

(1967) 03 GUJ CK 0009
In the Gujarat High Court

Najarkhan Kalubava and Another

APPELLANT

Vs

Kesarkhan Kayamkhan and Others

RESPONDENT

Date of Decision : 11-03-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Transfer of Property Act, 1882 — Section 41, 41 , 43

Citation : (1968) 9 GLR 1066

Hon'ble Judges : J.B. Mehta, J

Bench : Single Bench

Judgement

J.B. Mehta, J.—This appeal is filed by the original defendants Nos. 2 and 3 as the lower appellate Court had confirmed the trial Court's decree, decreeing the plaintiffs' suit for recovery of possession of the suit lands from the defendants except for a slight variation as regards the quantum of mesne profits. The original defendant No. 1 has been joined as a respondent and he having died during the pendency of the suit, his heirs have been brought on record and finally joined as respondents along with the plaintiff.

2. The short facts which have given rise to this appeal are as follows: The parties in this case are Molesalam Muslim Garasia of Gujarat. One Rupsing had executed a mortgage with possession for a consideration of Rs. 955/- in favour of one Kalubava, the father of defendants 1, 2 and 3 on 16th July 1928 as per Ex. 46. On the death of Kalubava, the heirs of defendants 1, 2 and 3 became the owners of the said mortgagee rights. Rupsing died on 16th December 1931. Thereafter Rupsing's widow Manba executed a mortgage with possession in favour of defendant No. 1 Kanaksing in respect of the suit lands along with certain other properties as per Ex. 45 on 14-4-1943. The consideration of this mortgage of Rs. 1410/- was made up of Rs. 955/- due on the previous mortgage Ex. 46 and the balance was paid in cash. An endorsement was made below Ex. 46 on 14-4-43 to the effect that the debt under the previous mortgage was discharged. Thereafter on 6-6-46 defendant No. 1 Kanaksing executed the present sale deed or assignment of his rights as a mortgagee in respect of the suit lands in favour of

the plaintiffs for a sum of Rs. 1410/- as per Ex. 38. It appears that on 26-6-47 Bai Manba executed a gift deed in respect of the equity of redemption of the suit lands in favour of defendants 2 and 3 as per Ex. 41. The plaintiffs' case was that after he purchased the mortgagee's rights from defendant No. 1 as per Ex. 38 he was put into possession on 6-6-46. However, on 19-6-46, defendants 2 and 3 forcibly took away possession from the plaintiffs' tenant. The plaintiffs, therefore, filed an earlier suit, being Civil Suit No. 124/48-49. By the order at Ex. 34, the Court had granted leave for withdrawal of the said suit with permission to file a fresh suit as it was satisfied as to the existence of sufficient grounds and because of a formal defect shown by the plaintiffs. The said order was passed on 6-7-53 granting permission and the said suit was dismissed. Costs having not been pressed by the defendants, no order was made as regards the costs. Thereafter, the present suit was filed on 10-10-53 for recovery of possession of the suit lands with past three years' mesne profits from the defendants. Defendant No. 1 remained ex parte all throughout. The contention of defendants 2 and 3 in the written statement Ex. 9 was that defendant No. 1 was not the owner of the suit lands and he had no authority to sell the suit lands on behalf of defendants 2 and 3. They also contended that Bai Manba had executed a gift deed in their favour on 26-6-47 at Ex. 41, and that they were all along in possession and the plaintiffs could not recover possession from them. They had also contended that the original debt had been extinguished as no application had been made under the B.A.D.R. Act. They, therefore, contended that the plaintiffs' suit was not maintainable against them. They also contended that the permission for withdrawal could not be granted and so the present suit was barred by res judicata. At the earlier stage the trial Court had held that the suit was not maintainable as plaintiffs had not filed any application under the B.A.D.R. Act against the heirs of Manba, defendants 2 and 3. The plaintiff had gone in appeal and it had been held that the defendants could not prove that they were debtors and that they were indebted to less than Rs. 15000/-. The plaintiffs' right as a mortgagee was not therefore held to be extinguished u/s 15 of the B.A.D.R. Act even though he made no application under the B.A.D.R. Act. The case was, therefore, remanded. Thereafter the trial Court held that the present suit was maintainable and was not time barred. The trial Court held that the gift deed in favour of defendants 2 and 3 was proved and was valid. The trial Court also held that the transfer dated 6-6-1946 in favour of the plaintiff by defendant No. 1 Kanaksing was valid and binding on defendants 2 and 3, and that Section 41 of the Transfer of Property Act applied to the case as the plaintiff was a bona fide transferee for value without notice from the ostensible owner. The trial Court had, therefore, decreed the plaintiff's suit for possession with mesne profits. In appeal the appellate Court also held that the gift deed in favour of defendants 2 and 3 was valid and that the transfer dated 6-6-46 in favour of the plaintiff by defendant No. 1 was binding on defendants 2 and 3 both as a result of Section 41 and Section 43 of the Transfer of Property Act and as in any case, as there was ratification by defendants 2 and 3 of the transaction which was entered into by defendant No. 1 as Karta of the joint family and because the

