

(1911) 08 CAL CK 0024
In the Calcutta High Court

Bibi Imambandi and Others

APPELLANT

Vs

Matasuddi and Others

RESPONDENT

Date of Decision : 30-08-1911

Acts Referred:

Evidence Act, 1872 — Section 155(3), 33, 34

Citation : 13 Ind. Cas. 678

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This appeal is directed against a decree in a suit for recovery of possession of Immovable properties which admittedly belonged at one time to a Muhammadan gentleman by name Mahammad Ismail Ali Khan who died on the 21st March 1903. The case for the plaintiffs-respondents is that Ismail Ali Khan left three wives and children by each of them and that on the 10th June 1906 they obtained a conveyance from the fourth wife of the share which had vested in her and her infant children. The plaintiffs farther allege that on the 17th June 1903 they applied for the registration of their names, in the office of the Collector, in respect of the share purchased by them but the application was opposed by the second and third wives and dismissed on the 21st May 1907. The order of dismissal was confirmed on appeal on the 12th August 1907. The Revenue Authorities found in substance that the lady alleged by the plaintiffs to be the youngest wife of Ismail Ali Khan was never lawfully married to him and was in fact his concubine. The plaintiffs thereupon commenced this action on the 21st March 1909 for declaration of the status of their vendor and of their title by purchase and also for recovery of possession with mesne profits and costs. They joined as defendants ten persons, namely, the two admitted wives of Ismail Ali Khan (the first and fifth defendants), the children of each of them, and their own vendor (the eighth defendant) and her children. The relationship between the parties will appear upon an examination of the three annexed geasological tables. The first shows the wives of Ismail Ali Khan and their children. The second sets out the pedigree of the family from which the third wife Amir Jahan

is descended. The third table furnishes the connecting link between the families and shows some of the principal persons examined as witnesses or mentioned in the evidence in the present litigation. The claim of the plaintiffs was resisted by the defendants who denied the title of their vendor, impeached the conveyance as a fictitious transaction, and questioned also the extent of the share, if any, to which the plaintiffs might, be fraud entitled. Upon these pleadings eight issues were raised of which three were important. The fourth issue raised the question, whether the eighth defendant was the married wife and the ninth and tenth defendants the legitimate children of Ismail Ali Khan, and whether the latter were acknowledged by him as such. The fifth issue raised the question, whether the conveyance dated the 10th June 1905, propounded by the plaintiffs, was valid and whether the contesting defendants could question the transfer. The eighth issue raised the question as to the properties of which the plaintiffs were entitled to recover possession. With reference to this last issue, it may be mentioned that the plaintiffs obtained a conveyance from the vendor on the 9th September 1909 by way of supplement to the original deed of sale. The fourth issue, it will be observed, raises the fundamental question in the case. The Subordinate Judge has answered this issue in favour of the plaintiffs and has decreed the suit. The two admitted wives of Ismail Ali Khan and their children have preferred this appeal. The decision of the Subordinate Judge has been assailed before us on the ground that it is against the weight of evidence on the record. It has also been suggested that evidence of a conclusive character has been improperly excluded to the detriment of the defendants. Before we deal with the evidence on the record, we must examine the question of the alleged improper exclusion of important relevant evidence.

2. The evidence which has been excluded consists of account-books of Ismail Ali Khan for a period of 19 years, i.e., from 1885 to 1904. The account-books had been filed by Ismail Ali Khan in a previous litigation against the present plaintiffs, known as the Chouth case. The plaintiffs allege that they had at that time made notes of entries in the account-books, and as upon the institution of the present suit, they found that the entries would be of considerable assistance to them, they called upon the defendants to produce the account-books. The suit was commenced on the 25th March 1909 and the requisition for the production of the account-books was made by the plaintiffs on the 22nd June 1910 during the progress of the trial in the Court below. The defendants did not produce the books till the 26th June, that is, after the plaintiffs had closed their case. The plaintiffs then discovered that pages had been interpolated and alterations made in the account-books with the result that some, at any rate, of the entries were inconsistent with their case. They consequently took exception to the reception of the books in evidence. About this time, a singular incident happened. The Subordinate Judge received--no one can explain from what source they came--several sheets which purported to be pages torn from the account-books. The entries in these pages do not accord with the admitted facts of the case. The Subordinate Judge has under these circumstances considered the account-books

