

(2012) 10 KL CK 0105

In the High Court Of Kerala

Case No : Regular Second Appeal No. 662 of 2003

Seline Fernandez and Another

APPELLANT

Vs

Bernard Francis and Others

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 9, 92, 92(1)

Citation : (2013) 1 ILR (Ker) 56 : (2012) 4 KLJ 468

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : P.R. Venkatesh, for the Appellant; Varghese C. Kuriakose, Jacob Sebastian and Praveen K. Joy, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.

And I tell thee this is my turn, that thou art Peter, and it is upon this rock that I will build my church; and the gates of hell shall not prevail against it.

(Mathew 16:18)

and I will give to thee the keys of the kingdom of heaven; and whatever thou shalt bind on earth shall be bound in heaven; and whatever thou shalt loose on earth shall be loosed in heaven.

(Mathew 16:19)

1. The words "bound" and "loosed" are expressions borrowed from the Jews, which means respectively "prohibited" and "permitted". Thus St. Peter was entrusted with the key to establish the Catholic Church on Earth. The keys are seen as the symbol of papal authority. The Kingdom of heaven, here, means the Church on Earth. St. Peter was entrusted the key to open the doors of faith to the world. It is believed that St. Peter is the "Rock", on which the Church has been built on this Earth. St. Peter is considered to be the head of the Apostolic

College and to this day, the supreme legislator of the Catholics, is the Roman Pontiff. The Apostles were empowered with the power to bind and loose (prohibit and permit); in the affairs of the Church, to set Church policy and teachings. Interesting question as to whether a Christian, more specifically, the Administrators elected by a Parish needs the sanction of its "ordinary" to initiate civil litigation to protect the property of the Church is one of the questions raised here. The unsuccessful defendants 1 and 2 before the trial Court, who are also the appellants in the first appellate Court, are the appellants in the above Second Appeal. The defendants 1 and 2 are the same persons; defendant No. 2 is impleaded in her capacity of Managing Partner of a firm as defendant No. 1.

2. The respondents/plaintiffs are the parishioners/Roman Catholics residing in the Edavaka of Mukkad Thirukudumba Church of Meenathucherry, Sakthikulangara Village, hereinafter referred to as "the Church". The plaintiffs 1 and 2 claimed to be the trustees and the 3rd plaintiff the Convener of the elected representatives of the parish constituting a Committee, in which plaintiffs 3 to 12 are members. The 3rd defendant is the Bishop of the Quilon Catholic Diocese, under which the Church comes, and the 4th defendant is the Vicar, appointed by the said Bishop. The suit was one filed for declaration of title and possession of plaintiff schedule properties, more fully described in plaint "A", "B" and "C" schedules comprised in Survey No. 2/63; totalling 2 acres and 15.5 cents. According to the revenue records, Survey No. 2/63 comprised a total of 3.51 acres. In addition to the declaration that the said property belonged to the Church Trust, fixation of boundaries as also injunction against obstruction of enjoyment of the property by the plaintiffs, the trust and the parishioners; as against defendants 1 and 2 was also sought An ancillary relief in the nature of recovery and mesne profits in the event of any encroachment during the pendency of the suit was also prayed.

3. The defendants filed written statement claiming title over plaint "A" schedule property and raised a counter claim, in the nature of injunction from trespass, and destruction of boundaries and improvements. Though in the written statement the title of the Church over plaint "B" and "C" schedules were also disputed, it was given up in the course of the proceedings as is evident from the deposition of D.W.1. The learned counsel appearing for the appellants also does not urge it before this Court. Essentially the dispute is with respect to plaint "A" schedule property. The appellants/defendants 1 and 2 claim title over the very same property and resists the suit on the basis of derivation of independent title by virtue of Exhibits B7 and B8; respectively of 51.5 cents and 50 cents, lying north-south.

4. The questions of law, as discernible to this Court from the arguments advanced and as agreed to by the learned counsel, are the following:

(i) Whether the plaintiffs independently or together as a Committee of Administrators, are competent to represent the parish and claim rights over the property of the Church, as per the Canon Law; which vests the Church property

in the hands of the Bishop or the Vicar and clearly mandates a consent from either of these two personalities for initiating a litigation?

(ii) Whether on the admission of the plaintiffs that the Church and its properties constituted a Public Trust; leave u/s 92 of the CPC ought to have been obtained by the plaintiffs, especially by reason of the reliefs being covered under clause (c) and (e) of Section 92 CPC?

(iii) On leave u/s 92 CPC being found to be necessary, is not the suit bad only for the reason of such leave having not been obtained and also for the reason of the suit being not filed in the principal Court having jurisdiction to try suits u/s 92 CPC?