law regarding Hindu joint family was applicable to such Molesalam Muslim Garasias. Both the Courts had recorded concurrent finding that possession of the suit lands continued with defendants Nos. 2 and 3, and that the plaintiff did not succeed in obtaining possession as contended by him. The lower appellate Court, however, found that the original mortgage Ex. 46 had been discharged by the fresh mortgage executed by defendant No. 1 at Ex. 45, the plaintiff getting title by his purchase of the rights as a mortgagee under the mortgage Ex. 45. He was entitled to get possession from defendants 2 and 3 and even after the gift deed Bai Manba stepped into the shoes of the mortgager and had no right to remain in possession as against the plaintiff. The appellate Court, therefore, confirmed the trial Courts' decree in favour of the plaintiff for possession of the suit lands. It only varied the said decree as regards quantum of mesne profits by directing an inquiry under Order 20 Rule 12(1)(c). Defendants 1 and 2 have therefore filed the present appeal.

3. At the hearing Miss Shah raised the following points:

(1) That the permission which was granted in the former suit for withdrawal under Order 1(2) was without jurisdiction and the said order was a nullity which would not save the present suit from the bar of res judicata.

(2) That the lower appellate Court had patently erred in invoking the principles of Hindu joint family in case of these Molesalam Muslim Garasias on an erroneous assumption of custom to that effect.

(3) That the finding as regards legal necessity was a perverse finding.

(4) That the lower appellate Court had misconstrued provisions of Section 41 of the Transfer of Property Act and its finding as regards reasonable care was completely a perverse finding.

(5) That the lower appellate Court had made out a totally new case on the basis of the principle of agency and of ratification by defendants 2 and 3 of the suit transaction and as regards the purchase money having been put into hotch-pot.

(6) That the lower Court had wrongly applied Section 43 of the Transfer of Property Act, even though defendant No. 1 had never become the full owner.

(7) That the written statement Ex. 63 and the judgment Ex. 40 which had been relied upon by the lower appellate Court were inadmissible in evidence and had been taken into consideration without any pleading and on a question which was never in issue.

4. Before taking up these contentions of Miss Shah, at the outset I would dispose of one contention which was raised by Mr. Parghi. Mr. Parghi argued that the finding of both the Courts as regards the validity of the gift deed Ex. 41 executed by Bai Manba in favour of defendants 2 and 3 in respect of the equity of redemption of the suit lands was a patently erroneous finding. Mr. Parghi sought to contend that under the Mahomedan Law a gift of equity of redemption was a

void gift because the essential condition of delivering possession could never be complied within case of the gift of mere equity of redemption as the possession would be with the mortgagee. This argument proceeds on the footing that Manba was a Muslim convert. There is nothing on the record to show this fact and in any event, unless there was a pleading to that effect, which would bring this fact in issue, the question could not be decided on any such hypothetical assumption at the stage of this second appeal. Therefore, the finding of both the Courts that the gift deed, Ex. 41, was a valid cannot be assailed at this stage. Mr. Parghi has also not challenged the concurrent finding of facts of both the Courts that possession had remained with defendants 2 and 3 and that the plaintiff had not obtained possession of the suit lands as contended by him.