as by no means beyond suspicion, and on the whole unreliable. It is singular that if the account-books are genuine and contain entries favourable to the case of the defendants, that the latter should not have produced them of their own accord at a much earlier stage of the proceedings. It cannot be suggested that the defendants did not appreciate the importance of these entries, they threw light upon a dispute which had broken out more than three years before and had been keenly maintained before the Revenue Authorities. The books were in the possession of the defendants from at least the 3rd August 1909 to the 25th June 1910. The unexplained omission to produce them at the proper stage of the proceedings is thus a matter for legitimate comment. The situation is not improved by the mysterious re-appearance of lost pages, while our examination of their appearance has rather confirmed than dispelled the doubts as to their genuineness which would otherwise result from the circumstances mentioned. There are in addition two weighty reasons which completely take away the evidential value of the account-books. In the first place, the books have not been properly proved, much less has any serious attempt been made to prove specific entries u/s 34 of the Indian Evidence Act. Mere assertions that particular pages or volumes were written by this or that writer, is not sufficient compliance with the provisions of the law, as explained in the case of *Hingu Miya v. Heramba Chandra Chakravarti* 13 C.L.J. 139 : 8 Ind. Cas. 81. It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business; but it is not sufficient merely to prove the correctness of the books. The entries themselves have to be proved unless, indeed, the necessity for such proof is removed by the admission of the opposite party. In the second place, it may be a matter for argument whether the books can be used for the purpose for which they were mainly intended, namely, to draw an inference adverse to the plaintiffs from the absence of the names of their vendors in the account books. The cases of *Queen-Empress v. Grees Chunder Banerjee* 10 C. 1024 and *In the matter of Juggun Lal* 7 C.L.R. 356, seem to indicate that though entries in a book of account are relevant to the extent provided by Section 34 of the Indian Evidence Act, such a book is not by itself relevant to raise an inference from the absence of any entry. The same view is apparently supported by the observations of Lord Davey and Lord Robertson in *Ram Pershad Singh v. Lakhpati Koer* 30 C. 231 at p. 247 : 7 C.W.N. 162 : 5 Bom. L.R. 103. The contrary view, however, was taken in *Sagur Mull v. Manroj* 4 C.W.N. ccvii in which it appears to have been held that the cases just mentioned did not rule that the fact of an absence of an entry is no evidence at all under any Section of the Indian Evidence Act and that evidence that there is no entry in the account books, though not admissible u/s 31, may be admissible under Sections 9 and 11. We are inclined to adopt this view, but we need not examine this aspect of the matter further, because we hold, concurrently with the Court below, that the account-books are unreliable and have been rightly discarded. We shall now proceed to examine the evidence on the record as it stands.

3. It may be stated at the outset that the oral evidence is hopelessly contradictory, and there are conflicting assertions by men of apparent respectability which it is extremely difficult, if not impossible, to reconcile. Our difficulty has not been diminished by the laxity with which previous depositions were received in evidence in the Court below. In the case of those witnesses who are now dead but who had deposed upon the matters in controversy in previous proceedings between the parties, the depositions have been properly admitted in their entirety. In instances where this has happened, it is only essential to see that the requirements of Section 33 of the Evidence Act are fulfilled. Section 32, Clause (5) is not of much assistance, because the previous statements were generally made after the present dispute had commenced. In another class of cases, namely, where a witness has been examined in the present trial but his previous deposition is relied upon to impeach his credit u/s 155, Clause (3) of the Indian Evidence Act, the contradictory statements alone can be admitted in evidence. In some instances, however, a previous deposition has been admitted in its entirety, and the attention of the witness has not even been drawn to the alleged contradictions so as to afford him an opportunity to explain the statements *Sham Lall v. Anuntee Lall* 24 W.R. 312 and *Queen-Empress v. Madho* 15 A. 25. See also Sections 145 and 158 of the Indian Evidence Act. At one stage exception was taken before us to the admissibility of evidence thus irregularly received. But when it transpired that each of the parties had treated the witnesses of his opponent in this manner, they agreed to waive their objection to the evidence to which otherwise valid exception might have been taken; and they invited the Court to arrive at a conclusion upon the whole of the evidence on the record. In our examination of the evidence, we must bear in mind at the outset the respective cases of the two parties. The plaintiffs assert that Enayet Zahora had been lawfully married by Ismail Ali Khan and that the ninth and tenth defendants are his children born of her womb. The case for the defendants is an absolute and uncompromising denial of this allegation. They assert, on the other hand, that Enayet Zohora was a woman of the town and that the paternity of her two children is unknown. The defendants do not seek to prove that Enayet Zohora was the mistress of Ismail Ali Khan, that she lived in his keeping as his concubine, and that the two children are her illegitimate children by him. In view of these divergent allegations, and the conflict of oral testimony, the only safe course to adopt is to test the evidence in the light of facts either admitted or proved beyond the possibility of dispute. We have, in the first place, the fact that Ismail Ali Khan was a man of undoubted respectability, owned considerable properties, and, as described by witnesses on both sides, was a gentleman of great pomp and dignity. Some of the witnesses also describe him as a man of piety or good character. In the second place, the family to which Enayet Zohora belonged, though poor, was of great respectability. In fact, Ismail Ali Khan and Enayet Zohora both belonged to the same Rajput family, once Hindus of great respectability who subsequently professed the Musalman faith. Ismail Ali Khan had married thrice. He took early in life, as his first wife, a lady named Dil Jan, from a place called Maju. On the 18th March 1890, after the death of his first