(iv) Is the declaration of title granted by the Court below one eminently possible on the evidence recorded before the Court below and has not the plaintiffs failed to establish title and identify the properties which are scheduled in the plaint and title over which is claimed?

5. The question regarding competence is raised by the learned counsel for the appellants based on Canon 532 and 1288. Canon 532 provides that in all juridic affairs the pastor represents the parish and he has to take care that the goods of the parish are properly administered. Canon 1288, according to the counsel, is a specific prohibition on the administrators from initiating or contesting litigation in a civil forum in the name of a public juridic person without written permission of their own "ordinary" ("ordinary" from Latin "ordinarius" is an officer of Church or Civic authority, who has, by virtue of his office, "ordinary power" to execute laws. In the Episcopal Church - the Bishop). Before looking into whether Canon Law would bind the Civil Courts of the Sovereign, Socialist, Secular, Democratic Republic of India, the contention could be analyzed in the perspective of Canon Law itself.

6. The three Churches, in the Catholic Communion, in India, recognizing the Roman Pontiff as the supreme head, are the Syro Malabar, Syro Malankara and the Latin Churches. The former two, considered as Eastern Catholic Churches, are governed by the Code of Canons of the Eastern Churches (CCEC). The latter, part of the Western Church, is ruled by the Code of Canon Law (CIC). Both were promulgated by Pope John Paul II, respectively in 1990 and 1983. We are concerned with the latter.

7. Canon Law is specifically addressed to the good order of church and society. The Canon Law recognizes three categories of personalities; i.e., the moral person, the physical person and the juridic person. The Catholic Church and the Apostolic See have the character of a moral person (Canon 113). By baptism when an individual is incorporated into the Church of Christ, then he is constituted as a physical person with the duties invested and rights vested properly to Christians (Canon 208-223). Juridic persons are constituted either by prescript of law or by special grant of competent authority given through a decree (Canon 114). Prior to creation of a juridic person, it is necessary that

there exist a moral person. Juridic persons constitute aggregates of persons or of things (Canon 115). An aggregate of persons which can be constituted only with at least three persons, is collegial if the members determine its action through participation in rendering decisions; whether by equal right or not, according to the norm of law and the statutes. While such aggregate of persons or things constitute a public juridic person, in accordance with norms of prescripts of law; private juridic persons are the other juridic persons who can be given the personality of a public juridic person only by a special decree of competent authority. The Catholic Church and the congregation of persons committed to an apostolic purpose, exists in the present case and the aggregate of persons too, being the Committee of Administrators. The moral person being in existence; the juridic person in the form of the Committee is constituted by the prescript of law.

8. Canon 532 postulates that in all juridic affairs the pastor represents the parish and he has to take care of the goods of the parish. From the commentaries in "New Commentary on the Code of Canon Law", commissioned by The Canon Law Society of America, Edited by John P. Beal, James A. Coriden & Thomas J. Green, 2010 Edition, it can be seen that what is mandated under the said Canon is more in the nature of ecclesiastical sensitivity in the administrators, in first consulting their "ordinaries" before embarking on a civil litigation. Canon 1288 cannot be seen as a total prohibition of administrators from initiating or contesting litigations before a civil forum without the written permission of their "ordinary". The consideration underlining the wisdom of requiring permission of ones "ordinary" is mainly due to the common law principles regarding precedents. The commentaries, on a careful analysis, indicates that what was intended is that any matters affecting the Church and its administration or religious precepts should not be agitated before a civil Court, without proper authorization, for fear of that being held against the Church as a whole, going by the rigor of precedents.

9. Examining the Canon as a whole, what is discernible is that the temporal goods belonging to a parish which, by law, is a public juridic person do not belong to the diocese. "Parish" is defined as "a certain community of the Christian faithful stably constituted in a particular church" by Canon 515.1 and by Canon 515.3, a legitimately erected parish possesses juridic personality by the law itself. Territory of a Particular Church though is not a constitutive element; it determines the faithful living in such territory to be included (Canon 372). When such Particular Church is erected by the Supreme Authority, then that possess juridic personality by the law itself (Canon 373). The 2nd defendant is also a parishioner. The 2nd defendant does not challenge the establishment or existence of the Church. Consecration of a Church is the essential element of carrying, on religious activities. The 2nd defendant swears by her faith, as a parishioner of the Church. The plaintiffs have styled themselves to be the Committee of Administrators of the Church. Going by the Canon, they individually are the "physical persons" representing the "juridic persons", being the elected representatives of the parish entrusted with the administration of the Church.