5. Before proceeding with the main contentions of Miss Shah on merits we would first dispose of the contention of Miss Shah in regard to the order granting leave for withdrawal of the previous suit as per order Ex. 34. Miss Shah vehemently relied upon the Full Bench decision in *Ramrao Bhagvantrao v. Babu Appanna* 42 Bom. L.R. 143. Lokur J. has delivered this judgment on behalf of the Full Bench consisting of Wadia, Divatia and Lokur JJ. At page 157, the learned Judge referred to the leading case of *Robert Watson & Co. v. Collector of Zilla Rajshaye* 1869 13 M.I.A. 160. In that case Their Lordships of the Privy Council had laid down in effect that there was no power in the Courts in India, similar to that exercised by Courts of Equity or common Law in England, to dismiss a suit with liberty for the plaintiff to bring a fresh suit for the same matter or to enter a non-suit and that such power of Indian Courts was limited to questions of form, as in the case (1) of mis joinder of parties, or of the matters in suit, (2) where a material document had been rejected for not having a proper stamp, and (3) if there had been an erroneous valuation of the subject matter of the suit. Their Lordships of the Privy Council at page 170 observed that in all such cases the suit failed by reason of some point of form, but Their Lordships were aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty had been given to him to bring a second suit. At page 158 Lokur J. further observed that even after the present Code was enacted the object of addition of Clause (a) of Order 23 Rule 1(2) was to give effect to the ruling of the Privy Council and not to override it, as the earlier rulings referred to by him thought Section 97 of the Code of 1859 did. Although the expression "sufficient grounds" necessarily included the ground that a suit must fail by reason of some formal defect, the latter was specifically mentioned in Clause (a) by way of an illustration. Finally, at page 160 Their Lordships held that Clause (a) was illustrative of the grounds referred to in Clause (b) although the grounds need not be ejusdem generis with the ground mentioned in Clause (a), they must be "at least analogous" to it. The ground in Clause (a) required that the suit must fail by reason of some formal defect; whereas the grounds contemplated in Clause (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. As to what defect would be considered formal, Their Lordships pointed out that the instances of

defects "of form cited by the Privy Council in *Robert Watson & Co. v. The Collector of Zilla Rajshahye* 13 M.I.A. 160 included mis joinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit. Their Lordships further held that the expression "formal defect" must be given a wide and liberal meaning and must be deemed to connote every kind of defect which did not affect the merits of the case, whether that defect be fatal to the suit or not. In the case before their Lordships, the plaintiffs had failed to prove that the site was an alluvion and after his suit was dismissed, in appeal, leave was sought to withdraw the suit. That was the case where there was no defect of form in the suit but the defect was one of substance arising out of their inability to prove the title on which they had based their claim. In those circumstances it was held that in allowing the suit to be withdrawn on this ground the Court had acted without jurisdiction and the order could be reversed u/s 115 of the Civil Procedure Code, because the learned Judge had exercised jurisdiction which did not vest in him under Order 23 Rule 1(2). On the same reasoning, Miss Shah argued that in the present case the only reason which was given by the plaintiff in his application for withdrawal at Ex. 34 of the previous Civil suit No. 124/48-49 was that the plaintiff was not in possession of the mortgage deed Ex. 45 dated 14-4-43 and there were formal defects. There is considerable force in Miss Shah's contention that the plaintiffs inability to prove the case would not be a ground of a formal defect but would be a ground of substantial defect, If, therefore, the order had been sought to be challenged in revision or under the writ jurisdiction, the order might be liable to be challenged on the ground of want of jurisdiction. The material question which, however, arises in the present case is as to whether such an order could be challenged in collateral proceeding after it became final and when it was not challenged in revision or in writ jurisdiction by the plaintiff. Miss Shah argued that the question being one of want of jurisdiction, the order was a nullity. Miss Shah in this connection strongly relied upon the decisions in *Satyabadi Gountia and Another Vs. Bediahar Bar Panda and Others*, and *Rama Singh v. Janak Singh* AIR 1920 Pat 63, where the ratio of the decision of the Division Bench of the Calcutta High Court in *Kali Prasanna Sil v. Panchanan Nandi* (1916) 44 Cal. 367, had been accepted as correct law. In *Rama Singh's* case, *Sultan Ahmed J.* had relied upon the decision of the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynodeen Khan* (1854-57) 6 M.I.A. 134, which proceeded upon the principle that wherever jurisdiction was given to a Court by an Act of Parliament upon certain specified terms contained in the regulation itself, it was a universal principle that these terms must be complied with, in order to create and raise jurisdiction, for, if they may not be complied with, the jurisdiction did not arise. All these decisions have, however, been overruled. Mr. Parghi relied upon the decision in *Hriday Nath Roy v. Ramchandra Barm* I.L.R 1921 Cal. 138, where a Division Bench of five judges had overruled the decision in *Kali Prasanna's* case. At page 151 the Full Bench laid down the following propositions:

(i) An order for withdrawal of a suit with leave to institute a fresh suit, made under Order XXIII, Rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void.