wife, he took the first defendant, Bibi Imambandi of Behar, as his second wife. A little more than a year afterwards, on the 26th December 1891, he took the fifth defendant Bibi Amir Jahan as his third wife. The case for the plaintiffs is--and they are supported by the testimony on oath of their vendor--that, shortly after his third marriage, Ismail Ali Khan, in or about the year 1892, took Enayet Zohora as his fourth wife. The evidence in support of this allegation is of a three-fold character; namely, first, direct evidence of the marriage; secondly, evidence of cohabitation as man and wife and thirdly, evidence of acknowledgment by Ismail Ali Khan of Enayet Zohora as his wedded wife and of her children as his legitimate offspring. As regards evidence of the first class, we have a number of witnesses on the side of the plaintiffs who depose that Enayet Zohora was married to Ismail Ali Khan about a year after the marriage of Amir Jahan. Muhammad Karim, Imam of the Musjid at Puraikilla, asserts that he presided over the marriage ceremony and that, when appointed Qazi, he took the permission of Enayet Zohora. His evidence has been severely criticised as false, because he made hopelessly contradictory statements about his age and his periods of service in different places. Some of the criticisms, specially those directed to the statements of his own age, are well founded. But upon this particular point, men of the class to which the witness belongs have, as is well-known, very inaccurate notions. His statements are supported by Mobarak Hossain, by Lalji Singh, by Jamna Singh, Jitan Mali and several other persons, amongst whom the most important is Mohamed Hossein, whose family is related to that of Hefazat Hossein, the father of Enayet Zohora. The Subordinate Judge has accepted the testimony of these witnesses as substantially true. The comment that witnesses of superior position in life have not been called, does not carry much weight, because it is unlikely that the fourth marriage of even a man of pomp and dignity could have been celebrated on an extensive scale. On the other hand, if the story of the defendants is true, that Enayet Zohora was a depraved woman of the town, it is difficult to appreciate why men of position and respectability should come forward and pledge their oath in support of what must be deemed, in that view, an invented story absolutely without foundation. We are, therefore, not prepared to discard summarily this body of evidence as to the marriage of Ismail Ali Khan with Enayet Zohora supported as it is by evidence of the other two classes to which we shall presently refer. As regards evidence of the second class we have the testimony of Mohamed Isha, who is the Mukhtear of Ismail Ali Khan, and related to him, though distantly, by marriage into his family. No substantial reason has been suggested as to why this evidence should be treated as wholly false. The evidence of Tarini Prasad Barman, though it does not go very far, does support the case of the plaintiffs. His evidence has not been challenged as that of an untruthful person, and it is remarkable that he should have been asked in cross-examination whether he knew that the three wives, whom Ismail Ali Khan admitted to him to have married, had been married according to religious form. He naturally declined to swear that they had been married in any form, but he adhered to his statement that Ismail Ali Khan had admitted to him that he had three wives, two of Sewan and one of Behar. This