10. Canon 1256 specifically provides that under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridic person which has acquired them legitimately. It is evident from Exhibit A3 that the trustees along with the Parish Priest had acquired the property from the vendors of that deed. Both "parish" and the "diocese" are public juridic persons. The role of the Administrator has been succinctly laid in Canon 1284.1, which binds all administrators to fulfil their function with "the diligence of a good householder". As a consequence, they are also bound to take care that the Church properties are protected by civilly valid methods and observe the precepts of both canon and civil law. It exhorts administrators to be especially on guard, so that no damage comes to the Church from the non-observance of civil laws. It cannot at all be gain-said that the Administrators who have arrayed themselves individually before the Court below as plaintiffs are not competent to initiate a civil proceeding before a recognized civil Court for protection of the property belonging to the Church.

11. The property vests in the parish. Canon 1290 specifically provides for observance of general and particular provisions which the civil law has established for contracts and their disposition unless they are contrary to Canon Law. The Transfer of Property Act, 1882 defines "transfer of property" as an act between living persons, conveying property. A "living person" includes a Company or association or body of individuals, incorporated or not. The parish has the juristic personality of a "living person". The suit, as is revealed from the records, was filed under Order 1 Rule 8 of the Code of Civil Procedure. The plaintiffs, by publication, proclaimed their intention to represent the parish in the said suit. The Bishop and the Parish Priest have also been impleaded as defendants 3 and 4. It is not as if the Bishop or the Parish Priest has opposed it; nor has any other third party come up with the claim of being the valid administrator of the Church. In fact the Bishop and the Parish Priest have affirmed affidavits dated 20.2.2004 unequivocally conceding the rights of the plaintiffs to file the above suit. The said affidavits are produced as Annexures R2(a) and R2(b) along with the counter affidavit dated 20.2.2004 to I.A. No. 144 of 2004.

12. As seen above, the Church and its properties would not vest in the Pope or the Arch Bishop as delegates of the Pope even in accordance with Canon Law. The maxim "Roma locuta est, causa finita est" (meaning, "Rome has spoken, case is closed") no longer survives. It is also maintained by scholars that St. Augustine (Sermon 131:10) did not state so as an indication of papal infallibility. Fr. Frank Morrissey, OMI, Ph.D., J.C.D., Professor of Canon Law, Saint Paul University, Ottawa, Canada, draws parallels in canonical and civil ownership, with his statement "good fences make good neighbours". Canon Law, as it exists now, realizes the fences erected by civil law and cautiously veers away from any transgression thereof. The competence of the plaintiffs cannot at all be doubted even going by the Canon Law; less so by the law applicable to this land.

13. Canon Law and the prescriptions therein were discussed only since the same was raised to non-suit the plaintiffs. It is not for a moment to be understood that Canon Law would override the civil law of the land. A Full Bench of this Court had in George Sebastian alias Joy Vs. Molly Joseph alias Nish, , held that Canon Law can have theological or ecclesiastical implication to the parties, but such personal law cannot have any legal impact. The statute that came up for consideration in the said case was the Divorce Act. This view was upheld by the Hon"ble Supreme Court in Molly Joseph alias Nish Vs. George Sebastian alias Joy, , wherein it was held:

It is well settled that when legislature enacts a law even in respect of the personal law of a group of persons following a particular religion, then such statutory provisions shall prevail and override any personal law, usage or custom prevailing before coming into force of such Act. From the provisions of the Divorce Act it is clear and apparent that they purport to prescribe not only the ground on which a marriage can be dissolved or declared to be nullity, but also provided the forum which can dissolve or declare the marriage to be nullity.

14. The Hon"ble Supreme Court has also considered the issue of what can be deemed to be matters of a civil nature coming within the definition of Section 9 of the CPC in Most. Rev. P.M.A. Metropolitan and others, etc. etc. Vs. Moran Mar Marthoma and another etc. etc., . A Division Bench of this Court had in Themma Vs. Infant Jesus Church, , held that the sanction from Venerable Curia of Verapoly Archdiocese is not a necessary legal requirement for executing a sale deed in pursuance of an agreement for sale entered into by the Church. The decision of the Madras High Court in C.S. Robert and A.S. Arokiaraj, Trustees and representatives of Catholic public of Vakampatti Vs. M. Kanagappan and Others, relied upon by the learned counsel for the appellants, in my opinion, with due respect, may not be the correct understanding of law and the Canon.

