Haji Mohd. Sayeed And Ors. vs Abdul Ghafoor And Ors. on 5 January, 1955

Equivalent citations: AIR1955ALL688, AIR 1955 ALLAHABAD 688

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Beg, J.

1. This is a plaintiff's second appeal. It arises out of a suit for injunction and some other reliefs. The suit was brought in a representative capacity against a number of defendants who were also sued in a representative capacity. Both the plaintiffs as well as the defendants are Muhammedans residing in the town of Mail Nath Bhanjan in the district of Azamgarh. It appears that among the Muhammedans of this town strained relations have existed between the two sects of Sunni Muslims -- one calling itself Ahl-e-Hadis and the other calling itself Hanafi.

The former sect is also nicknamed as Wahabi by the latter. The present suit marks the culmination of a long-standing dispute between them. There appear to be differences between the two sects in the mode of offering prayers and rituals connected therewith. It is said that the Ahl-e-Hadis recite the 'Surai Pateha' or the first chapter of the Quran behind the Imam in a loud tone, but the Hanafis do not recite it.

Further it is said that the Ahl-e-Hadis pronounce the word 'Amin' after 'Surai Fateha' in a loud tone, whereas the Hanafis recite it in an inaudible or low tone. The Ahl-e-Hadis perform the gesture of 'Rafu'ul-Yadain' (raising of the, hands) when pronouncing the Takbir, viz., the words 'Allaho Akbar' (God is Great) and also every time before bending during the prayers, whereas the Hanafis raise their hands during 'Takbir only once and not higher than the ears.

During the prayers the Ahl-e-Hadis fasten their hands over the chest, whereas the Hanafis fasten their hands oyor the navel. The differences between them had given rise to both civil as well as criminal litigation in the past. In the mosque in dispute the hanafis had been offering prayers behind an Imam of their own for a long time past. Adjoining this mosque there is an Arabic school called the Madrasa-i-Alia which was established by the Ahl-e-Hadis.

In this Madrasa (school) the Abl-e-Hadis used to educate students of their own sect. This Madrasa faces the mosque on the east with only a 'galli' intervening the two. The suit was brought, by the plaintiffs on the allegation that the members of their sect had been offering prayers in this mosque

in the past, and that they had an apprehension that the members of the Hanafi sect would restrain them from performing their prayers in future.

They accordingly claimed a relief that the defendants should be restrained from interfering with the rights of the plaintiffs to offer prayers in a congregation of their own and according to their own rituals. It was further alleged by the plaintiffs that there were certain rooms in the said mosque which were constructed by them to be used as a hostel for the students of Madrasa-i-Alia. They claimed possession over these rooms. The plaintiffs further alleged that there was an apprehension that their right of way to Madrasa-i-Alia through the 'galli' which intervened between, the school and the mosque would be interfered with.

They, therefore, prayed for a further injunction to the effect that the defendants be restrained from interfering with their right of way.

2. The suit was resisted by the defendants on a number of grounds. They alleged that the mosque was founded by a Hanafi for the purpose of enabling the Hanafis to offer prayers in the same. They further alleged that in the town of Mau there was prevalent an old custom according to which the Hanafis and the Ahl-e-Hadis had their separate mosques, and the two sects offered their congregational prayers separately in their respective mosques.

The mosque in question was a Hanafi mosque, and the supervision, management and control of the said mosque had always vested in the Hanafis and they were accordingly entitled to hold congregational prayers in it. For the aforesaid reasons they denied that the Ahl-e-Hadis had any right to hold congregational prayers in it. They further alleged that the rooms in question belonged to the mosque, and were a part and parcel of it and denied that they constituted a hostel of the students of Madrasa-i-Alia or were ever used as such.

3. The trial Court held that the plaintiffs were not entitled to hold prayers in the said mosque in a congregation of their own. It further held that- the rooms in question appertained to the mosque, and did not constitute the hostel of the Madrasa-i-Alia. It, accordingly, dismissed the plaintiff's suit for injunction and possession in this regard. It, however, held that the plaintiffs had a right of way to the Madrasa-i-Alia through the northern and southern gates of the passage adjoining the mosque, and gave a declaration in favour of the plaintiffs to that effect.

