
(1974) 03 RAJ CK 0017
In the Rajasthan High Court
Case No : Second Appeal No. 400 of 1970

Bhagwati Lal and Others

APPELLANT

Vs

Bhorelal and Others

RESPONDENT

Date of Decision : 01-03-1974

Acts Referred:

Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44

Citation : AIR 1974 Raj 225 : (1974) RLW 139 : (1974) 7 WLN 232

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Advocate : R.K. Rastogi and R.P. Dave, for the Appellant; C.L. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

C.M. Lodha, J.—This appeal raises an interesting question ,as to the interpretation of Section 4(1) of the Partition Act (IV of 1893) (which will hereinafter be referred to as "the Act").

2. Plaintiff Moola and defendants Nos. 1 and 2 Potu and Loharey were members of an undivided family. Moola's father Bholuram and defendants Potu and Loharey's father Kundan were first cousins. The family owned a house in Karauli. Moola had half share and Potu and Loharey had jointly half share in the house. Defendants Nos. 1 and 2 mortgaged their undivided half share with Fakiralal and Ghisiya Lal for a sum of Rs. 1,500 by a registered mortgage deed dated 17-5-1967. The whole of the house was, however, in possession of Gannulal and Devilal whom it had been rented out, about 10 years prior to the mortgage, Plaintiff Moola filed the present suit in the Court of Munsiff. Karauli on 22-1-68 for partition and separate possession of his half share in the house. On 16-3-1968, defendants Nos. 1 and 2 redeemed the mortgage and sold their half share to Bhagwatilal and his brothers Haricharanlal and Gopal Prasad, sons of the erstwhile tenant Devilal by a registered sale deed dated 16-3-1968.

Consequently the plaintiff amended the plaint on 6-5-1968 by substituting the aforesaid purchasers Bhagwatilal, Haricharan Lal and Gopal Prasad as defendants 3, 4 and 5 respectively in place of the mortgagees Fakiralal and Ghisiya Lal, All the defendants resisted the plaintiff's suit. Defendants Nos. 3, 4 and 5 pleaded inter alia in their joint written statement that the defendants Nos. 1 and 2 had offered to sell their half share in the house to the plaintiff and in the alternative also offered to purchase his share, but the plaintiff remained silent and thereupon defendants Nos. 1 and 2 sold their share to them after redeeming the mortgage. The trial Court framed 5 issues on 30-7-1968. On 30-8-1968 the plaintiff made an application u/s 4 of the Act that the half share of defendants Nos. 1 and 2 sold by them to defendants Nos. 3 to 5 may be directed to be sold to him for a price to be assessed by the Court. This application was opposed by both sets of defendants, who filed separate replies to the application. Defendants Nos. 3, 4 and 5 stated that the valuation of the whole house was not less than Rs. 10,000/-, and, therefore, the suit was not triable by the Munsif Court. They further pleaded that they were prepared to purchase the plaintiff's half share in the house for Rupees 5,000/-.

3. After recording the evidence produced by the parties the learned Munsiff, Karauli by his judgment dated 3-6-1970 allowed the plaintiff's application u/s 4 of the Act and directed defendants Nos. 3 to 5 to execute a sale deed in favour of the plaintiff in respect of the 1/2 share, and get the same registered for a consideration of Rs. 5,000/- on or before 22-7-1970 and fixed 7-7-1970 for deposit of the sale price Rs. 5,000/- by the plaintiff.

4. Aggrieved by the judgment of the trial Court defendants Nos. 3 to 5 filed appeal but the learned Additional District Judge. Gangapur City by his judgment dated 12-9-1970 affirmed the judgment of the trial Court. Hence this second appeal by defendants Nos. 3 to 5 Bhagwatilal and others.

5. The following two points have been urged by Mr. Rastogi, learned Counsel for the appellants:--

(i) That Section 4 of the Act does not apply to the present case as the transferee has not sued for partition, and, therefore, one of the essential conditions of the section has not been fulfilled; and

(ii) that the house in question is not ft "dwelling house" and therefore too Section 4 does not apply.

