

1872

HARI MOHAN
BYSAK
v.
KRISHNA
MOHAN BYSAK

But there is also, we think, another point on which the defendants (appellants) are entitled to succeed in this appeal. It is quite clear that the plaintiffs (the drawees) considered the defendant Sham Sundar Bysak as their only debtor; they received part payment of the hundi from him and gave him time in which to pay the remainder, and under ordinary circumstances this alone would excuse the drawers from liability, because they were entitled to receive notice at the very first of Sham Sundar's failure to pay the money; and if they did not receive that notice, they would, according to the ordinary rule of law, not be bound to make arrangements for the payment of the hundi; and as to the notice itself the law is that notice shall be sent to the drawer of the bill at the time dishonor takes place. In this case the bill fell due on the 5th of Asar 1276 (18th June 1869), whereas no notice of its having been dishonored, was sent to the defendants, drawers of the bill, (till ten months after, or in Jaishita (May) of the following year. On the whole we think that the plaintiffs never considered the defendants (drawers of the hundi) as their debtors, and that they knew, as every body else must have known, all the parties living in the same town of Dacca, that these two men were ordinary servants of Sham Sundar Bysak, and only drew this hundi in the common discharge of their duties as gomastas, and there cannot be the slightest doubt that the plaintiffs looked to Sham Sundar, and to Sham Sundar alone, as the person from whom they were entitled to recover their money.

Under these circumstances, we think that the decree of the Judge as against the appellants, defendants 2 and 3, is wrong, and must be reversed. This appeal, is therefore decreed with costs payable by the plaintiffs, respondents. The decree of the Judge against the defendant No. 1, Sham Sundar Bysak, will stand.

Before Mr. Justice Macpherson.

BHIM DAS v. UPENDRA MOHAN TAGORE.

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June 14.

Will, Construction of—“ Domestic Servant.”

SUIT against the executors of the will of Prasanna Kumar Tagore to recover Rs. 1,731-8 to which the plaintiff alleged he was entitled under a clause in the will, by which the testator gave and bequeathed to each of his domestic servants in Calcutta, who should have been in his service ten years and upwards at the time of his death, Rs. 100 for every rupee of monthly salary drawn by them, from the testator, respectively.

The plaintiff stated in his plaint that he was a washerman by caste and profession, and that in 1845 he had been engaged by the testator as one of his servants at a monthly salary of Rs. 15, and had continued in the testator's actual and constant service down to the date of the testator's death, being a period of about twenty-five years. He further alleged that, during the time he was in the service of the testator, his principal duty was to wash the testator's clothes, and those of his family and establishment at Calcutta; that by

the direction of the testator, he was in the habit of carrying the dirty clothes every week to Kurdah, where his own house was situated; and that, having washed them there, he brought them back to be ironed at the testator's usual place of residence in Calcutta, spending two or three days at Kurdah, and the remainder of the week at the testator's residence; that while at Kurdah he lived in his own house and at his own expense, but that in Calcutta he lived in the testator's residence, and got his meals at the testator's expense, and the tools required by him for his work were supplied to him by the testator; that, besides his duties as a washerman, he, when not actually engaged in his own work, was required by the testator to, and he did make himself generally useful at the testator's residence; that, in or about the year 1855, the family of the testator's daughters having increased, the testator made a settlement upon them, and separated his own domestic establishment from theirs; that the testator's daughters having desired to retain the plaintiff's services as their washerman, the testator consented to his acting for the testator's daughters upon separate pay; and that, after such consent, he worked both for the testator and the testator's daughters, but that his acting for the daughters did not interfere with the arrangement and routine of his work for the testator. He further stated that he was not allowed to, and did not in fact hire himself out as a washerman or in any other capacity whatsoever to any other person or persons.

The defendants, while admitting assets sufficient to pay the legacy, disputed the plaintiff's right on the ground that he had not worked solely for the testator; but had hired himself out as washerman to persons other than the testator, and that he did not live in the testator's house as alleged in the plaint.

The evidence on behalf of the plaintiff failed to prove the case as stated, and bore out the defendant's allegations.

Mr. *Bonnerjee* (Mr. *Kennedy* with him) for the plaintiff.

Mr. *Phillips* for the defendant.

MACPHERSON, J., expressed an opinion that, if the case had been proved, as laid in the plaint, the plaintiff would have been clearly entitled to recover but the evidence having failed to prove that case, his Lordship dismissed the suit without costs as against the plaintiff. The defendant's costs to come out of the estate.

Suit dismissed (1).

Attorney for the plaintiff: Baboo *T. B. Chatterjee*.

Attorney for the defendants: Mr. *Hatch*.

(1) See in *Vithoba Malhari v. Corfield*, 3 Bom. H. C., App., 1. per *Yardley*, C. J. at p. 21, and per *Jackson*, J., at p. 26.

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HAN TAGORE.