(ii) A fresh suit instituted upon leave so granted is not incompetent.

(iii) The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

In arriving at this conclusion Their Lordships proceeded upon a well recognised distinction between the jurisdiction as such to try a suit and the exercise of that jurisdiction. At page 147, Their Lordships observed that, given necessary jurisdiction, a distinction must be made between the exercise of the jurisdiction; and existence of the jurisdiction for fundamentally different were the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein was what made up jurisdiction; and when there was jurisdiction of the person and subject matter, the decision of all other questions arising in the case was but an exercise of that jurisdiction. At page 150, it was further observed that the Court had jurisdiction to try the suit, and in the exercise of that jurisdiction was competent to make an order for withdrawal with liberty reserved to the plaintiff to institute a fresh suit in respect of the same subject-matter if it was satisfied that circumstances existed which justified such an order. However, erroneous the order might be, it was not an order made by a Court without jurisdiction; it was on the other band, an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order could not consequently be deemed null and void. The same view has been approved by the Full Bench of the Patna High Court in the later Patna decision in *Raj Kumar Mahton Vs. Ram Khelawan Singh*, where this Full Bench overruled the two earlier decisions relied upon by Miss Shah which followed the ratio in *Kali Prasanna's* case (*Supra*) which was already overruled by the Full Bench of the Calcutta High Court. In view of this settled position of law, it is clear that the order of withdrawal in such a case is an order by a competent Court. Even though such an order may be revised or interfered with in revision or writ jurisdiction, if there is a jurisdictional error on the ground that the necessary conditions as regards the defect being a formal defect as envisaged in Order 23 Rule 1(2) were not fulfilled, it would not make such an order null and void. It is not, therefore, open to Miss Shah to contend that the order at Ex. 34 was null and void and, therefore, the present suit was barred by the principle of *res judicata*.

6. Now turning to the merits of the case, Miss Shah's grievance is a fundamental one as the lower appellate Court had proceeded on an assumption and had made out a completely new case which was never set up in the pleadings. As pointed out by Their Lordships of the Supreme Court in *Bhagat Singh v. Jaswant Singh*

AIR 1966 S.C. 1861 , wherein Their Lordships had followed the observations of the Privy Council In AIR 1930 57 (Privy Council) , where a claim had been never made in the defence presented no amount of evidence could be looked into upon a plea which was never put forward. The case before Their Lordships was in connection with the custom of adoption and as the pleading regarding the adoption by the defendant was a vague pleading and no such specific plea was taken about the custom, their Lordships refused to look into the evidence on the ground that a serious prejudice would arise to the other party as the evidence might not be led from that particular aspect unless parties' attention was focused on the particular point by the same being raised in the pleading and by an issue being raised to that effect. In the present case, the lower appellate Court has proceeded on the assumption that these Molesalam Muslim Garasias of Baroda were governed by the Hindu Law in all respects and not merely in the matters of inheritance and succession. The lower appellate Court has gone to the extent of holding that the Hindu Law of joint family as such was applicable to these converts, even though no such special custom was ever pleaded or brought in issue at any stage of the trial. The lower appellate Court also made out a completely new case, as we will presently consider, that defendants Nos. 2 and 3 had ratified the sale deed in favour of the plaintiffs and that from the judgment, Ex. 40 in the partition suit No. 78/46-47, between the three defendants themselves, it was clear that the consideration amount of Rs. 1410/- of the sale deed in favour of the plaintiffs at Ex. 38 was brought into hotch-pot and its effect was that in the partition, the rights in the suit lands had gone to the share of defendant No. 1. On these points also there was never a pleading nor an issue and on this material fact the lower appellate Court has proceeded on an assumption which was entirely unwarranted and which would cause serious prejudice to the defendants as they had no opportunity at any stage to meet this new case at all. These infirmities go to the root and completely vitiate the decision of the lower appellate Court.

