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that the memorandum of appeal be returned to the plaintiff for him to file in the proper court. Under the circumstances we think that the parties should pay their own costs both in this Court and in the District Judge's Court.

Appeal decreed.

Before Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

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BENI MADHO PRAGWAL (DEFENDANT) *v.* HIRA LAL (PLAINTIFF).*

Pragwal—*Right of pragwal to exclusive use of a flag of a certain design—Suit for injunction*—Birt jajmani.

Held that a *pragwal* may acquire a right to the use of a flag of a particular design so as to enable him to sue for an injunction against any other *pragwal* making use of a flag with a similar design for the purpose of diverting pilgrims from the original owner. *Ganesh* v. *Babu Ram* (1) referred to.

THE facts of this case were as follows:—

One Sri Kishan was a *pragwal* and in that capacity made use of a flag of a particular design according to the custom of *pragwals*, the object of such flag being to indicate to illiterate pilgrims that such and such a *pragwal* was to be found in its neighbourhood. Sri Kishan died, and his business descended according to custom to his widow Musammat Kesar. She, however, being disqualified by her sex from carrying out the duties of a *pragwal*, employed one Beni Madho, who had been a confidential servant of Sri Kishan, to carry out those duties. This he did, but admittedly only as the agent of Musammat Kesar. On the death of Musammat Kesar, Beni Madho continued to carry on the business of a *pragwal* on his own account, using the same flag that had been used by Sri Kishan. Whereupon one Hira Lal, who was the next reversioner under the Hindu law to Sri Kishan, sued Beni Madho for an injunction to restrain him from using a flag of that design. The court of first instance decreed the suit, and on appeal the decree was confirmed. The defendant thereupon appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant:—

The real question is whether a *panda* had any property right in any particular design of flag. I submit not. There are two

* Second Appeal No. 1224 of 1917, from a decree of F. D. Simpson, District Judge of Allahabad, dated the 31st of July, 1917, confirming a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 28th of February, 1917.

(1) (1914) I.L.R., 37 All., 72.

kinds of rights, one given by Statute and the other acquired by long usage. The present case comes under neither. It is not in the nature of a customary right, because a customary right has to be pleaded and found. First it has to be shown whether it is a legal right an infringement of which gives a cause of action, they are not akin to trade rights. A trader can enforce his rights in a Court of Law. A *panda* cannot do so against his client. The analogy of trade-marks cannot be applied to such rights. For a trade-mark to be entitled to protection it must be actually applied to a vendible article in the market; *Sebastian:* Law of Trade-Marks, 5th Edn., page 33. Design has been defined in section 2, clause 5, of the Indian Patents and Designs Act (Act II of 1911) and means any design applicable to any article. The design in a flag is not applicable to any article and cannot be the subject of protection in a Court of Law. The case of *Ganesh* v. *Babu Ram* (1) where it was stated that the flags and books of *panda* are the ordinary paraphernalia or stock-in-trade of the owner of a *birt jajmani*, is distinguishable. The books of the *panda* may be property, but not the flag. Moreover, the point did not arise there directly. It was not argued in that case whether a *panda* has any property rights in a flag. The case proceeded upon the assumption that they carried with them a property right. The question in this case is whether that assumption is correct. A *pragwal* has no right of any kind in the land of the *ghat* to the exclusion of his neighbours. *Husain Ali* v. *Matukman* (2). *The Municipal Board of Cawnpore* v. *Lallu* (3). I submit that if a neighbour usurps the seat where a *panda* sits it is not the infringement of a right, much less the usurping of a flag.

Dr. *Kailas Nath Katju*, (for The Hon'ble Pandit *Moti Lal Nehru*), was not called upon to reply.

PIGGOTT and KANHAIYA LAL, JJ.:—The parties to this litigation are *pragwals*, that is to say, members of a certain class of priests, whose occupation it is to receive pilgrims at the sacred confluence of the waters at Allahabad and to assist them in the due performance of the ceremonies attendant on their

(1) (1914) I. L. R., 37 All., 72. (2) (1883) I.L.R., 6 All., 39.
(3) (1898) I. L. R., 20 All., 200.

