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original purchaser, who bought on the 31st of July 1866, never did exercise that right. He seems to have acquiesced in the continuance of the building on the ground, and to have sought to make use of his supposed legal right, for the purpose of extorting an excessive price or rent for the use of the site of the house from the defendant. This, I think, he could not do. Nandakumar sold to the plaintiff, who brought the present suit, on the 21st of July 1869. Without expressing a final opinion whether, in the present case, Nandakumar, immediately on acquiring the tenure, could have called on Bipinbehari or Rambax to remove the materials of the house, and give him actual possession, I think, if it ever existed, such right is now lost, and that the plaintiff's only right is to get a fair rent for the land. I think that the judgment of the Court below should be reversed, and the suit dismissed with costs in all the Courts.

*Appeal allowed.*

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[ORIGINAL CIVIL.]

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*Before Mr. Justice Phear.*

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DHANNO SIRANG v. UPENDRA MOGAN TAGORE AND  
 OTHERS.

*Will, Construction of - "Domestic Servant."*

The testator, a Hindu, made a will in the English form and language, in which he bequeathed (*inter alia*) as follows:—"To each of my domestic servants in Calcutta who shall have been in my service ten years and upwards at the time of my death, Rs. 100 for every rupee of monthly salary drawn by them from me respectively." The plaintiff had been in the service of the testator for about 40 years as sirang on board a steamer, which the testator kept on the river, and in which he used to visit his zemindaries and perform other journeys by water. The plaintiff was in the habit of daily attending at the testator's residence, and there obeying any orders that might be given him. If the steamer was not needed, the plaintiff used to attend at the testator's residence from early in the morning to about one in the after-noon, returning to take his meals and sleep on board the steamer. *H id* that he was entitled to take under the legacy as a domestic servant of the testator.

THIS was a suit for the sum of Rs. 1,300 to which the plaintiff alleged he was entitled under the following clause of the

will of the late Prasana Kumar Tagore, in whose service he had been up to the time of his death :—

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“ *Clause 12.*—I give and bequeath to my sudder naib and sudder mooktear, and to each of my native assistants and writers in the English department of my business, and to my other native assistants and servants employed in my zemindari department, and munshi and cash departments in Calcutta, who shall have been in my actual and constant service ten years and upwards at the time of my death, and to each of my domestic servants in Calcutta, who shall have been in my service ten years and upwards at the time of my death, Rs. 100 for every rupee of monthly salary drawn by them from me respectively.”

The plaintiff in his plaint stated that, in or about 1831, he had been engaged by the testator as sirang of a river steamer belonging to the testator at a monthly salary of Rs. 13, and that he continued in the testator's actual and constant service from the year 1831 down to the day of the testator's death ; that during the time he was in the service of the testator, he was in the habit, by the direction of the testator, of taking his meals on board the steamer and sleeping there, and his duties were to take charge of the steamer as sirang on any journey that the testator wished to make by water ; that the testator made frequent journeys by water to his zemindaris ; and when he was not so engaged, he used to be in daily attendance at the testator's residence, and remained there from early in the morning until about one in the after-noon, when, if there were no orders for him, he used to return to the steamer. The plaintiff submitted he was entitled to take under the bequest to the “ domestic servants ” of the testator.

The defendants who were the executors of the will of the testator, stated in their written statement that they had no knowledge of the position of the plaintiff as a servant of the testator, but they believed it was not the fact that he was in daily attendance at the testator's residence, but that he went only occasionally for the purpose of receiving orders.

They admitted they had sufficient assets of the testator in their hands to pay the legacy, and submitted the question to the determination of the Court, whether the plaintiff was entitled

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to it as a domestic servant of the testator. Evidence was called by the plaintiff.

Dhanno Sirang said :—“ I am still acting as a servant. After my dismissal by Upendra Baboo and Jatendra Baboo, I continued to act as sirang. I knew Prasanna Kumar Tagore, I was in his service for forty years. There was nothing fixed about my work. When the Baboo went on board the ship, I used to go with him ; and when he used to be at the baitakhana, I used to be with him at six, and came away at eleven A.M. On board the boat I used to order the crew about according to the direction of the Baboo. When I served on the pinnace, I got wages for twenty-seven years, at the rate of Rs. 10 per month. During the eleven months that it took to build the steamer, I used to remain at the baitakhana. When the steamer was built, he said there was no necessity for another sirang : ‘you take charge of it.’ I used to receive orders to fetch the malli, or to fetch the coachman. All the servants used to be in attendance, and whoever was ordered to do anything did so. When at night there was a dinner, he used to order me to attend. There were 100 or 150 servants who attended his person. My duties were to take care of the things. Prasanna Kumar used to go on board to his zemindaris. The Baboo used to be in the cabin. The sikani had charge of the helm. I brought the bride of Ganendra from Jessore. At the marriage of Nagendra, I brought his bride too. He kept all his servants happy, and gave them bakshish. I received presents from Prasanna Kumar Tagore. I have been to Nuddea to fetch money.”