7. Miss Shah had pointed out that in the 13th Edition-1966-of Mulla's Hindu Law at page 565, it is mentioned that Suni Borah of Gujarat and Molesalam Garasias of Broach were governed by the Hindu Law in succession and inheritance because these communities were originally Hindus and had become subsequently converted to Mohomedan religion relying upon the decision in Bai Baiji v. Bat Santok ILR Bom. 53 and Maharana Shri Fatesangji Jasvcmtsingji v. Kuvar Hartsangji FatesIngji ILR Bom 181. Even on the assumption that there was a judicial recognition of such custom that these Molesalam Garasias even in Baroda territory were governed in the matters of succession and inheritance by the Hindu Law, as appears from some of the decisions which have been referred to by the lower appellate Court, there is no presumption that the entire Hindu Law applied to these Muslim converts, unless a special custom to that effect was pleaded and proved. In Mangaldas v. Abdul Razak 16 Bom. L.R. 224, Macleod J. following the observations of Beaman J. in Jan Mahomed v. Datu Jaffar 15 Bom. L.R. 1044, observed that where Mahomedans were concerned, the invariable and

general presumption was that they were governed by the Mahomedan Law and usage. It lay on a party setting up a custom in derogation of that law to prove it strictly. But in matters of simple succession and inheritance among Khojas and Memons they were governed by the Hindu Law as applied to separate and self-acquired property. Further proceeding at page 229-230 Macleod J. observed that the rules of inheritance and succession under Hindu Law applied only to separate or self acquired property. The notions of joint family, joint family property, joint family business, are utterly unknown to Mahomedan Law to conclude, therefore, that because Cutchi Memons had retained the rules of Hindu Law relating to inheritance and succession which could only be applied to separate property, they had also retained the law of the joint family with all its far-reaching consequences was absolutely illogical. At page 231, the learned Judge finally observed after considering the doctrine of stare decisis that as Mahomedans were governed by Mahomedan Law. unless a custom to the contrary had been proved, if there was any previous decision of the Court, that Cutchi Memons were governed by the Hindu Law of the joint family, it was manifestly contrary to reason if it depended not upon evidence that there was such a custom, but upon the argument that the Hindu Law of Inheritance and succession Included the law of the joint family. In *Bat Sakar v. Ismail Gafoor* 32 Bom. L.R. 1034, the Division Bench, consisting of Broomfield and Tyabji JJ., also took the same view. At page 1045, Tyabji J. observed that after Mr. Justice Beaman's elaborate judgments, followed by Macleod J. the Courts did not presume that the Khojas and Memons In Bombay were governed by Hindu Law except with reference to succession and Inheritance, which were presumed to be governed by the Hindu Law applicable to separate or self acquired property, unless such custom was established. At page 1054 Broomfield J. also held that the presumption as to the application of Hindu Law extended only to the simple law of inheritance and succession In the case of separate property, and that the application of the coparcenary law was not to be presumed and must be proved. In view of the settled position of law, even proceeding on the footing that there was a judicially recognised custom In respect of Molesalam Muslim Garasias In the Baroda territory that they were governed by the Hindu Law In matters of succession and Inheritance, there could be no such presumption that the law regarding the Hindu joint family and regarding the Karta's powers of alienation would apply In case of these Muslim converts in absence of a specifically pleaded and proved custom. The learned appellate Judge was, therefore, completely wrong in holding that the defendant Mo. 1 had the same powers as Karta of Hindu joint family qua the other two defendants 2 and 3 as If defendants 2 and 3 formed a coparcenary governed by the principles of Hindu Law. The learned appellate Judge was equally wrong in recording the finding that defendant No. 1 was the Karta of the Hindu joint family from the alleged admission in the earlier written statement Ex. 63 of defendants 2 and 3 where they had only admitted that Kanaksing was managing the family property. Such an admission In an earlier proceeding without reference to the whole context could not be construed as an admission that defendant No. 1 was managing the Hindu joint family or the law of coparcenary applied even to these

Muslim converts and such evidence could never be looked into, when pleading of such custom was never put forward in the pleading. The case would have, therefore, to be decided only on the footing that on the death of Kalubava, the father, the three sons defendants 1 to 3 succeeded to the mortgagee's rights of Kalubava under Ex. 46 as they were co-heirs. Such co-heirs who were sharers in the property were equally owners of their rights and none of them including defendant No. 1 would have any larger powers of alienation so as to bind defendants 2 and 3 on the ground of his being a Karta of the family or even on any doctrine of agency for unlike partnership, the co-ownership never constituted one co-owner as an agent of the other.

