1890

BAIJ NATH v. SITAL SINGH.

a sale of the defaulter's right, title and interest, and does not pass a title clear from prior incumbrances. It may well be that this consideration influenced the Legislature in omitting to allow a right of pre-emption in sales under s. 168.

In my opinion s. 188 of Act XIX of 1873 has no applicability to sales under s. 168 of that Act.

On these grounds I would disallow the claim of Sital to pre-emption and would decree the appeal of the purchaser Baijnath with costs.

Appeal decreed.

1890
November 7.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Mahmood.

BASDEO (PLAINTIFF) *v.* GHARIB DAS (DEFENDANT). *

Hindu Law—Succession to the "gaddi" of a temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast."

Per EDGE, C. J. and MAHMOOD, J.—The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponent's title.

Per MAHMOOD, J.—It was necessary for the plaintiff in this case to prove that he was "*Nihang*," as distinguished from "*Grihast*," which he failed to do. Meaning of the terms "*Nihang*" and "*Grihast*" explained.

Genda Puri v. *Chhatar Puri* referred to (1).

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Babu *Sirish Chandar Bose*, for the respondent.

EDGE, C. J.—This appeal arises out of a suit that has been heard and determined by the Subordinate Judge of Meerut, in which he dismissed the suit with costs. The plaintiff brought his suit to

* First appeal No. 28 of 1890 from a decree of Babu Piari Lal, Subordinate Judge of Meerut, dated the 3rd December 1888.

(1) L. R. 13 I. A. 105.

recover possession of a certain property attached to the *gaddi* of Baksar. He alleged that, according to the custom which governed the succession, he was the person lawfully entitled to the *gaddi* and to the title of *Mahant*, and, as such, to the property in suit. The custom which he alleged was that the *Mahant* for the time being had the power, without consultation with or interference by any one, to appoint his successor. His case was that he was so appointed by the deceased *Mahant* Ganga Prasad who died on the 26th February 1887. The plaintiff also alleged that the defendant had taken possession of the property attached to the *gaddi* and kept him, the plaintiff, out of possession of it.

On the other hand, the defendant, by his written statement, denied that the plaintiff had been nominated by Ganga Prasad as his successor; he alleged that the plaintiff was a married man and as such incompetent as a candidate for nomination; and he went on to allege that he himself had been appointed to succeed Ganga Prasad, and that such appointment was made with the consent of the *Mandaldhari Mahants*, and that he had been invested by Ganga Prasad with the cap and necklace, and that he had performed the obsequies of Ganga Prasad, and in paragraph 5 he in fact traversed the custom alleged by the plaintiff. He therein says :—"Succession to the *gaddi* depends upon the consent of the *Panchayati Mahants* and very exalted *Mandaldhari Mahants* so that the plaintiff has no right to get the property, nor is there any cause of action for the present suit." There were other questions raised in the written statement which it is not necessary, in the view that I take of the case, further to refer to.

Now the position is this :—The plaintiff claims a decree to eject the defendant from the property in suit. Admittedly the plaintiff never was in possession; and, admittedly, immediately after the death of Ganga Prasad, the defendant took possession and has continued in possession down to the present time. Under those circumstances it is for the plaintiff to prove a title which entitles him to have the defendant ejected from the property and to get possession of the property himself.

1890

BASDEO v. GHARIB DAS.

We have been referred to no case which is precisely in point. I mean by that, no case in which the question as to how the succession to the *gaddi* of a monastery of this particular persuasion of *Nanakshahis* has been decided. So far as we know, that is a question which has never been legally decided. We are bound, therefore, to see whether any custom has been proved, which would, on the facts as to nomination alleged by the plaintiff, if we were satisfied with his evidence as to the nomination, entitle him to a decree. The law as laid down by their Lordships of the Privy Council in the case of *Genda Puri* v. *Chhatar Puri* (1) applies in our opinion generally to this case.

I propose to refer to the evidence of the witnesses called on behalf of the plaintiff, to whose evidence our attention has been called by his counsel and vakil. There may have been other witnesses called on his behalf in the Court below whose evidence the plaintiff did not consider it necessary to translate or print, and whose evidence certainly has not been relied upon in the course of the argument of this case.

[The remaining portion of the judgment of Edge, C. J., has not been reported here as it deals exclusively with the effect of the evidence in the case. The conclusion arrived at was that the plaintiff-appellant, on the evidence adduced by him, had failed to prove his title and the appeal should be dismissed—W. K. P.]