4. The plaintiffs took the matter up in appeal in respect of the refusal of the relief of injunction and possession, and the defendants filed cross-objections against the declaration regarding the right of way.

5. The appellate Court remanded the case to the trial Court after framing a number of fresh issues. After the findings of the trial Court on the fresh issues were received, the appellate Court gave its own findings to the effect that since 1915 the Hanafis had been holding congregational prayers in the said mosque, that they had been throughout supervising, controlling and managing the said mosque and that, accordingly, the right to hold congregational prayers vested in them.

The appellate Court further found that since a long time past in the town of Mau there had prevailed a practice under which the Hanafis and the Ahl-e-Hadis had been performing their congregational prayers separately in their respective mosques, and the said practice being ancient, certain and reasonable it had the force of a local custom. It further upheld the finding of the trial Court to the effect that the rooms in question appertained to the said mosque, and were never used by the students of the Madrasa-i-Alia as their hostel.

It, accordingly, dismissed the appeal of the plaintiffs in this regard. As to the right of way, the appellate Court held that the plaintiffs had succeeded in establishing the said right. It, accordingly, modified the decree of the trial Court in this regard by granting the plaintiffs a relief of injunction against the defendants, and decreeing their suit to this extent. In this view of the matter, the cross-objections of the defendants were also dismissed.

6. Dissatisfied with the said judgment the plaintiffs have filed a second appeal in this Court. The defendants have similarly filed cross-objections relating to the right of way, and the same points have been reagitated before us.

7. Learned counsel for the appellants has challenged the correctness of the conclusions arrived at by the lower appellate Court. He has argued that the lower Court having held that every individual professing moslem faith has a right to pray in a mosque, it should logically have further held that every sect of the Muslim religion has a right to hold congregational prayers in any mosque. We do not think that the latter is a necessary corollary of the former.

The nature of the two rights as well as the considerations that apply to each of them are different. The former is an individual right. The latter is a joint right. In the former case the prayers are performed singly and without an Imam, or any leader. In the latter case the prayers are performed jointly, i.e., in a congregation, and behind an Imam whom the congregation is expected to follow.

The result is that in the former case there is a greater scope of individual variation and less chance of disturbance of the rights of others than in the latter. The fallacy in the argument of the learned counsel for the appellants appears to us to be that from the fact that every Mohammedan possesses a right to offer prayers in a mosque as an individual, he argues that it necessarily follows that every separate sect has a right to hold congregational prayers in a mosque.

For the latter proposition of law he has been unable to cite any ruling in his favour. He has, however, cited certain extracts from the famous commentary of Raddul Muhtar which, according to him, support his contention. We have, however, looked into these extracts and we are of opinion that they do not in clear terms warrant the proposition which he seeks to establish. In particular he has placed strong reliance on the following passage at page 368 of the Raddul Muhtar in the chapter entitled "Azan":

> "It has been known to you that it is right that the saying of the prayer by the second congregation, provided that the place of the Imam in the second congregation is in another Mahrab, is not forbidden".

The passage, as cited before us by the learned counsel, has been divorced from its previous context. To understand its proper import, we think that it is necessary to reproduce the passage preceding the one cited above in the same commentary and which runs as follows:

> "The basis of what Imam Halwani said is that during the byegone age of ancestors the congregational prayers used to be held once only and not twice. The same used to be the practice during the period of the Prophet, and after him during the period of the Caliphs, i.e., the congregational prayers used to be held once. Let it, therefore, be known to you that the holding of a second congregation is on a consensus of opinion considered to be 'Makruh' (improper).
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> (The word 'Makruh' according to Craven's Royal Dictionary means odious, abominable, improper, unbecoming, loathsome, something to be detested, disliked or disapproved).
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> After the above sentence follows the above-quoted passage cited by the learned counsel for the appellants. Read in the previous context, the matter, in our opinion, assumes a different complexion. Construed as a whole, to our mind the passage clearly condemns the holding of a second congregation. At any rate, it does not recommend or consider it as a desirable course at all.
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> It might be that the intention was to permit it only under necessity, and as a matter of last resort. No such necessity exists in the present case. On the other hand, the evidence shows that in a criminal litigation in the year 1915, the parties agreed to say their congregational prayers in separate mosques of their own, and this usage which has since then ripened into custom has been prevailing in the said locality.
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> The report of the Commissioner shows that there are at least six mosques which bear the inscription that they are meant exclusively for offering prayers by the Hanafis, and there are about seven mosques which bear the inscription that they are to be used for offering prayers by the Ahl-e-Hadis alone. Further, only about fifty paces away from the mosque in question, the Ahl-e-Hadis have got their own mosque where they can and do pray separately in congregation.
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> Even the plaintiffs themselves do not allege that they suffer or would suffer any inconvenience or hardship if they are not allowed to say congregational prayers in the mosque in question. The above passage from Ruddul Muhtar further shows that even when such a course is permitted, a condition is laid down to the effect that the Imam holding the second congregation should change his original position, and should stand in a place different from the place where the Imam in the first congregation stood.
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> Thus the sanction accorded appears to be only under exceptional and unusual circumstances. It appears to be a measure of emergency, and is hedged round with