undoubtedly supports the case of the plaintiffs. As regards evidence of the third class, we have witnesses of position and respectability. Mahomed Abdul Khaujir, Abdul Razak and Abdul Hossein, Abdul Bartat, if believed, prove conclusively that Mahomed Ismail Ali Khan treated Enayet Zohora as his wife and her children as his legitimate issue. In spite of the searching criticism of their testimony, and after all allowance has been made for minor contradictions, there is a substantial residue left which supports the case of the plaintiffs and militates against that of the defendants. No good reason has been assigned why this body of evidence should be entirely discarded. We have, finally, the evidence of Enayet Zihora herself supported by that of her sister Enayet Fatima and of two other ladies, both relations of the family, namely, Bibi Wahidan, the wife of Mahomed Tusaff, and Bibi Wahidan, the wife of Abdul Suttar. As regards the evidence of Enayet Zjhora, it may, no doubt, be suggested that she is deeply interested in the success of the plaintiffs and that her testimony should be received with caution, But she stood the test of cross-examination successfully though that cross-examination was not merely searching but in many places irrelevant and though, so far as we can form an estimate from the written record, her temper was not always of the very best. The evidence of the three classes we have mentioned, taken as a whole, if it stands unrebutted, is unquestionably sufficient to establish the case of the plaintiffs. But before we examine the evidence on the side of the defendants it is necessary to remember that in cases of this description the rebutting evidence must be of the strongest character. Where there is prima fide evidence of cohabitation as man and wife, and a long course of treatment of the lady as a wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. In the leading case of *Piers v. Piers* (1849) 2 H.L.C. 331 : 13 Jur. 569 Lord Cottenham said. "I have not found that the rule of law is anywhere laid down more to ray satisfaction than it is by Lord Lyndhurst in the case of *Morris v. Davies* (1837) 5 Cl. & F. 163 : 1 Jur. 911 : 3 Car. & P. 215. He says, "the presumption of law is not to be lightly repelled." It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." To put the matter briefly, as was done in *De Thoren v. Attorney-General* (1876) 1 A.C. 686 the onus of disproving a presumptive marriage is on those who deny its existence or validity and the countervailing evidence must not merely give rise to doubt, but must be strong, distinct, satisfactory, and conclusive. These remarks apply with special force to the present case. Here we have a fairly respectable body of direct evidence of marriage. That evidence is supported by indirect circumstantial evidence, namely, long cohabitation of the parties as husband and wife. This would tend to raise a presumption of a complete and valid marriage, as their Lordships of the Judicial Committee held in *Suistry Velaider Aronegary v. Sembecutty Vaigalie* 6 A.C. 364 : 44 L.T. 895 : 50 L.J. P.C. 28. We have finally a long course of treatment of the lady and her children. Much weight must necessarily be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided. As was well said by Mansfield, J., in the