6. I may observe straightway that there is a sharp cleavage of judicial opinion on the first question. Of course, the present suit has not been instituted by the transferees for partition. They are defendants in the case. The contention of the learned Counsel for the appellants is that Section 4 applies only in a case where the transferee brings a suit for partition. Alternatively he has argued that at any rate if the transferee does not file the suit for partition, he must, even in the position of a defendant, make a claim for partition, but, that in the present suit the appellants who are transferees did not make even a claim for partition. His

argument in a nut-shell is that Section 4 of the Act cannot in any case apply to a suit where the transferee does not make a claim for partition either as plaintiff or as a defendant but resists the prayer for partition. In this connection he has argued that the right conferred by Section 4 of the Act is one of pre-emption which is a weak right and, therefore, the provisions of Section 4 must be strictly construed.

7. On the other hand Mr. Agarwal learned Counsel for the respondent-plaintiff has contended that Section 4 of the Act would be applicable even where the suit for partition is brought by a member of an undivided family against a stranger transferee and the latter may not have specifically claimed a share in the residential house.

8. As I have already observed above, the case-law is not uniform on the point and there have been conflicting decisions in the same High Court. Since there is no decided case of our Court and the learned Counsel for both the parties have taken pains to place before me all the relevant case law on the point, I think it proper to discuss some of these cases.

9. In *Balshet Gopalshet Sonar v. Miransaheb Daruwale*, ILR (1899) Bom 77, Parsons. J., observed that "the District Judge applied Section 4 of the Partition Act (IV of 1893) to this case apparently without noticing that that section in its terms relates only to cases where the transferee sues for partition." It was held that Section 2 and not Section 4 was applicable to the case inasmuch as the parties were agreed that a division of the house could not conveniently be made, and the Court at the request of the largest share-holder, directed a sale of it. With these observations the case was remanded to the District Court with a direction to determine the market value of the house by a sale by auction and to order sale of the shares to the share-holder, who offered to pay the highest price above that valuation and distribute the purchase money in the proportion of the share owned by each. There is, however, no discussion on the point as to what is meant by the phrase "sues for partition".

10. In *Khanderao v. Balkrishna*, AIR 1922 Bom 121 separate judgments were written by Macleod, C. J. and Shah, J. and the latter observed as follows:--

"But I feel quite clear that Section 4 is limited to the transferee who sues for partition. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may claim his share in a partition suit."

In that case an application u/s 4 of the Act was made by the second defendant, a member of the family after the preliminary decree was passed asking the executing court to take action under that section with regard to the shares of the plaintiff and the defendant No. 3 who were transferees from two other members of the family. The question that arose for decision was whether the application of the second defendant could be granted with respect to the share of the third

defendant? It was observed that it cannot be said that the third defendant was suing for partition. It was further observed that if the plaintiff's share was valued u/s 4 and defendant No. 2 paid its value, the suit would come to an end as there would be no longer any plaintiff to the suit and unless one of the defendants applied to be made a plaintiff in his place, proceedings would necessarily abate. Thus It would be seen that no considered opinion was given regarding the interpretation of the phrase "sues for partition". There is no other Bombay case brought to my notice.

11. Now I turn to the cases of Calcutta High Court: In *Satyabhama De Vs. Jatindra Mohan Deb and Others*, the Court found that the respondents had applied for a share in the dwelling house and it was held that it would not be stretching too much the language of the law to treat the respondents as plaintiffs within the meaning of Section 4, Partition Act. It was observed that this view is supported by the well-known principle that a party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant, and that this dual capacity of a party in a partition suit does not preclude even the defendant who claims a share in the dwelling house from being treated as plaintiff for the purposes of Section 4 of the Act. It was further held that by their application, the respondents claimed share in the dwelling house and they may be treated as suing for partition of the dwelling house.

12. In *Abu Isa Thakur and Another Vs. Dinabandhu Banik and Another*, Das, J., held that Section 4 should be liberally construed and after relying on the definition of the words "to sue" in Stroud's Judicial Dictionary, the learned Judge observed that the object of Section 4 is to prevent intrusion of strangers into the dwelling house of an undivided family and that this object would be frustrated if a stranger purchaser forces himself into the dwelling house of an undivided family and drives the other co-owner to file a suit as plaintiff and then figuring as a defendant is allowed to defeat the claim for pre-emption u/s 4 on a narrow and literal interpretation of the section."

