

(1925) 02 MAD CK 0037
In the Madras High Court

Hathoor Gramathil Valia Manayilparkum Okkilikkara Siddayya
and Another

APPELLANT

Vs

Munnambeth Ambu Nair

RESPONDENT

Date of Decision : 20-02-1925

Acts Referred:

Citation : AIR 1925 Mad 1264 : (1925) 22 LW 487 : (1925) 49 MLJ 379

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—This is an application to revise the order of the Subordinate Judge of Tellicherry passed on a petition by the defendants to set

aside an ex parte decree passed against them. The defendants filed an application to set aside the ex parte decree which was dismissed by the

Subordinate Judge on 16th August, 1922. The present application is to set aside the order passed on the previous application and also to set aside

the ex parte decree. After the application was filed both parties filed a joint affidavit in which the defendants consented to take oath and the plaintiff

agreed to abide by the oath of the defendants. On the date when the oath was to be taken by them, the plaintiff and the defendants appeared and

they were asked to go and bathe before taking the oath. The defendants came back after the bath but the plaintiff did not return in consequence of

which the oath was not taken and the Commissioner made a return to that effect. The Sub-ordinate Judge heard the parties and dismissed the

application of the petitioners.

2. It is contended by Mr. Karunakaran Nambiar for the petitioners that the Subordinate Judge should have set aside the ex parte decree as the

plaintiff failed to be present to hear the oath taken and he relies upon a case in *Ayyakannu Nadar v. Muthiah Nadar* (1906) 17 MLJ 99 In that

case it was held that if a party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree. On the strength of

this ruling the petitioners want an order in their favour. That case has no application to the present, for in that case it was the plaintiff who ought to

have adduced evidence of certain facts to prove his case and in the absence of evidence the Court was justified in dismissing the suit. Under the

Oaths Act, Section 11, the evidence so given shall, as against a person who offered to be bound as aforesaid, be conclusive proof of the matters

stated; if a party attacks them as regards any fact the oath is proof of that fact and the Court is bound to accept that as proof of that fact. But if the

party who agrees to take an oath declines afterwards or fails to take the oath the Court may only take that circumstance into consideration in

deciding the case. The absence of an oath or refusal to take an oath would not import into the case evidence which was not otherwise adduced

before it. This view was held by a Bench of this Court in a case reported in *Ulagappu Chettiar v. Peria Karuppan Chetty* (1912) MWN 361. In

the present case the defendants failed to take the oath that they were not aware of the institution of the suit and that they were not liable to the

plaintiff. The failure to take the oath would not and could not be treated as evidence that they were not aware of the institution of the suit and that

they were not liable to the plaintiff for the amount claimed by him. The failure to take the oath was due to the plaintiff's conduct in not appearing

before the temple to hear the oath taken. In the circumstances, the Lower Court ought to have called upon the defendants to prove their allegations

by oral evidence and if they declined to do so, the Court should have dismissed the application for want of evidence on their part. Such a course

was not pursued in this case. The learned Sub-Judge heard the parties and dismissed the application. I think this course was not a proper course to

adopt in a case of this kind. I therefore set aside the order dismissing the petition and direct the Subordinate Judge to restore the petition to file and

dispose of it according to law. In so doing the Subordinate Judge would direct the petitioners to pay the costs of the plaintiff incurred by their

negligence without reference to the ultimate result of the case. The costs of this petition will be provided for in the order that the Subordinate Judge

may pass on the petition.