8. The material question which next arises is whether the release by defendant No. 1 would amount to a release by defendants 2 and 3. The mortgage document Ex. 45 which was executed by Manba in favour of defendant No. 1 on 14-4-43 in terms mentions this consideration of Rs. 1410/- as made up of Rs. 955/- due on the previous mortgage Ex. 46 and the balance paid in cash. The endorsement is made below Ex. 46 on 14-4-43 to the effect that the debt under the previous mortgage was discharged. The previous mortgage Ex. 46, as we have already stated, was executed by Manba's husband Rupsing in favour of Kalubava, the father of defendant Nos. 1 to 3 on 16-7-1928 at Ex. 46. On the death of Kalubava as we have already discussed, all the three sons, defendants 1 to 3, were the co-heirs of the rights of mortgagee with possession in respect of the suit lands. All these three co-heirs together could have given a valid discharge and the release by defendant No. 1 alone would not operate as a valid release so as to bind defendants 2 and 3. Miss Shah in this connection rightly relied upon the decision of the Division Bench consisting of Chandavarkar and Aston JJ. in *Sttaram v. Shridhar* ILR Bom. 292. At page 295, the learned Judges observed that assuming that the principle of the English Common Law as to the operation of a release given by one of two or more joint promises was not affected by the Indian Contract Act and is the law here, as held in *Barber Maran v. Raman Ramada Gounden* (1897) 20 Mad. 461, it was clearly inapplicable to the case of co-heir, who were not joint promises, but the heirs of a single promise, and it would be dangerous to extend and apply the English doctrine to a release given by one of such co-heirs. Their Lordships added that in the case of co-heirs, among the Hindus, the Hindu Law, as a general rule constituted one of them, the senior in age, as the Karta or manager of the inheritance on behalf of all the co-heirs. Once that principle of a Karta under the Hindu Law is not applicable, in view of this binding authority, it is clear that one of the co-heirs cannot release the mortgage security without concurrence of the rest so as to give a valid discharge to the mortgagor and free the mortgaged property from the incumbrance. Miss Shah in this connection relied on the decision of the Privy Council in *Shrinivasdas Bavri v. Maherbai* ILR Bom. 300 at page 309. In that case there had been a mortgage effected on a property in favour of the two joint mortgages and it had become necessary to prove that the mortgage had been discharged. In proof of this fact a certified copy of a release executed by only

one of the joint mortgagees, but which recited the death of the other mortgagee, and the fact that his co-mortgagee was his sole heir had been produced. Their Lordships held that the recitals in the release deed were not evidence against joint mortgagees. Their Lordships also held that if at the date of the release, co-mortgagee Damodardas was living, there would be nothing to prevent him or those claiming through him from disputing the truth of the recitals contained in the release. In view of this authoritative pronouncement by the Privy Council, there could be no doubt that in case of such co-heirs of a single promise at least, a release by one of the co-heirs cannot be effected so as to bind the other co-heirs as the release of the entire mortgage security. Once the doctrine of joint Hindu family karta was not applicable and as co-heirs were not agents of each other the finding recorded by the lower appellate Court that the release by one of the co-heirs viz., defendant No. 1 was a release of the entire mortgage debt must be set aside. We must, therefore, proceed on the footing that the previous mortgage with possession in favour of defendants 2 and 3 had not been released or discharged by the subsequent mortgage, Ex. 46, executed by Manba in favour of defendant No. 1 wherein defendant No. 1 purported to discharge the entire debt. In that view of the matter, defendants Nos. 2 and 3 alone had right to remain in possession in preference to the plaintiffs who got rights only under the mortgage executed in favour of defendant No. 1. The next argument of Mr. Parghi, however, was that even if there was no valid release of the mortgaged security which would bind defendants 2 and 3 by doctrine of estoppel contained in Sections 41 and 43 of the T.P. Act the plaintiff had become absolutely entitled to the rights of the defendants 2 and 3 as well and defendants 2 and 3 were precluded from asserting their right which subsisted under the previous mortgage Ex. 46 in favour of their father. In *Gurbaksh Singh Vs. Nikka Singh*, Their Lordships held that Section 41 was an exception to the general rule that a person could not confer better title than he had. Being an exception, the onus certainly was on the transferee to show that the transferor was the ostensible owner of the property and that he had, after taking reasonable care to ascertain that the transferor had the power to make the transfer acted in good faith. Both these ingredients must be proved by the plaintiff in order to invoke estoppel contained in Section 41. Miss Shah further relied upon an apposite decision in *Suraj Ratan Thirani and Others Vs. The Azamabad Tea Co. and Others*, . Their Lordships observed that in order, that Section 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer of the full 16 as interest. Now the facts, however, were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there was not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It was manifest that the conduct of co-sharers in permitting one of them to manage the common property did not by itself raise any estoppel precluding them from asserting their rights. In the present case

