

(1881) 03 CAL CK 0027

Calcutta High Court

Case No: None

In Re: Asgur Hossein
and Others
 The
Empress

APPELLANT

Vs

RESPONDENT

Date of Decision: March 10, 1881

Acts Referred:

- Evidence Act, 1872 - Section 33

Citation: (1881) ILR (Cal) 774

Hon'ble Judges: Pontifex, J; Field, J

Bench: Division Bench

Judgement

Pontifex, J.

(The learned Judge, having gone through the evidence, confirmed the finding of the Sessions Judge. His Lordship then continued.)

2. The deposition before the Deputy Magistrate of one of the complainants (Darshan) was admitted by the Sessions Judge u/s 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill and confined to his house. We are of opinion that the evidence as to his illness was not sufficient to bring the case within Section 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us, that of Pyari Lall petitioner (4 C. L. R. 504), in which it was held that the incapacity to give evidence mentioned in Section 33 must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to Section 32 which precedes it, that something short of permanent incapacity might satisfy the words of the section "incapable of giving evidence." It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without

reading the deposition of Darshan, to support the conviction.

3. There was a preliminary objection which was taken, viz., that the committing Magistrate had made a*kind of preliminary enquiry, in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons; and that though they were so examined, in answer to his application no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary enquiry was not an enquiry conducted in the presence of the accused; that the enquiry he made of these particular persons was for the purpose of finding out whether there was any and what case ; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was inofficious and improper to swear these witnesses on an occasion and for the purpose as stated, but having sworn them, we are of opinion that, under the circumstances, he was not bound to take down their statements in writing. As the Deputy Magistrate was only the committing officer, and as he did not try the case, we think that the accused has no cause of complaint in this respect.

4. The conviction will be confirmed.