

(1951) 11 MAD CK 0020

In the Madras High Court

Case No : Civil Revision Petition No. 1283 of 1950

Pudusseri Vadakkethil Vikraman alias Kunhikuttan Nair

APPELLANT

Vs

V. Krishnan Nair

RESPONDENT

Date of Decision : 14-11-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Oaths Act, 1873 — Section 11

Citation : AIR 1953 Mad 396 : (1952) 65 LW 783 : (1952) 1 MLJ 452

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : B. Pocker, for the Appellant; P.K. Janakiram, for the Respondent

Judgement

Basheer Ahmed Sayeed, J.—The defendant who is the petitioner in this civil revision petition seeks to revise the order of the Small Cause

Judge who gave a decree in favour of the plaintiff under the circumstances set out in the said judgment.

2. The suit was filed by the plaintiff for recovery of a sum of Rs. 250 lent in cash and interest thereon towards an Agreement to sell a piece of land

to the plaintiff. The defendant petitioner contended that the alleged agreement was false, that he never received any money and that the suit was

filed out of spite.

3. When the point for determination was set down as to whether the plaintiff claim was true and binding on 1-2-1950 both the plaintiff and the

defendant entered into an agreement which was endorsed on the reverse of the plaintiff.

4. The agreement consists of two parts. The first part is signed by the plaintiff and his counsel and that part is to the effect that if the defendant

would take an oath in Parambathuk-kudu Bhagavathi Amman temple at Vandalorc that he did not receive the sum of Rs. 250 for the Kolankora

lands the suit should be dismissed with costs; and in default there should be a decree. The second part of the agreement is signed by the defendant

which says that the defendant agrees to take the oath as aforesaid and for that purpose he received a sum of Rs. 12-8-0 towards the cost of taking

the oath. This agreement clearly sets out that the challenge was made by the plaintiff and that it was accepted by the defendant.

5. But unfortunately for the parties, when the defendant went to the temple, the temple was closed and the "poojari" of the temple who was met by

the defendant informed the defendant that the money payable for taking the oath should be deposited as a condition precedent with the uralan who

was residing at some distance off and so it was not possible to deposit the amount on that day and take the oath at the appointed time. It may be

mentioned that the oath was to be taken on the 19th of February at 10 a.m. for which purpose an amin of the Tirur Court was also sent to be

present on the occasion of taking the oath.

Consequent upon this failure on the part of the defendant to take the oath, obviously for reasons beyond his control, the suit was decreed by the

learned Small Cause Judge. The decree appeal's to have been passed on the representation of the plaintiff's counsel that the agreement of the

parties according to the endorsement on the plaint should be given effect to and a decree should be passed. The learned Small Cause Judge says in

his judgment that under Order 23 Rule 3, Civil P. C., he had no option but to give effect to the agreement and, therefore, decreed the suit with

costs. Against this judgment and decree, the defendant has preferred this revision petition.

6. The main point taken by Mr. B. Pocker appearing for the petitioner is that the agreement to take the oath is not an adjustment or a compromise

within the meaning of Rule 3 of Order 23, Civil P.C. The agreement or adjustment or compromise contemplated under Rule 3 of Order 23, C. P.

C., should be one which could be capable of being incorporated in a decree and that an agreement of the kind where two parties have agreed

merely to take oath cannot be said to be an adjustment or a compromise capable of being entered in a decree. An agreement of this kind merely

provides for a decree being passed on the happening of certain contingencies. It cannot, therefore, be said to be an adjustment of the suit by itself.

In the absence of there being any possibility of an agreement of this nature being incorporated in the form of a decree, the learned Small Cause

Judge was not correct in having observed that he had no option but to pass a decree in terms of the agreement.

The further contention of the learned counsel, for the petitioner is that the failure to take the oath cannot entitle the plaintiff to a decree straightway

but that such failure can only be a circumstance which could be taken into account or consideration in deciding the case by the Small Cause Judge.

By no means could the failure to take the oath should be taken as evidence in order to base a decree in favour of the plaintiff or the defendant as

the case may be. When parties do not comply with the terms of the agreement in the matter of taking the oath the learned counsel argues there

should be evidence taken in order that the case might be decided one way or the other. Therefore the finding of the learned Small Cause Judge that

he had no option but to give effect to the agreement under Rule 3, Order 23, Civil P. C., is not sustainable.

7. There is considerable force in these contentions of the learned counsel for the petitioner and I am inclined to agree with him.