The learned Judge further observed that "in a suit for partition, the parties to the suit are in the position of counter claimants and it can very well be predicated of a defendant in a suit for partition that he is suing for partition." It may be pointed out that in that case the defendant-transferees did not make any specific claim for their share and yet Section 4 of the Act was held to be applicable. This case fully supports the respondent-plaintiffs' contention.

13. In *Sunil Kumar Mukhopadhyaya and Another Vs. Provash Chandra Majumdar and Others*, which is a Bench decision, P.N. Mookerjee, J., with whom Gupta, J., agreed observed as follows:--

"So far as this Court is concerned, the above statutory provision has almost always been liberally construed and widely Interpreted in favour of the members of the family and strictly against the stranger purchaser.

It is also well settled in this Court that the above statutory provision (Section 4

of the Partition Act) applies not only in the case of a suit by the stranger purchaser as plaintiff, but, also, to a case where the said stranger purchaser is sued as a defendant for partition."

Thus the Calcutta High Court has put liberal construction u/s 4 of the Act in favour of a member of the family.

14. Two decided cases of the Madras High Court have been brought to my notice: Both are single Bench decisions and they have taken slightly divergent views. In *Sri Muthangi Butchi Ramayya Vs. Gurralla Venkata Subbarao and Others*, Raghava Rao, J., held that there must be a suit at the instance of a transferee of a share of a dwelling house for partition and then, if any member of the family, being himself a share-holder in respect of the dwelling house, undertakes to buy the share of the transferee-plaintiff the Court shall make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder. It was observed that the equity of the statute, as it is sometimes called, cannot override its plain language. In this view of the matter, it was held that where a member of the joint family sues the stranger transferee of a share of the house for purchasing the share, there being no suit for partition by the transferee his claim cannot be allowed. This case supports the appellants' contention. However, in a later case, *Ramaswami Pillai Vs. Subramania Pillai and Another*, Natesan, J., took a middle course and observed that since in the case before him the transferee-defendant had himself come out with an application under Order XX, Rule 18. CPC for partition of the properties, and for passing of a final decree, he was certainly suing for partition and it would be open to a sharer in the family to buy him off under the provisions of Section 4 of the Act.

15. So far as Allahabad High Court is concerned the latest judgment placed before me is a Full Bench decision; *Sakhawat Ali Vs. Ali Husain and Others*, . Hence I do not consider it necessary to refer to earlier cases of Allahabad High Court. Mootham, C. J., while delivering opinion of the Full Bench observed as follows:--

"In our opinion it was clearly the intention of the legislature that the right conferred by Section 4 should accrue to the member of the undivided family only in the event of the transferee seeking to obtain partition of his share in the dwelling house, and we hold therefore that the provisions of Section 4(1) will not apply to a suit for partition in which the stranger defendant does not himself claim the separation of his share. It may be that the construction which in our view should be placed on this sub-section will in some instances, deprive a plaintiff of a relief to which under a wider interpretation he would be entitled, but as has been pointed out in *Sri Muthangi Butchi Ramayya Vs. Gurralla Venkata Subbarao and Others*, a decision with which we respectfully agree the equity of the statute cannot override its plain meaning."

Thus this case is an authority for the proposition that a transferee could be considered to be one who sues for partition, even though a defendant in a suit

for partition, when he claims his share and prays for allotment of the same.

16. Coming to the Patna High Court the latest case brought to my notice is Harendra Nath Mukharjee Vs. Shyam Sunder Kuer and Others, This is a Bench decision and therefore I do not consider it necessary to refer to the earlier Single Bench cases of Patna High Court. In that case it was held that though on the language of Section 4 of the Act, the Act applies to a suit for partition filed by a transferee, by judicial decisions this section has been extended to apply to a suit for partition filed by a member of the family as well. In this connection reference was made to an earlier Bench decision of that Court: Abinash Chandra v. Smt. Kamla Devi AIR 1950 Pat 317. The Patna High Court seems to be consistently of the view that Section 4 has to be liberally construed, and cannot be read as precluding a member of the family from availing himself of the provision of this section, if the stranger transferee has not filed the suit for partition, Thus the Patna High Court is in favour of the view propounded on behalf of the plaintiff-respondents.