Berkeley Peerage case 4 Camp. 401 at p. 416 : 14 R.R. 782, if a father brings up a child as his legitimate son, this amounts to a daily assertion that the son is legitimate. See also the observations of Lord Cranworth in *Campbell v. Campbell* 1 H.L. (Sc.) 182 at p. 199. Now, how does the evidence stand on the side of the defendants if tested in the light of these principles? On their behalf, reliance has been most strongly placed upon the deposition of Mr. Mjjzharul Huq, a gentleman of unquestioned position and attainments. His evidence, no doubt, tends to support the case of the defendants. But it is by no means clear how much of his knowledge is based upon first-hand information and how much on hearsay. The explanation suggested on behalf of the plaintiffs that, while Counsel in the mutation case, he held statements made to him about the wives of Ismail Ali Khan which were unguardedly accepted by him as true, is certainly plausible. The evidence of Zakir Hossain is practically of no value, because his admission that Ismail Ali might have more wives than he heard of, completely takes away from the effect of his statement-in-chief. Kissen Prasad, who was examined in the mutation case and has since then died, made statements at the time which might apparently help the defendants, but he freely admitted that Ismail might have had another wife besides those mentioned by him, and it is fairly clear that the child who saluted him on the occasion of his visit to Ismail must have been the child of Enayet Zohora. We do not pro* pose to examine in detail the evidence of the witnesses who have been brought forward by the defendants to swear that Enayet Zohora was the mistress of Akbar Khan, who is not called and who is said to have been the Station Master of Sewan and Ohapra. This evidence, as the Subordinate Judge says, is quite untrustworthy and it is inconceivable that the plaintiffs, admittedly astute and successful men of business, should have put forward a depraved woman of the town as the widow of Ismail Ali Khan and taken a conveyance from her; they must have known that, if they attempted to play such a game, evidence would be forthcoming to prove conclusively the character of the woman and the station in life she occupied. We unhesitatingly reject the story of the defendants that Enayet Zohora was a depraved public woman, and that she had no connection with the family of Ismail Ali Khan, and that she was picked up from the slums of the city, as it were, to enable the plaintiffs to set up a wholly unfounded claim to a share of the properties left by Ismail Ali Khan. It must further be remembered that her father Hefazat Hussain, though not prosperous, belonged to a family of undoubted respectability and was treated by his friends and relations as a gentleman who could be received in polite society and treated on terms of equality. If Enayet Zohora, his daughter, had been a deprave^ woman of the town, he would have been cast out and never admitted into polite society. Evidence has also been produced on the side of the defendants to throw doubt upon the theory that Enayet Zohora was married to Ismail Ali Khan at the time and place alleged by her, and that she was treated as the lawfully wedded wife, and her children, as his legitimate issue. This evidence is of a negative character, and very little weight can be attached to it, even if the statements of the witnesses are accepted as substantially true. After a careful scrutiny of the evidence on the

side of the defendants we are clearly of opinion, that it does not rebut the prima facie case made on behalf of the plaintiffs. But much reliance was placed, and very properly, upon the conduct of the parties immediately after the death of Ismail Ali Khan. It was painted out on behalf of the defendants-appellants, that while Imambancli and Amir Jahan at once put forward chums to the estate of Ismail Ali Khan as their husband, no such claim was advanced by Enayet Zohora and that she took no steps to conduct the litigations known as the Chouth case and the Stable case which had been commenced by Ismail Ali Khan against the plaintiffs on the 1st July 1905 and the 16th January 1906, respectively. Some weight, no doubt, must be attached to this circumstance. But it has been explained that Enayet Zohora was poor and had only her old father to put forward her claim and that of her children. The explanation suggested is by no means improbable. At any rate, on the 18th June Zohora applied for substitution in the Chouth case, but her application was refused on the 26th June 1906, as she had on the 10th June divested herself of all rights in the property then in litigation by the execution of the conveyance in favour of the plaintiffs. It must not be overlooked, on the other hand, that the defendants were powerfully supported at the time in their endeavour to deprive Enayet Zohora of all share in the estate of Ismail Ali Khan. It has been established beyond doubt, that the son of Ashgar Ali, cousin of Hafiz Khan, is married to one of the daughters of Bibi Amir Jahan; that the son of Hafiz Khan is engaged to her other daughter; and that Amir Jahan had made a gift of all her properties to her two daughters. Hafiz Khan, therefore, had considerable interest in the success of the proceedings before the Revenue Authorities and of this litigation.

4. Upon a review, then, of the whole evidence the position may be summarised as follows: There is a considerable body of evidence, which we are not prepared to disbelieve, to the effect that Enayet Zohora was married to Ismail Ali Khan; that they lived for many years as husband and wife; and that Ismail Ali Khan treated her children as his legitimate issue. To meet this evidence the defendants have brought forward witnesses to swear that Enayet Zohora was a depraved woman of the town, and was accessible to all comers. This evidence must be discarded as wholly false. They have not set up an alternative case that Enayet Zohora was in the keeping of Ismail Ali Khan as his mistress. But, even if such a case had been put forward, it could not have been reconciled with the admitted position and station in life of the parties concerned, Ismail Ali Khan was a gentleman of pomp and dignity, and is described by witnesses, on both sides, as a man of much piety. The religious faith he professed allowed him to take four wives; he had married thrice in respectable families; he is not shown to have kept mistresses; he might, if he so desired, have taken Enayet Zohora in marriage, as she came of a family of equal distinction. He did, as a matter of fact, live for many years with Enayet Zohora as her husband and he treated her children as his legitimate issue. No Court will assume, under these circumstances, that she was his concubine. The theory becomes improbable in the highest degree when we remember that the father of Enayet Zohora was also