8. In support of this contention the learned counsel for the petitioner has invited my attention to a series of decisions. The first is --"Vasudeva

Shanbog v. Naraina Pai", 2 Mad 356. That decision discusses at length the old law and the law as amended later by the Oaths Act (Act 10 of

1873) and the "discussion is very instructive. The substance of that decision is that if an agreement to take oath is broken, it can never be a proper

ground for an adverse decision against the party responsible for the failure to take the oath though it may serve as corroborative evidence, if there

is other evidence enabling the court to pass a decree. This decision follows an earlier decision reported in -- "K. Uttatchadayan v. P. M. Raman

Nambiar", 4 Mad HCB 422 which is to the same effect, viz., that the failure to take the oath cannot be a sufficient ground to pass a decree

immediately.

The next decision relied upon by the learned counsel for the petitioner is -- "Moyan v. Pathukutti", 31 Mad I, which follows -- "Vasudeva

Shanbog v. Naraina Pai", 2 Mad 356, -- "Olkilikara Siddaya v. Ambu Nair", 49 MLJ 379, which is also relied upon, by the learned counsel for

the petitioner which in turn follows--"Thukku Goundan v. Kuppandu Goundan", 17 Ind Cas 339 is also to the effect that the failure to take oath

can only be considered to be a circumstance which the Court can take into consideration and it can never be construed as an adjustment enabling

the Court to proceed under Rule 3 of Order 23, Civil P.C. The latest decision on the point is the one reported in -- "Shah Nawaz v. Ghulam

Mohammad", AIR 1946 Lah 78, which reviews the earlier decisions and agrees with the decision in -- Vasudeva Shanbog v. Naraina Pai", 2 Mad

356 and --"Moyan v. Pathukutti", 31 Mad 1. All these decisions represent one view of the matter.

9. But the learned counsel for the respondent has invited my attention to another series of decisions which represent a 2nd view. The first of these

decisions referred to by the learned counsel for the respondent is the one in -- "Ayyakannu Nadar v. Muthiah Nadar", 17 Mad LJ 99. In this case

the party who agreed to be bound by the oath .in a certain form by his own conduct prevented the oath being taken in that form. The oath was not

taken although the other party was ready and willing to take it in the form which had been agreed to. The decision went on the basis that the

agreement to be bound by an oath of this kind was in effect an agreement to treat the evidence given under the oath as the evidence in the case,

and to dispense with other evidence and that if the party who had agreed to be bound prevented the oath being taken, the other party was in the

opinion of the learned Judge entitled to a decree, at any rate in a case like the one before them, where it was the plaintiff who agreed to be bound

and the result of his refusal to allow the oath to be taken in the form agreed upon was that there was no evidence in support of his case.

I do not think that the principle of this decision would apply to the facts of the present case. In the present case, the challenger was the plaintiff and

the person who accepted to take the oath was the defendant and the taking of the oath was not prevented by any conduct either on the part of the

challenger or on the party who accepted to take the oath. On the other hand the record goes to show that the defendant could not take the oath

though he was willing for the reason that the temple was not kept open and by the time any attempt could be made to get the temple opened the

"uralan" who was in charge of the temple and who was to receive the fee for the purpose was not available. Only the "Poojari" was available and,

therefore, for reasons for which the defendant was not responsible the oath could not be taken. In those circumstances, it could not be said that

there was any conduct on the part of either of the parties to the suit by which the taking of the oath was prevented.

The second case relied upon by the learned counsel for the respondent is -- "Thoyi Ammal v. Subbaraya Mudali", 22 Mad 234. In this case, the

defendant in the suit before its trial filed a petition u/s 9 of the Oaths Act of 1873 that if the plaintiff should take an oath according to law regarding

certain facts this defendant should forfeit his right of contesting the suit. He subsequently desired to withdraw the petition on insufficient grounds but

the plaintiff took the oath and on the strength thereof all the issues were decided and a decree passed in plaintiff's favour. The suit was, however,

remanded on appeal for disposal after recording evidence on both sides.

On appeal by the plaintiff against the order of remand a Bench of this Court held that there was nothing in Sections 9 to 11, Oaths Act, which

allowed a party who had agreed to the administration of an oath under those sections to retract after the plaintiff had accepted the proposal, that

the Act gives the Court the discretion to administer the oath or not, and that it should not administer it if good grounds be shown for retracting and

it was justified in so doing notwithstanding the retraction if the grounds were frivolous.