> conditions. The passage even if stretched to the utmost degree in favour of the plaintiffs falls short of warranting the claim that they have set up in this, case viz., that they are legally entitled to hold congregational prayers in the mosque at all times under all circumstances even though it might result in a denial of the same right to the defendants.

8. Even if it be conceded for a moment that it is permissible in certain circumstances to allow the holding of more than one congregation we find it difficult to understand how that will be enough to entitle the plaintiffs to the equitable relief of injunction in their favour against the defendants. In the present case it has to De remembered that the plaintiffs belong to a sect different from that to which the defendants belong.

It is also beyond doubt that the defendants have been holding congregational prayers according to their form in the said mosque for a long time, and the effect of granting the prayer to the plaintiffs might be to defeat the efficient and proper holding of prayers by the defendants in their own fashion, a right which they have been exercising for a fairly long time, and which, by virtue of its strength and uniform practice has ripened into a local custom.

Moreover, in view of the bitter relations that have existed between the two sects for a long time, and which during the last fifty years have led to a crop of civil as well as criminal litigation, the result of the grant of the above relief in the present case would be to create a situation that would be explosive and fraught with danger.

It is bound to lead to a position in which a violent clash between the parties might take place any moment with the result that no sect would be able to perform any prayer at all.

At any rate the tempestuous mood in which the minds of parties are worked up is certainly not one which will be conducive to the effective peaceful or efficient performance of joint worship by either.

9. The learned counsel for the appellants has also relied on another passage of Raddul Muhtar on page 527 which is as follows:

> "If each Muslim set has a separate Imam of its own as is the practice prevailing in our days then it is better to say prayer behind its own Imam whether he says the prayer with the first congregation or with the second congregation. It has been agreeable to all Muslims, and all the Muslims of Makka, Madina, Baitulmoqaddas, Egypt, and Sham have acted upon this principle. Those, who do contrary, are not reliable."

It is noteworthy that in the above passage the position envisaged appears to be that of an agreement voluntarily entered into or accepted by the partias, and the emphasis appears to be on the choice of an Imam when two congregations are permissible and are held in the same mosque by different sects. Further it is to be noted that even in such a situation, in order to preserve the interests of harmony and peace, and to minimise the chances of the disturbance of the prayer of others, it is recommended that each sect should prefer to offer prayers behind the Imam of its own sect.

We can conceive of a position where harmonious relations prevail and where by agreement between the parties or by established usage or custom, two congregations of different sects might be held in a mosque. From the above passage, however it does not follow that every sect has a right to hold congregational prayers according to the form prescribed by the tenets of that sect in every mosque even though the differences between them have repeatedly in the past assumed the shape of an armed conflict and culminated in violent clashes.

What the exact position should be where one sect has already been managing a mosque and performing congregational prayers in it for a long time, and another sect suddenly makes up its mind to assert the same right in the same mosque In open, clear and defiant disregard of the prior rights of the other sect and in clear violation of a previous agreement by members of their own sect is a situation that is not dealt with in any of the passages cited above.

The action of the plaintiffs appears to us to be clearly mala fide and indefensible in law and equity. Thus so far as the exact question with which the Court in the present case is concerned, no clear authority has been cited in support of the contention advanced on behalf of the appellants, and we are loathe to give effect to an argument that would lead to results that are so unfair and inequitable, unless constrained to do so by injunctions of law that are clear, emphatic and unambiguous.