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bathing in these sacred waters, more particularly on the occasion of certain festivals generally revered. The findings of the courts below are in substance as follows. One Sri Kishan was a *pragwal* carrying on this particular business. He used a flag with a certain emblem, which flag was fixed at the spot where at any particular time he had taken up his post on the river bank, as a means of identification for the benefit of the illiterate pilgrims, a sort of notice that if they came to the spot indicated by that flag they would find there Sri Kishan, *pragwal*, the descendant and successor by inheritance to the rights of a line of *pragwals* with whom it had been customary for any particular pilgrim and his family for generations past to deal on the occasion of their visits to the sacred confluence. Sri Kishan died many years ago, and his rights, whatever they were, passed to his widow, Musammat Kesar. The defendant, Beni Madho, was a confidential servant or attendant of Sri Kishan and continued to serve the widow in the same capacity. His position was so far changed by the death of Sri Kishan that, Musammat Kesar being unable personally to minister to the wants of the pilgrims, he was in a position to undertake that duty; but according to the finding which we must accept in second appeal, he did so as her agent and representative. Musammat Kesar died in 1915, and the plaintiff, Hira Lal, is the nearest reversioner under Hindu law to the estate of Sri Kishan, whatever that estate may be. The plaintiff claims the right to take over, if we may so express it, the business which had been carried on by Beni Madho as the agent of Musammat Kesar. He complains that his efforts to do so have been obstructed by the defendant. There has been a previous litigation, we may remark, in connection with an attempt made by Musammat Kesar to transfer certain houses to Beni Madho by way of gift. The essential fact upon which this suit is based is that, when the plaintiff takes his seat beside the waters in the neighbourhood of the confluence and sets up the flag which was used by Sri Kishan as his emblem, he finds the defendant, Beni Madho, also seated somewhere in the neighbourhood using a similar flag. There is a plea in the memorandum of appeal before us against the finding of the courts below that the flag used by Beni Madho is a colourable imitation of that

used by Hira Lal, but we must accept the clear finding of the lower appellate court on this point. We must take it that the flag set up by Beni Madho is calculated to mislead pilgrims into the belief that he, and not Hira Lal, is the successor and representative of Sri Kishan. The one substantial point which has been argued before us is whether, upon these facts, the plaintiff has a cause of action against Beni Madho. The right in virtue of which the plaintiff brings this suit is one of a kind generally described by the expression '*birt jajmani*.' It would be easy to cite cases in which a right so described, to receive offerings from pilgrims visiting a particular shrine, has been recognized by the courts in this province, and by this Court, as of the nature of property, as being enforceable by suit, as being generally heritable and sometimes as being transferable. We have to consider what the particular right of *birt jajmani* means in connection with the ceremonial bathing at the confluence of the rivers at Allahabad. Obviously no particular pilgrim can be compelled to seek the ministrations of any particular priest. It has been suggested also that no suit would lie by any particular priest against a pilgrim who had accepted his ministrations for the recovery of any particular fee. This latter argument, whether well founded or not, is of no practical consequence. As a matter of established custom the pilgrims who accept the ministrations of a particular priest in connection with their ceremonial bathing do pay him some remuneration for his services. Probably they would be too much afraid of the possibility of his calling down upon them the divine displeasure if they refused payment of whatever the customary fee may be. Now it is beyond question, that is to say, it is apparent from the evidence on this record, it does not seem to have been seriously denied in the pleadings, and it would not be difficult to quote decisions of this Court which proceed on the assumption, that particular pilgrims are in the habit of seeking out particular priests, or the descendants or representatives of some particular priest with whom they know that their family has dealt for generations. It may be that a pilgrim has greater faith in the due performance of all necessary ceremonies, and therefore in the religious benefit derivable from the ceremonial bathing, if