MAHMOOD, J.—I agree so entirely in the estimate of the evidence which the learned Chief Justice has expressed in his judgment, that it is not necessary for me to say anything more than this, that on all points connected with the question of *onus probandi*, the proof of title rested with the plaintiff. I concur with him also in holding that the plaintiff has failed to prove his own case. The learned Chief Justice has already referred to the case of *Genda Puri* v. *Chhatar Puri* (1) and out of the judgment of their Lordships of the Privy Council I wish only to read two short passages at pages 105 and 106. The passage says :—" In determining who is entitled to succeed as *Mahant* in such a case as the present the only law to

(1) L. R., 13 I. A., 105.

be observed, is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to custom to recover the office and the land and property belonging to it. This has been laid down by this committee in several cases. The infirmity of the title of the defendant, who is in possession, will not help the plaintiff, as the Subordinate Judge seems to have thought."

In this case when I was listening to the learned argument addressed to us by Mr. *Hill*, the learned counsel for the plaintiff-appellant, I confess I did feel that there may have been as great a difficulty as the learned counsel imagined in the title of the defendant. However, I felt exactly as the learned Chief Justice has now represented in his judgment, that it is for the plaintiff to prove his title, be the title of the defendant as feeble as possible. This is all I wish to say as to the reason of my concurrence in the judgment of the learned Chief Justice.

There is, however, one matter upon which I wish to express a few words, and this is that I take it that both Mr. *Hill* on behalf of the plaintiff-appellant, and Mr. *Conlan* on behalf of the defendant-respondent concede, as common ground between them, that in order to qualify a *Chela* to succeed to the deceased *Ganga Prasad*, it was necessary that the successor should be *Nihang*, as distinguished from *Grihast*. His Lordship the Chief Justice has rightly observed that the exact distinction between these two terms is not necessary matter for decision for the purposes of this case. I do feel that myself; but I may say that, whilst fully concurring with that, I have no doubt (even after having heard the learned philological argument addressed to us by Pandit *Sundar Lal* in his reply on behalf of the plaintiff-appellant) that *Grihast* means a householder, that celibacy for purposes of the definition of *Nihang* is only a part of the qualification, a part of the signification, of the term. The word *Nihang* according to Shakespear's dictionary at p. 2099 means:—"Naked, free from care." I must then remember also what Fallon in his well known dictionary says as to the meaning of the word *Grihast*, from which the word *Grihasti* is derived by the

1890

BASDEO v. GHARIB DAS.

addition of the appendix „i." It means domestic or worldly affairs; and, as is usual with this learned author, he cites a well known Hindi proverb showing what in common parlance the word meant in the language of the country. This proverb is:— *Joga asan Grihast kathin*; Easy a holy friar to be, hard house affairs and husbandry.

I have absolutely no doubt that the translation of the word *Grihast* as given above is in accordance with the manner in which the word is used in the language of the country, and it does not necessarily mean a married man, nor is it limited to the fact of the taking place of any marriage ceremony legitimate or illegitimate. It means a householder at large; it means a householder as distinguished from a wanderer; an *Arya* from a *nomad*. It is important to know that a person who is a *Grihast* can never be a *Nihang* according to the proper signification of these terms.

The proverb quoted above has especial application here, because on the evidence in this case it clearly follows that the plaintiff was not a wanderer on the face of the world in order to be a *Nihang*, but he was a householder. It has been attempted to be shown that he was a married man; that he was keeping a woman. That evidence I do not attach any importance to; still there is enough to show that he was not a *Nihang*.

One word more as to the word *Grihast*, and I refer to the dictionary of Shakespear again at page 1700 where he says:— "*Grihast* means a householder, a man of the second order, or he who, after having finished his studies and been invested with the sacred thread, performs the duties of the master of a house and father of family; a peasant; a husbandman."

It must be clearly understood that the meaning of the word is somewhat similar to the Roman expression *pater familias*. In order to be *pater familias*, it is enough to be the head of a family, to be the manager of affairs in the household, and by analogy this is all that the Hindu law means by the word *Grihasti*, notwithstanding the contention of Pandit *Sundar Lal* who drew my attention to

Chapter 3 of *Manu Smriti*. It is needless for me to dwell upon that chapter, but I have no doubt that there is nothing there either as to the meaning of the word *Nihang*, or as to the signification of the term *Grihasti*.

Holding these views then as I do, *viz.*, that the plaintiff has failed to prove that he is a *Nihang*, but that he is a *Grihast*, I have nothing more to say than that I entirely agree in all that the learned Chief Justice has said upon the evidence, and the decree which his Lordship has made in the case.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MURTAZAI BIBI AND ANOTHER (DEFENDANTS) *v.* JUMNA BIBI AND OTHERS (PLAINTIFFS.) *

1890. [*December* 8.

Muhammadan law—Wakf—Construction of document.

Where a Muhammadan of the Shia sect executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowances for the other members, and of maintaining the dignity of the *riasat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *riasat*.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (1) followed. *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan* (2) *and Nizamuddin Gulam* v. *Abdul Gafur* (3) referred to.

---

* First appeal No. 143 of 1888 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Gorakhpur, dated the 29th June 1888.

(1) L. R., 17 I A., 28. (2) L. R., 3 I A., 291.
(3) I. L R., 13 Bom., 264.