Here again the facts of the case are not on all fours with the present case for, in the case decided by the learned Chief Justice and Benson J. in --

"Thoyi Ammal v. Subbaraya Mudali", 22 Mad 234, there was a petition for making one of the parties to take an oath according to law regarding

certain facts and that the petition was retracted from. But in the present case, as had already been pointed out, there was no retraction. On the

other hand, by circumstances which are said to be not brought about by either of the parties, the oath could not be taken. There was neither

retraction nor refusal. So then, the reasoning given in this Bench decision does not, in my opinion, avail "the respondent.

The next case referred to by the learned counsel for the respondent is the one -- Bhagavathi Vannan Vs. Veera Vannan, . In this case Pandrang

Row J. after discussing the various rulings on the point has come to the conclusion that the disposal of the suit at the stage where there was no completion of the process of the taking of the oath was improper and that the proper course for the trial Court was to issue a commission at the cost of the defendant directing the taking of the oath as agreed upon on a day to be fixed and direct the plaintiff to be present on that occasion and that if the plaintiff failed to be present then the trial Court should deal with the case as if Section 12, Oaths Act, applied. I think the decision in this case is a near approach to the facts of the case in this revision petition.

If the defendant was prevented from taking the oath as accepted by him, by reason of the fact that the temple was not open and that the "uralan" was not available to receive the fee and then allow the taking of the oath to be proceeded with, there was no further attempt made by the defendant to complete his agreement to take the oath. He having received the fee to be paid to the "uralan" for the purpose of making the oath was still bound to avail of another opportunity to make the oath and it would have been very proper and correct for the learned Small Cause Judge to have ordered a fresh opportunity to be made available to the defendant to take the oath. This has not been done and it could not, therefore, in the circumstances, be stated that there has been any failure on the part of either of the parties to fulfil the agreement which they entered into in regard to the taking of the oath.

In such circumstances, I am inclined to agree with and follow the course adopted by Pandran; Row J. in having directed that there should be a further opportunity made available to the defendant who seems to be still willing to abide by his original agreement to take the oath. In that case, the proper thing for the learned Small Cause Judge would be to appoint a commissioner and direct that the defendant to had the oath on a fixed day in the form which had been agreed upon in the presence of the Commissioner as well as of the plaintiff who has challenged the defendant to take the oath. On the completion of this oath, it will be for the learned Small Cause Judge to decide the matter.

10. There is another Bench decision referred to by the learned counsel for the respondent and which is reported in -- Valli Ammal and Another

Vs. Arunachala Moopanar and Others, . A Bench of this Court held in that

decision that if the oath is not taken in pursuance of an agreement the case cannot be disposed of on the basis of a default either on behalf of the challenger or by the acceptor. The provisions of Section 11, Oaths Act, can only be attracted if the oath had been taken in accordance with the agreement arrived at between the parties. Various other aspects of the case have been, discussed at great length in this Bench decision but I do not think for the purpose of this civil revision petition I need go into a detailed discussion of the points that have been" discussed in the said Bench decision.

The fundamental fact remains that unless the oath is taken, as agreed to by the parties, there cannot be said to be any evidence on the basis of which the Court can proceed to dispose of the case one way or the other so that it seems to me necessary that the agreement to take the oath must be put into operation before the Court can have any material before it to decide the case on the basis of the agreement. It also seems to be evident from the trend of these decisions that a mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not.

In such circumstances, I do not think that it will be safe, in the interests of justice, that the Court should follow any other course of action than what is set down in the first series of decisions ending with -- "Siddaya v. Ambu Nair", 49 Mad LJ 379 & -- "Shah Nawaz v. Ghulam Mohammad", AIR 1946 Lah 78. While adhering to the view that a mere agreement to go through the taking of an oath to enable the Court to decide a matter cannot be the same as a compromise or an adjustment of a suit I think, in the circumstances of the present case, it will be in the interests of justice that the course that has been followed in -- Bhagavathi Vannan Vs. Veera Vannan, should be adopted in this case as well.

In view of this I direct that the learned Small Cause Judge should appoint a particular day for the taking of the oath by the defendant, direct him to do so in the form already agreed to, appoint a commissioner in whose presence it should be done and also direct that the plaintiff be also present on the occasion of the oath-taking. Of course, it follows that for the purpose of

taking the oath, the defendant who had already received the fee to be paid to the "uralan" will make all the necessary arrangements beforehand to keep the temple open so that it may not again be said that the "uralan" or the "poojari" of the temple was not available for fulfilling his obligation under the agreement to take the oath.

In the circumstances, the suit will be remanded to the lower Court for being disposed of in the manner indicated above. In view of the fact that the

Judgment of the learned Small Cause Judge has not discussed all the relevant issues that arose in a matter like this, I think it is a proper direction in

the circumstances of the case that each party should bear his costs.