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he knows that it has been performed under the guidance and with the help of the prayers and ministrations of the representative of the priest with whom his family has been in the habit of dealing. The question then is simply whether the plaintiff is entitled to restrain Beni Madho from making use of an emblem, when such use in effect serves as a notice to the illiterate pilgrims that Beni Madho is the representative and successor of Sri Kishan, whereas such representative capacity belongs in law to the plaintiff, Hira Lal. The nearest case to the present, that of *Ganesh* v. *Babu Ram* (1), decided by a Bench of this Court of which one of us was a member, proceeds on the assumption that the *birt jajmani* right of *pragwals* at the sacred confluence of the rivers at Allahabad is a right both heritable and enforceable at law. It is quite true that this point was not specifically argued in that case, but the decision proceeds on the assumption that this was so. We have been referred to two other cases, *Husain Ali* v. *Matukman* (2) and *The Municipal Board of Cawnpore* v. *Lallu* (3), in which the question in issue was as to the right of certain priests to make use of a particular parcel of land to the exclusion of all other persons. In the former case the right was claimed as against a lessee of the Municipal Board of Benares and in the latter case as against the Municipal Board of Cawnpore. The decision of this Court in each case was that the plaintiff had failed to establish any right in the soil. No question arises in the present case as to the right of the plaintiff or of any other *pragwal* to occupy any particular parcel of land. Indeed, as thus stated, the question could never arise, in view of the notorious fact that the rivers are continually shifting their course, that the whole appearance of the sacred confluence may be altered and its locality shifted very considerably between one year and another. We are not concerned in this case with any question that may arise as to the relative rights of *pragwals* to establish themselves nearer to the sacred confluence itself on any particular festival, or on any other occasion. Such a question can be dealt with if and when it arises. In the present case the question is simply whether the

(1) (1914) I. L. R., 37 All., 72. (2) (1883) I. L. R., 6 All., 39

(3) (1898) I. L. R., 20 All., 200.

plaintiff has or has not a right to carry on a certain business in or about a particular locality, and whether the defendant has or has not given him a cause of action by unlawful interference with his conduct of that business. We think that these questions must be answered in the affirmative. This appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

NAND KUNWAR AND OTHERS (DEFENDANTS) *v.* SUJAN SINGH (PLAINTIFF).* 1920 *May*, 31.

Civil Procedure Code (1908), order XXXIV, rule 8—Prior and subsequent mortgages—Suit and sale of mortgaged property by prior mortgagee—Subsequent suit for sale by puisne mortgagee not impleaded in former suit—Court not competent to extend time limited for payment of purchase money to auction purchaser.

Held that a suit by a puisne mortgagee, who had not been made a party to the prior mortgagee's suit in the course of which the mortgaged property had been sold by auction, to pay off the auction purchaser and bring the mortgaged property to sale, is not, *quoad* the auction purchaser, a suit for redemption, and the Court has no power under order XXXIV, rule 8, to extend the time limited for payment of whatever may have been found due to the auction purchaser *Kalian* v. *Sadho Lal* (1) distinguished. *Idumba Parayan* v. *Pethi Reddi* (2) dissented from.

THE facts of this case are fully stated in the judgment of the Court

Mr. *J. M. Banerji*, for the appellants.

Babu *Piari Lal Banerji*, and Munshi *Panna Lal*, for the respondent.

TUDBALL and SULAIMAN, JJ. :—This is a defendant's appeal which has arisen out of a mortgage suit on an application by the decree-holder for a final decree. The facts are as follows :—

Two persons, Hari Singh and Sahib Singh, on the 22nd of June, 1871, created a simple mortgage over the property in suit in favour of one Sujan Singh (not the present respondent). On the 17th of March, 1876, they created another simple mortgage on the property in favour of one Lachcho On the 27th of July, 1878, Sujan Singh sued upon his mortgage without impleading Lachcho, the puisne mortgagee. The property was finally put

* First Appeal No. 398 of 1917, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 20th of April, 1917.

(1) (1912) I. L. R., 35 All., 116. (2) (1920) I. L. R., 43 Mad., 357.