17. In AIR 1937 4 (Nagpur) Stone, C. J., held that "where in the course of another suit the defendant applied to have a partition under the Partition Act, he is correctly regarded as having "sued" for partition within the meaning of Section 4." In coming to this conclusion he relied on the definition of the term "to sue" in Stroud's Judicial Dictionary.

18. The only other High Court whose cases have been placed before me by learned Counsel for both the parties is Orissa.

19. In Banchhanidhi Vs. Balaram and Others, a Single Judge of that Court held that

"the language of Section 4 does not preclude a defendant from availing himself of the provisions of that section if the stranger transferee happens to be arrayed as a party defendant and should not be strictly limited only to those cases where the transferee figures as the plaintiff."

20. In a subsequent decision Sundari Bewa Vs. Ranka Behara and Others, a discordant note was struck by another Judge sitting singly and it was held that only in a case where a stranger purchaser is suing for partition of his share as against the joint family that the need for exercising the right of pre-emption u/s 4 of the Act arises and hence in a case where the stranger-purchaser even claims partition of his share as a defendant in the suit for general partition. Section 4 of the Act is not attracted. The learned Judge observed that the stricter view is more reasonable and is in accord with the plain and literal meaning of the section. Both these cases came up for consideration before a Division Bench of that Court in Alekha v. Jagabandhu, AIR 1971 Ori 127 and Sundari Bewa Vs. Ranka Behara and Others, was overruled. The learned Judges also differed from the view taken by the Allahabad High Court in Sakhawat Ali Vs. Ali Husain and Others, and held that to attract the operation of Section 4 of the Act, it is not necessary that the stranger-defendant should have also claimed a partition of his

own share in that dwelling house, Thus this is the extreme view in favour of a member of an undivided family.

21. The net result of the foregoing discussion of the authorities of the various High Courts is that Calcutta, Orissa and Patna are completely in favour of the member of an undivided family and hold that Section 4 of the Act would be attracted in a suit for partition instituted by a member of an undivided family in respect of a dwelling house against a stranger defendant even though the stranger defendant may not have claimed a partition of his share.

22. The Allahabad and the Nagpur High Courts have taken a middle course and their view is that Section 4 would apply even though a suit is not brought by the stranger but the stranger defendant seeks to obtain partition of his share in the dwelling house. Out of the two Madras Single Bench cases the earlier case: Sri Muthangi Butchi Ramayya Vs. Gurrula Venkata Subbarao and Others, is an extreme view in favour of the stranger-defendant, whereas Ramaswami Pillai Vs. Subramania Pillai and Another, seems to follow the middle course propounded by Allahabad. The Bombay High Court also seems to be of the view that for application of Section 4 of the Act the suit for partition must be brought by the stranger-purchaser, though the point did not arise directly and has not been discussed in detail,

23. At this stage. I may advert to Section 44 of the Transfer of Property Act which reads as under:--

"44. Where one of the two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as, to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred."

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. Second Part of this section excludes the right of a stranger-purchaser of a share in a dwelling house to joint possession. As has been observed in *Khirode Chandra v. Saroda Prosad*, (1910) 7 Ind Cas 436 (Cal) Section 4 of the Act is a logical sequel or corollary to Section 44 of the Transfer of Property Act. The latter Act denies the right of joint possession to a stranger-purchaser who is left only with the right to sue for partition. It was felt that the partition of a dwelling house specially of small dimensions would divide it into unsuitable parcels and may in some cases introduce undesirable neighbours. The Partition Act, 1893 was therefore enacted so as to come to the rescue of the members of an undivided family, and gave them the right to purchase shares obtained by strangers to the family. There is no denying the fact that the object underlying Section 4 of the

Act is to prevent the transferee of a share in the family house, who is an outsider from forcing his way into the dwelling house in which the other members of the transferor's family have a right to live. Consequently an interpretation which would advance the object of the Act must be put if that can be done without sacrificing or disregarding the terms of the section.