10. So far as the Muslim Law is concerned, the two primary sources of authority are the Holy Quran and the 'Hadis'. The Quran is the holy book of the Mohammedans believed by the Muslims to be the word of God revealed through the mouth of the Prophet in moments of inspiration. The injunctions in this book are considered to be mandatory and binding by every Mohammedan. Next comes the 'Hadis' which consists of precepts, sayings and traditions of the Prophet as disclosed from his conduct in every day life in this world.

So far as these two primary sources of the Muslim Law are concerned, the learned counsel conceded that it was not possible to ascertain any clear authority in support of the proposition which he seeks to advance. His incapability to do so may be explicable on, the ground that the birth of multifarious sects in Mohammadan religion being an incident that followed the demise of the Prophet, the problem did not arise in this specific form at the time when the two aforementioned primary sources of Moslem Law held away.

So far as the appellants are concerned their counsel informs us that they are Ahl-e-Hadis, and further states that according to the tenets of their own sect they are not allowed to go beyond the Quran and the 'Hadis' for the purpose of seeking any authority in support of religious injunctions. In the above circumstances, we cannot see how it is conscientiously possible for his clients to vehemently rely in their favour on a proposition of law based on authorities which they themselves repudiate as unworthy of credence and belief.

11. Learned counsel has, however, chosen to rely on other sources. We have looked into them and fail to extract from them any clear or consistent answer to the specific problem presented in this case. The third source of authority is the Ijmaa. Ijmaa has been defined in the Principles of Muhammadan Jurisprudence by Abdul Rahim (1907 Edn. 115) as follows: "Ijmaa is defined as

agreement of the jurists among the followers of Mohammad in a particular age on a question of law."

12. The fourth source of authority is 'Qeyas' or analogy the nature of which as expounded at page 139 of the same book is as follows:

> "Rules of law analogically deduce do not rank so high as authority, as those laid down by a text of the Quran, or Hadith, or by consensus of opinion. The reason is that with respect to analogical deductions one cannot be certain that they are what the Lawgiver intended, such deductions resting as they do upon the application of human reason which is always liable to err. In fact it is a maxim of the Sunni jurisprudance that a jurist may be right or may be wrong.
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> A Qadi in deciding a case is not, therefore, bound by a particular rule of juristic law merely because it has the approval of certain doctors, but may follow his own view."

The appellants' learned counsel has been unable to provide us with any clear or consistent authority on the point in issue before us either from Ijmaa (consensus of authority of jurists in a particular age) or from Qeyas (analogy). Where no clear authority is available on a point or where the authorities available are of a conflicting nature, it is open to jurists even according to a school of Muslim Law to resort to principles of equity for the purpose of deciding a particular question at issue before them.

This particular source is the fifth one and is termed as 'istehsan' (Juristic Equity). Particularly, it would be open to Courts to draw upon this source where rigidity or narrowness of rules suggested need adjustment in the light of changes brought about by the altered conditions of life and society in a particular age. The following extract from Abdur Rahim's Commentary on Mohammadan Jurisprudence is relevant for the purpose of disclosing the amplitude of 'Istehsan' (Juristic Equity) as a source of Muslim Ecclesiastical law:

> "It may happen that the law analogically deduced fails to commend itself to the jurist, owing to its narrowness and inadaptability to the habits and usages of the people and being likely to cause hardships and inconvenience. In that event also according to the Hanafis, a jurist is at liberty to refuse to adopt the law to which analogy points, and to accept instead a rule which in his opinion would better advance the welfare of men and the interests of justice.
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> The doctrine by which a jurist is enabled to get over a deduction of analogy, either because it is opposed to a text or consensus of opinion, or is such that his better judgment does not approve of it, is technically called Istihsan (literally, preferring or considering a thing to be good) which I have translated juristic preference or equity."

The present case appears to us to be a case where the matter should be decided according to the equitable considerations arising in the case in question. It may also be worthy of note that the relief

claimed by the plaintiffs is an equitable one. In granting the said relief, the Court should not only look to the effect of the grant of such relief, but also to the conduct of the plaintiffs.