a man of piety and respectability. Why should he consent to see his daughter lead a life of depravity and shame? Would Enayet Zohora herself consent to lead a life of infamy with one who had taken her own relation, Amir Jahan, as his wife? The conclusion appears to us irresistible that the defendants have failed to prove that Enayet Zohora was a depraved woman of the town; while on the other hand, the plaintiffs have proved by reliable evidence that she was the lawfully married wife of Ismail Ali Khan, and her children must be deemed legitimate. *Wise v. Sunduloonissa* 7 W.R. (P.C.) 13 : 11 M.I.A. 177. We have not mentioned another circumstance upon which the Subordinate Judge has relied in support of this conclusion. He has stated in his judgment that the appearance of the tenth defendant, Bibi Nur Mahamdi, bears a striking resemblance to the features of Ismail Ali Khan. For this purpose, the Subordinate Judge saw the girl and received in evidence the photograph of the deceased; in this Court, a photograph of the girl has been produced, as she has meanwhile been betrothed and can no longer appear in public. There can be no doubt that the evidence of the resemblance of a child to the putative father is competent. The question has been raised more than once in the Courts of Great Britain and of the United States, and it has been ruled that such evidence is admissible *Wright v. Hicks* 15 Georgia 190 : 60 Am. Dec 687. *In the matter of Jessup* 81 Calf. 408 : 9 L.R.A. 594, *Shoten v. Judd* 56 Kan. 43 : 54 Am. St. Re. 587 where for this purpose pictures of the alleged putative father and of his child were held admissible. See also *Wigmore on Evidence* Sections 166 and 1154. *Morris v. Davies* (1837) 5 Cl. & F. 163 : 1 Jur. 911 : 3 Car. & P. 215; *Douglas Peerage case* 2 Har. 402; *Andrews v. Askey* 8 Car. & P. 7; *Bagot v. Baogot* I.L.R.1878Ir. 308 where reference is made to *Shakespear, Winter's Tale, Act II, Section 3*, see, also, *King John, Act I, Section 1* *Burnally v. Baillie* 42 Ch. D. 282 at p. 290 : 58 L.J. Ch. 842 : 61 L.T. 634 : 38 W.R. 125 *Nicolas on Bastardy*. 140, *Hubbuck on Succession*, p. 884,] In the case before us, our conclusion is based upon the oral and documentary evidence on the record, and the evidence of resemblance need only be considered as furnishing independent corroboration of that evidence.

5. It has finally been contended that Enayet Zohora, as merely those facto guardian of her children, was not competent to alienate their shares, and upon this point reliance has been placed upon the cases of *Moyna Bibi v. Banku Behari Biswas* 29 C. 473; *Mafuzzul Hosain v. Basid Sheikh* 4 C.L.J. 485 : 14 C. 36 : 11 C.W.N. 71; *Ram Charan Sanyal v. Anukul Chandra Acharya* 4 C.L.J. 578 : 34 C. 65 : 11 C.W.N. 160; *Durgozi Row v. Fakeer Sahib* 30 M. 197 : 1 M.L.T. 433 : 17 M.L.J. 9.; *Ummi Begam v. Kesho* 30 A. 402 : 5 A.L.J. 474 : A.W.N. (1908) 220; *Syedun v. Vilayet* 17 W.R. 238; *Hunoomon Persaud v. Babooee Munraj Koonwaree* 6 M.I.A. 393 at p. 413. The question thus raised does not, however, properly arise in the present suit. The contesting defendants do not claim through Zohora's children; on the contrary, they completely repudiate any claim of the latter, and it is not open to them to contend that they will be prejudiced if a decree is made in favour of the plaintiffs. It is conceivable that the plaintiffs may have to face a contest with the ninth and tenth defendants when they come

of age and are able to assert their own rights; but in the present litigation, the plaintiffs are entitled to succeed as against the first seven defendants, who have denied the title of their vendors. The result, therefore, is that the decree made by the Subordinate Judge must be affirmed, and this appeal dismissed with costs, to be paid by the appellants to the plaintiffs-respondents.