24. In Stroud's Judicial Dictionary the phrase "to sue" has been defined thus:--

"And these words "to sue" may be applied indifferently either to the defendant or plaintiff. And the words "to sue" not only signify "to prosecute" but also to defend or to do something which the law requires for the better prosecution or defence of the cause" (page 2912 -- Third Edition).

25. Thus the expression "such transferee sues for partition" can be interpreted to apply to a transferee defending a suit for partition. If effect were given to the respondents' contention the result would defeat the object of the legislature to secure the indivisibility of a dwelling house. Imagine of a case where the stranger-purchaser may make a forcible entry into a dwelling house of an undivided family and drives the other co-owners to file a suit for partition as plaintiff, then the plaintiff would not be able to have the benefit of Section 4 of the Act with the result that he must put up with undesirable neighbours in the same house. This would result in clearly setting at naught the object and intention behind Section 44 of the Transfer of Property Act and Section 4 of the Act. In giving the interpretation which I have done it would not be correct to say that equity has been allowed to override the statutory provision. On the other hand I think, I have given a just and equitable interpretation to the language of the section without doing any violence to it.

26. I am, therefore, of opinion that a member of an undivided family who has filed a suit for partition against a stranger defendant is entitled to the benefit of Section 4 of the Act even in a case where the defendant-stranger does not claim his share by partition of a dwelling house,

27. However, I would like to examine this case from another point of view also which has found favour with some of the High Courts and particularly with the Allahabad High Court in AIR 1956 All 356 (FB). In para No. 11 of their reply to the application u/s 4 of the Act, the appellants have stated that they are prepared to purchase the plaintiff's half share for Rs. 5,000/-. The question is whether this sort of offer to purchase out the plaintiff's share by the defendants amounts to claiming a partition of their share? Learned counsel for both the parties have frankly stated before me that they have not been able to lay their hands on any direct authority on the point,

28. In AIR 1950 Pat 317 while dealing with the question of court-fee payable on an appeal in respect of the prayer u/s 4 of the Act it was observed that the prayer simply amounted to asking for partition indicating the manner in which it should be made. The learned Judges observed as follows:--

"This provision (Section 2 of the Act) as also the provision in Section 4 appears to prescribe modes in which a partition can be made. In this aspect of the matter, it appears to us that the plaintiff, in asking for relief u/s 4, Partition Act, was doing no more than asking for partition and indicating the manner in which the partition should be made."

29. A perusal of the provisions of Sections 2, 3 and 4 of the Act would show that in a suit for partition it is not necessary that the subject-matter of partition must be physically divided i.e. by metes and bounds. u/s 2 for certain reasons the Court may direct a sale of the property and distribution of the proceeds thereof among all the share-holders, u/s 3 the Court may offer to sell the share or shares to such shareholder at the price ascertained on a valuation of the share or shares. Thus the modes prescribed in Sections 2, 3 and 4 of the Act are only methods of partition. In some of the States of the U. S. A. when the nature and condition of the property are such that the Statute will not compel actual partition, the commissioners are authorised to make an appraisal in respect of partition. This appraisal is returned to the court and if one of the parties is willing to take the property and pays the appraised value he is permitted to do so.

30. In T.S. Swaminathudayar Vs. The Official Receiver of West Tanjore, the Supreme Court said that "while effecting a partition of joint family properties it would not be possible to divide the properties by metes and bounds there being of necessity an allocation of properties of unequal values amongst the members of the joint family, properties of a larger value might go to one member and properties of a smaller value to another and therefore there would have to be an adjustment of the value by providing for the payment by the former to the latter by way of equalisation of their shares. This position has been recognised in law and a provision for such payment is termed "a provision for owelty or equality of partition."

31. It, therefore, appears to me that though the ordinary method of partition is to direct a physical severance of the separate interest but the Partition Act envisages other methods of partition also in view of the exigencies of each case and an offer to purchase a co-owner's share or to sell one's own share to the co-owner is also a method of partition. In this view of the matter, I have come to the conclusion that in the facts and circumstances of the present case, it must be held that the appellants by making an offer to purchase the plaintiff's half share in the dwelling house for Rs. 5,000/- made a claim for partition. Consequently, judging from this angle also the appellants should be deemed to have asked for partition, and, therefore, too the condition "such transferee sues for partition" is fulfilled.