also the lower appellate Courts has relied upon the fact that the property stood in the revenue record in the name of defendant No. 1 and that defendant No. 1 was allowed management of the property by the other co-sharers, defendants 2 and 3. That however would not show that defendant No. 1 was the ostensible owner. Mr. Parghi relied upon one more circumstance that before the sale in favour of the plaintiff the mortgage executed by Manba Ex. 46, was in the name of defendant No. 1 alone. Even this circumstance could not help the plaintiff. In the present case the facts were too eloquent for the plaintiff to ignore notice thereof except at his own risk. As seen from the concurrent finding of both the Courts the possession was with defendants 2 and 3 and a false recital was made in the mortgage deed as regards fresh mortgage with possession. The plaintiff had also notice that the rights purchased by him were under the mortgage which had itself mentioned the release of the previous security which was in favour of the father of defendants 1, 2 and 3. The plaintiff is person of the same village and he was aware of all these facts and still he refused to make any inquiry. There is not a word in his evidence to suggest that any inquiry was made by the plaintiff. On the contrary, he has stated that as defendant No. 1 was managing the property, he had taken deed from defendant No. 1. The plaintiff had thus relied upon his own knowledge and had not relied upon any representation whatsoever from defendants 2 and 3 or even of defendant No. 1, which would show that defendants 2 and 3 were representing that defendant No. 1 was the ostensible owner.

9. It is, therefore, clear that the least inquiry on the part of the plaintiff would have disclosed the real fact that defendant No. 1 was neither the ostensible owner nor had he any authority to act on behalf of defendants 2 and 3 so as to bind their shares. The first estoppel u/s 41, therefore, could not be invoked on the facts of the present case. Even as regards the second estoppel, the lower appellate Court had completely ignored the pleading and had made out a totally new case for the first time in the second appeal. As we have already stated, in the absence of any pleading whatsoever and any issue, defendants Nos. 2 and 3 would have no opportunity whatever to lead evidence on this point and they had been seriously prejudiced. The whole finding of the lower appellate Court is based on the judgment, Ex. 40. Even if it is possible to use these recitals in judgment these recitals in the relevant para make only the mention of the contention of defendants 2 and 3 that defendant No. 1 has committed fraud and had pocketed the entire consideration amount. No issue had been raised on this question and no finding whatever had been given. Merely because the learned Judge disallowed mesne profits after considering all the circumstances, it could not be presumed that the consideration amount of Rs. 1410/- was brought into hotch-pot or that the suit property had gone to the share of defendant No. 1. Not only this evidence could not be looked into in the absence of any pleading or issue, but even this evidence would not warrant any such finding. Therefore, the finding of the lower appellate Court that defendant No. 1 got rights in the suit property to his share in the partition and that is why Section 43 of the T.P. Act

was applicable to the facts of the present case, is completely a perverse finding. Therefore, the plaintiff cannot rely on Section 41 and Section 43 of the T.P. Act to show that the rights of defendants 2 and 3 had even been transferred to him.

9.1 As a result of this discussion the position which emerges is that the rights of defendants 2 and 3 under the original mortgage with possession at Ex. 46 subsisted and were not transferred to the plaintiff. The plaintiff's suit for possession against defendants 2 and 3 must, therefore, fail.

10. In the result this appeal is allowed and the judgment and the decree Of the lower appellate Court are reversed and the plaintiff's suit for possession and mesne profits is dismissed with costs all throughout on the plaintiff.