*To the Court.*—I lived on board the ship.

*Akhai Chandra Baree* gave the following evidence :—

This book shows the list of all the servants kept by the Baboo. They are all separately classified. He had about 125 servants. He was a rich man, and he kept the boat because it pleased him to do so. The plaintiff used to come to the house daily, and of course he must have had orders. I can't say whether he was employed regularly about the Baboo's person. The steamer used to remain generally on the other side of the water. Sometimes, when necessary, it used to be brought to this side.

After the Counsel for the defendants had replied on the evidence, this witness was recalled by the Court and said :—

There were a sudder naib and a sudder mooktear. There was an English department and a Zemindari department. There were assistants in these two departments. There were also a munshi and cash department with assistants. These were in the baitakhana. There were no other

departments. There were khansamas, khitmutgars, syces, mallis, darwans, coachmen, and bearers. Besides these and the steamer servants in the inner department s, there were no other servants, either in-doors or out-doors in Calcutta."

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Mr. *Kennedy* and Mr. *Bonnerjee* for the plaintiff.—The meaning of the testator's language is to distinguish between his menial servants and those who were more directly attendant on his person. Domestic means personal—*Ogle v. Morgan* (1). The reasoning of Lord Truro in that case is wholly inapplicable to the present ; but without that, the case is rather than otherwise in favour of 'the plaintiff ; see page 360 *per* Lord Chancellor. It is not the custom for servants, as a rule, to be fed and boarded by their Hindu masters. The intention of the testator was to make provision for his dependants in general. If the will had been in Bengali, the word used would have been " *chakri*." The boat was kept as a travelling equipage, and not for business ; thus there was no distinction between the sirang and the Baboo's coachman—*Howard v. Wilson* (2), *Townshend v. Wyndham* (3), *Bulling v. Ellice* (4) *Thrupp v. Collett* (5), and *Nowlan v. Ablett* (6).

Mr. *Phillips* and Mr. *Macrae* for the defendant.—This is a mere question of law as to the meaning of the word "domestic ;" on that the decisions are clear. The *domus*, so to speak, of the sirang is on board the steamer, not in the residence of the testator. The testator might simply have used the word servants ; instead he has distinctly named two classes of servants. The word domestic, as used by the testator, does not include a sirang employed in a steamer on the river—*Nicholl v. Greaves* (7) and *Ogle v. Morgan* (1). There the distinction is drawn between in-door and out-door servants, the latter not being considered domestic—*Vaughan v. Booth* (8) and *Blackwell v. Pennant* (9). As to the meaning of the word under Regulation I

(1) 1 De Gex. Mac & Gor., 359 ; S. C., 16 Jur., 277. (5) 5 Jur., N. S., 111.

(2) 4 Haggard, 107.

(6) 2 Cr. M. & R., 54.

(3) 2 Vernon, 546.

(7) 17 C. B., N. S., 27., See 37.

(4) 9 Jur., 936.

(8) 16 Jur., 308.

(9) *Id.*, 420.

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of 1814, see *Vithoba Malhari v. Corfield* (1) where a *darzi* was held not to be a domestic servant.

Mr. *Kennedy* in reply.—The cases cited are of no force in deciding the question; they apply to a totally different state of society—*Grant v. Grant* (2) *In the Matter of domestic servants* (3), where the distinction is drawn between personal or “domestic” servant and “workmen or laborers,” Act XIII of 1859 being held not to apply to contracts for the former, who are called “chakri,” [PHEAR, J.—How do you apply that case?] It shows the meaning of “chakri” as opposed to other servants. In Regulation I of 1814, the word used is “household,” not “domestic.”