It is also to be borne in mind that the grant of such equitable relief is discretionary, and the Court might very well refuse it, if a party has by its conduct forfeited its claim to it, or there exist circumstances which make it inequitable to grant it.

13. If the relief In question is granted to the plaintiffs, it appears to us that the effect of it would be not to promote the efficient conduct of worship but to defeat it. If each sect of Muslims residing in a particular local area was to start asserting independently its right of holding congregational prayers in the mosque, the necessary result of allowing such a right would be that no one would be able to hold any prayers of any kind.

Further, the diversity in the rituals and the form of prayers offered by the various sects might not be such as to be tolerated by the rival sect. In fact one sect may regard the other as heretic or 'kafir'. The simultaneous exercise of the right to pray by one sect might seriously interfere or disturb the performance of a similar right by the other sect. Under such circumstances, to grant such relief in an indiscriminate fashion must necessarily result in a breach of the peace.

It has been suggested on behalf of the appellants that this Court may fix times for prayers to be held by the Hanafis & the Ahl-e-Hadis sects in the village as the time for prayers by Ahl-e-Hadis falls a little earlier than that of Hanafis. We are unable to accept this suggestion. It is possible that there may be other sects also in the village; and in any case, there is nothing to prevent other sects springing up in future.

If the right to have time fixed for prayers is conceded in favour of the two contending sects that are parties to this litigation, there appears to be no reason why a similar right should not be conceded in favour of other sects who may claim it. The position would thus be reduced to absurdity. Even between the two parties before us such a course would not only be undesirable but impracticable.

Such times would vary with different seasons. In fact so far as the 'Maghrib' or the sunset time prayer is concerned, learned counsel concedes that it is impossible for the Court to fix two points of time because the time for this prayer of both the sects coincides. Moreover, even if such a course were to be adopted, it will not be possible for the Court to enforce it on the spot, and this Court would be reluctant to grant a decree that could be flouted or made futile at the whim or option of a particular, party especially when the relief to be granted is discretionary.

Supposing for a moment such times were to be fixed, it is possible for a sect whose time is fixed earlier to prolong its prayers so as to make the recitation of prayers by the other sect impossible. The only effect of allowing such relief to every party, would be, as we have observed above, to invite a breach of the peace an event which would result in the mosque being attached and put beyond the use of all the sects.

In the above situation, we are of opinion that the only reasonable and fair course is that which "has been adopted by the Courts below. They have come to the conclusion that since 1915 the members of the Hanafi sect have been continuously holding congregational prayers in the said mosque and have been managing, supervising and controlling the same. This practice has crystallised in the form of a custom so clearly that mosques in this town bear labels in the form of inscriptions showing that they are for Hanans or for Ahl-e-Hadis exclusively.

The lower Court has also found that apart from the daily prayers each sect offers its Friday prayers, in separate mosques of its own. Further, it has found that each sect has got a separate Idgah of its own where its adherents offer their Idd prayers separately every year. As mentioned above, a mosque of Ahl-e-Hadis exists only fifty paces away from the mosque in question. There appears to us to be absolutely no reason why the plaintiffs should not resort to this mosque which is their own, and in which they can worship and hold their congregational prayers in peace without disturbance either to themselves or to others.

As mentioned before, there is on record also an agreement between some members of the sect of Ahl-e-Hadis and some members of the Hanafi sect of as long as 1915 when they agreed to offer their congregational prayers in a separate mosque. Learned counsel for the appellants argued that they were not parties to the said agreement, and hence the said agreement should not be considered binding on them.

This objection ignores the fact that the agreement is cited not because it is not considered to be binding on the parties to the present case, but as an explanation of the practice which has been found as a fact to be existing in the town of Mau, and according to which both the sects have been offering their congregational prayers separately in different mosques of their own. We see no reason why this particular agreement should be ruled out as inadmissible.

It is certainly admissible for the purpose of explaining the origin of this practice, especially when we find from circumstances as well as from what has been happening in this particular town that the said practice has been observed continuously. The said practice has, according to the clear finding of the lower Court hardened into a custom. The lower appellate Court has further found that the said custom is ancient, reasonable and certain, and that it possesses all the incidents and features of a valid custom.

Under the above circumstances, the question in the present case resolves itself into one of regulation of rights of various parties on the principles of justice, equity and good conscience in the light of the particular circumstances emerging in the case before us.

