate. We think that we might give the same directions which were given by this Court in the case of *Din Tarini Debi* (1). If the lady would take a house or a suite of rooms not far from the Magistrate's Court, and if she will pay all the costs which the Magistrate shall deem reasonable and proper, he will not enforce her attendance in Court, but examine her in the place so appointed in the presence of the parties concerned, and in the manner in which *pardanashin* ladies are ordinarily examined. This will not entail any inconvenience or loss of time upon the Court, but will at the same time remove the hardship which the lady may be subjected to, if the order of the Magistrate as it stands is enforced. If, however, she does not comply with the conditions imposed, the order of the Magistrate will stand.

In these terms the rule will be made absolute.

C. E. G.

Rule made absolute.

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APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

KALI KRISHNA TAGORE (PLAINTIFF) v. IZZATANNISSA KHATUN AND ANOTHER (DEFENDANTS)*

1897
February 10.

Second Appeal—Code of Civil Procedure (Act XIV of 1882), section 538—Suit for compensation for use and occupation of land valued at less than Rs. 500—Provincial Small Cause Courts Act (IX of 1887), sections 15 and 23, Schedule II, Article 8.

A suit for compensation for money realized by the defendants from the actual occupants of land, who were stated to be the plaintiff's tenants, is a suit of a nature cognizable by the Small Cause Court ; therefore, no second appeal lies to the High Court in such a suit valued at less than Rs. 500, notwithstanding that the plaint was returned by the Small

* Appeal from Appellate Decree No. 33 of 1895, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 26th of September 1894, reversing the decree of Babu Siti Kantha Mullick, Munsif of Barisal, dated the 26th of April 1894.

(1) I. L. R., 15 Calc., 775.