PHEAR, J.—There is but one question for me to determine in this suit, and that is whether or not the plaintiff on the facts of the case was a domestic servant of the testator within the meaning of the word “domestic,” as that is used in this clause of the testator’s will (*reads.*)

I say that it must be within the meaning of the word “domestic” as used in this clause, because it is eminently the case in construing an English will made by a native of this country, that the words used should be looked at and considered in close reference to the whole of the context. In the event of the word “domestic” being used by an English testator in England to designate members of his own household establishment, it would be, I think, presumed, unless it appeared from the will that the testator intended the word to bear an unusual sense, that he employed it in the sense which it commonly bears in ordinary parlance, having regard to the nature and conditions of private establishments in England. The different cases to which Mr. Phillips referred me are cases in which the Courts were called upon to put a construction on clauses somewhat similar to this. From these it appears that it has been held in England that a distinction was to be drawn between in-door and out-door servants,

(1) 3 Bom. H. C. Rep., App. 1.

(3) 3 B. L. R., A. Cr., 32.

(2) L. R., 5 C. P., 308; S. C. on appeal, *Id.*, 727.

among the whole body of the servants who are in a greater or less degree personal to the master, and minister to his ordinary wants in and about the house, and "domestic" has been held properly to designate those employed and dwelling in-doors, in contradistinction to those employed and dwelling out of doors. Thus in a very strong case on which Mr. Phillips relied, the coachman, though he often waited at table, was held not to be a domestic servant; and in two or three other cases cited yesterday, the head gardener and under gardeners were held not to be properly designated as domestic servants or members of the domestic establishment; and reasons are given in *Ogle v. Morgan* (1) for drawing the distinction in that way. The like reasons, however, certainly do not seem to me to arise out of the circumstances of servants in this country, whether forming the household establishment of native gentlemen or of English residents. I do not feel therefore able to say that the word "domestic" in the testator's will must be even *prima facie* taken to apply only to servants employed in in-door work in the house; and when I look at the terms of the whole clause, and consider them with reference to the facts disclosed by Akhai Chandra, it seems to me that this clause was intended by the testator, taking the whole in its different sub-divisions, to cover the entirety of his establishment in Calcutta. He first speaks of his sudder naib and his sudder mooktear. Akhai Chandra says, these are superior servants in Calcutta. Then he mentions each of his native assistants and writers in the English department of his business, and Akhai Chandra says that the English department was a recognized department of his business in Calcutta. He next goes on to his other native assistants and servants in the zemindari department, and Akhai Chandra states that the zemindari department was another recognized department in Calcutta. He next mentions his munshi and cash department, which is that in which the witness Akhai Chandra himself was. Finally, the clause ends "and to each of my domestic servants in Calcutta, &c., If I give the term "domestic" the strict meaning, which Mr. Phillips asked me to attach to it, I should then leave this

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(1) 1 De Gex. Mac. & Gor. 359 S. C., 16 Jur., 277.

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part of the clause applicable to very nearly all the servants belonging to the testator's establishment in Calcutta; but I should cut off a small margin, which would consist of servants, who, as I understand the habits and circumstances of servants in this country, are in no way separable by any material conditions of life or service from those whom I should comprehend within the term "domestic." I should have to leave out the syces, coachmen, and mallis, and also the palki-bearers, if there were any, while I included Mahomedan table servants, &c. ; and I think it would be an unnatural construction of the testator's words, which would have the effect of cutting his domestic establishment into two such arbitrary divisions as those. I cannot help thinking, on a consideration of the whole clause, that the testator intended to cover the whole of his establishment in Calcutta, and that he did not imagine any such line of distinction as I have stated, and as Mr. Phillips contended for. If then I pass beyond this line, why am I not to say it covers the plaintiff, as well as any of the servants who were in daily attendance at the baitakhana establishment in Calcutta. Whatever might have been the case, if the matter rested solely on the testimony of the sirang himself, whom one might perhaps not unjustly suspect of exaggerating the amount of his attendance at the baitakhana, there can be no doubt, from Akhai Chandra's evidence, that the plaintiff was, year after year, and day by day, in the habit of presenting himself as part of his duty at the baitakhana, and remaining there with the other servants in attendance on his master, though it may be uncertain what precisely were the services he rendered in the house. I think, then, I must come to the conclusion on the facts before me that the plaintiff does come within the meaning of the word "domestic" in this clause, and that he is entitled to the legacy for which he sues. There will, therefore, be a decree for that amount, with costs on scale No. 2. The executors were perfectly justified in defending this suit, and ought therefore to have their costs out of the estate.

*Judgment for the plaintiff.*

Attorney for the plaintiff: Baboo *Tara Ballabh Chatterjee*.

Attorney for the defendants: Mr. *Hatch*.