14. It is not the first time that a question of this nature has arisen in Court. Authorities are not wanting where, in view of the insurmountable difficulties which would be generated by taking the contrary view the Courts had no hesitation in holding that the right of each and every sect to hold congregation prayers in a particular mosque should not be upheld.

15. In this connection the remarks made in -- 'Khalil Ahmad v. Israfil', AIR 1916 Pat 87 (A), are instructive and relevant. A Bench of the Patna High Court in the said case held that "Every mosque is open to any Mahomedan, to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Mahomedans are not entitled to pray in every mosque as a separate congregation behind an Imam chosen by themselves."

This case was followed by a Bench of the Allahabad High Court in -- 'Sifat Ali Khan v. Ali Mian', AIR 1933 All 284 (B), in which it was laid down that-

> "Mohammedans of the Ahmadia sect are entitled to enter a Sunni mosque if they please and to offer up prayers with the regular congregation behind the Imam chosen by the members of the congregation, taut they are not entitled to pray in a separate congregation behind an Imam of their own in a mosque which has always been used by orthodox Mohammadans."

The Patna case was also followed by a Bench in -- 'Amir Hussain Shah v. Hafiz Ghulam Rasul'. AIR 1936 Pesh 65 (C), in which it was held that:

> "Every Mahomedan has right to say his prayers in any mosque and behind the regular Imam provided he does not disturb or interrupt other worshippers. A particular sect is not however entitled to have a separate call of prayer made or to hold a separate congregation behind an Imam of their own, as it would lead to insurmountable difficulties and continual friction."

We find ourselves in accord with the view expressed in these cases.

16. Learned counsel for the appellants further argued that at any rate the members of the Ahle-e-Hadis sect have an individual right to pray in the said mosque. In this connection he cited two Full Bench rulings of the Allahabad High Court, viz.. -- 'Queen Empress v. Ramzan', 7 All 461 (FB) (D); and -- 'Ataullah v. Azimullah', 12 All 494 (FB) (E). In the present case, however, the plaintiffs did not claim a relief asserting their individual right to pray in the said mosque, nor have they claimed any relief in respect of their right to join and pray in the congregational prayer which has been held in the said, mosque for a long time past.

They have claimed a right to form a separate and exclusive congregation of their own and to offer their prayers in this fashion. Any observations made by us in this judgment relate to cannot for the reasons already given by us, be and are confined to this right only. Such a right granted to them in the circumstances of the present case. The two Allahabad cases cited by them did not deal with the question which has arisen in this case, and are, therefore, irrelevant and unhelpful in the determination of the matter before us.

It was further argued on behalf of the appellants that if the plaintiffs possessed a right and lawfully exercised it in a bona fide manner, they cannot be deprived of it merely because their exercise of such a right might result in a breach of the peace. It has, already been held by us that the plaintiffs

have no right to offer congregational prayers in the mosque in question.

Further, we are also of opinion that the exercise of the exclusive congregational right claimed by them is neither lawful nor bona fide. This argument, therefore, cannot be of any avail to them. In the form in which the plaintiffs have claimed the relief, we are of opinion that we must refuse it for reasons given by us above, and dismiss the plaintiff's suit for injunction in this regard.

17. The remaining part of the plaintiffs' appeal relates to their claim for possession of the rooms which are alleged by them to be a part of the hostel of Madarsa-i-Alia. Both the Courts below have disbelieved the plaintiffs' case in that regard, and have concurrently found that the said rooms appertain to the mosque in question. It has been rightly conceded on behalf of the appellants that this matter is concluded by finding of fact, and cannot, therefore, be reagitated at this stage.

For the above reasons we are of opinion that the appeal of the plaintiffs should be dismissed with costs. We order accordingly.

18. So far as the cross-objection of the defendants relating to the right of way is concerned, both the Courts below have concurrently found in favour of the plaintiffs, and have held that the alleged right of way exists. The lower appellate Court has, accordingly granted an injunction in favour of the plaintiffs in that regard. No error of law or defect of procedure has been pointed out before us to enable us to subvert this finding of fact, which is based on admissible evidence and is, on the face of it, just and fair. We accordingly uphold it and dismiss the defendants' cross-objections with costs.