32. I may now refer to one more branch of argument of the learned Counsel for the appellants and it is this that since the right conferred by Section 4 of the Act is a right of pre-emption it should be strictly construed. In this connection reliance has been placed on Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, Rati Ram and Others Vs. Mam Chand and Others,

and Mota Singh v. Prem Prakash Kaur, ILR (1961) P&H 614,

33. In Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, it was observed that there are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute, and that the right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts cannot go out of their way to help the pre-emptor. Suffice it to say that these observations were made by their Lordships in an altogether different context while dealing with the provisions of the Berar Land Revenue Code and have no application to the facts and circumstances of the case on hand. Moreover, the present case is not one of defeating law of pre-emption by any legitimate means. The conclusion to which I have come is based on interpretation of the provisions of Section 4 of the Act, The authorities relied upon by the learned counsel are distinguishable and do not apply to this case.

34. This brings me to the second point, viz. whether the house in question is a "dwelling house"? I may observe that this objection was not raised before the first appellate court and therefore the appellants must be deemed to have abandoned it. However, the learned counsel for the appellants argued that it is a pure question of law and may be allowed to be raised in this Court. The appellants, it appears, gave up or abandoned this ground in the lower appellate court and cannot be allowed to raise it now. Apart from that, I do not find any substance in this point even on merits. There is ample authority in support of the view that creation of a tenancy does not terminate the possibility of the owners of the house returning to its occupation. What seems to be important u/s 4(1) of the Act is that the house concerned should either be actually in use, though not necessarily in constant occupation by the owners as a residential house or that conditions should be such that it is still possible for them to return to the house for occupation at some future time. Judging by that test, by mere grant of a tenancy, a house which is otherwise a residential house of the members of the undivided family owning it, does not cease to be a dwelling house. Reference in this connection may be made to Dulal Chandra Chatterjee Vs. Gosthabehari Mitra, Kalipada Ash and Another Vs. Tagar Bala Dasi and Others, Kalyanmal v. Jagadishprasad, AIR 1953 Nag 130 and Krishna Pillai Vs. Thekke Valia Veetil Parukutty Ammal,

35. A bare perusal of the statement of P. W. 1, Moola (plaintiff) dated 12-8-1969 shows that he has not abandoned the idea of living in the house and no such act as may amount to abandonment on his part has been proved. He has stated that though he did not see his ancestors living in the house, he and his sons occupied this house in the year 1938 and that his aunt died in this very house and her last rites were performed in it. He has further stated that his daughter's marriage was performed in this house and that from 1938 he lived in one of the rooms of this house for 8 to 10 years and one of the rooms is still under his lock and key. In cross-examination he has stated that he is at present living in a house rented

out from Kirori and that he has experienced considerable difficulty in shifting from one rented house to another. Learned Counsel for the appellants argued on the basis of this statement that the house in question ceased to be a dwelling house. In my opinion, the contention of the learned Counsel is without force and my conclusion is that the house in question has not ceased to be a dwelling house of the family.

36. Before closing the judgment, I may refer to an additional ground relied upon by the learned Counsel for the respondent-plaintiffs on the basis of which he tried to support the judgment under appeal. That ground is that the plaintiff-respondents are entitled to pre-empt the sale of half the share by Potu and Loharey in favour of the appellants under the Rajasthan Pre-emption Act, 1966. No such ground, was relied upon either in the pleadings or in the course of trial and it is therefore not open to the respondents to take the appellants by surprise as they had no opportunity to meet the plaintiff's case on this point in any of the two courts below. If this ground had been relied upon by the plaintiff in his pleadings, for ought I know, the appellants may have raised a very formidable defence on facts as well as in law. I am, therefore, not prepared to permit the respondent-plaintiffs to rely on this ground.

37. The net result of the foregoing discussion is that no case has been made out for interference with the judgment of the court below and I hereby dismiss the appeal. However, the parties are left to bear their own costs.