15. The learned counsel for the respondents would also draw my attention to the order of this Court in C.R.P. No. 155 of 1980. The respondents had filed an earlier suit for injunction against the appellants. The same was dismissed by the trial Court, holding that the plaintiffs were not competent to file the suit without permission from the Bishop and cannot represent the parish without publication under Order 1 Rule 8 of the CPC and also for reason of not identifying the plaint schedule property. An appeal was filed and there a prayer was made to withdraw the suit with liberty and the same was granted. The appellants filed the above Civil Revision Petition against the appellate judgment. This Court in the Civil Revision Petition held:

It cannot, however, be said that the plaintiffs are not competent to maintain the suit. As worshippers of the Parish, they can maintain the suit if they obtain permission under Order I Rule 8 C.P.C. or obtain permission from the Bishop.

This Court also noticed the filing of the present suit subsequent to the appellate order and rejected the revision. The contention advanced that the appellants

cannot raise any preliminary plea against maintainability, after having suffered the order in Civil Revision Petition, need not be considered by this Court in view of the findings on competence rendered above.

16. The other question with respect to the maintainability of the suit is raised on the strength of Section 92 of the Code of Civil Procedure. The learned counsel for the appellants would contend that admittedly the Church is a Christian trust. The same being a public trust, according to the learned counsel, the subject matter of the suit would be one coming within sub-clauses (c) and (e) of sub-section (1) of Section 92 of the Code of Civil Procedure. The Church being projected as a public trust and the reliefs being with respect to vesting of property and declaration of title over the trust property, it is contended, the plaintiffs ought to have instituted the suit only with leave of the Court and that too in the principal Civil Court of original jurisdiction. The plaintiffs have not sought for any leave and the suit is instituted in the Munsiffs Court. Nothing more is required to throw out the suit, is the contention. The learned counsel would also rely on two decisions of this Court, reported in *Koshy v. Thomas*, 1962 KLT 662 : 1962 ICO 1235, and *St. Peters Orthodox Syrian Church and Others Vs. Fr. Abraham Mathews and Others*, .

17. *Koshy's* case (*supra*) was a case in which 4 parishioners of a Church filed a suit in their individual capacity as also representative of the parishioners and on behalf of the Church. The validity of the meeting which elected the defendants to a committee to manage the affairs of the Church and their authority to carry on the management was questioned. There was also a prayer for framing a scheme. The defendants contended that the suit would come within the umbrella of Section 92 CPC for reason of there being a prayer for framing a scheme. The plaintiffs then filed a replication before the Court below alleging that the Church was not a public trust and withdrawing the prayer for framing a scheme. This Court found that all suits, founded upon any breach of trust for public purposes of a charitable or religious nature irrespective of the relief sought, would not come within Section 92. It was also clearly held that a suit for declaration that a property in suit belongs to a public trust also would not fall within the mischief of Section 92. For applying the mischief u/s 92, it was held that all the three conditions enumerated in the said Section must co-exist, i.e., (i) there must be an express or constructive trust for public purposes of a charitable or religious nature; (ii) there must be an allegation of breach of trust or the direction of the Court should be deemed necessary for the administration of such trust; and (iii) the suit should have a prayer for any one of the reliefs mentioned in sub-clauses (a) to (h) in sub-section (1) of Section 92. However, in the said case it was held that the withdrawal of the prayer for framing a scheme alone would not take it out of the mischief of Section 92 in so far as the averments in the plaint were to the effect that for the proper and efficient management of the Church, a scheme of management is necessary. It was only in such circumstance that the said case went against the plaintiffs.

18. St. Peter's Orthodox Syrian Church case (supra) reiterated the rigid requirements of law regarding an express or constructive trust for public purposes of a charitable or religious nature, the existence of alleged breach or necessity for a direction for the administration; and the suit praying for any one of the reliefs mentioned in sub-clauses (a) to (h) of Section 92(1) CPC. These decisions does not come to the aid of the appellants herein. The Hon'ble Supreme Court has in Harendra Nath Bhattacharya and Others Vs. Kaliram Das (Dead) by his Heirs and Lrs. and Others, , which was referred to in St. Peter's Orthodox Syrian Church case (supra), held that a suit could be said to be one u/s 92 only if there is in existence a public trust of a religious or charitable character and either a breach of trust or directions from the Court are deemed necessary for administration of such trusts and the prayers are one or other of the relief specifically mentioned in the Section. The three ingredients should exist together.

19. The contention of the learned counsel for the appellants is that the declaration sought for in the suit is in effect a declaration of vesting of the property in the individual trustees. That would bring it under sub-clauses (c) and (e) of Section 92(1) CPC, is the argument. Even if the reliefs are so considered, it is pertinent that there is no breach of trust alleged; nor is there any necessity; deemed or express, of any direction from the Court for the administration of the trust. Looking at the reliefs too, it cannot be said that they are covered by either sub-clause (c) or sub-clause (e) of Section 92(1) CPC. Prayer (a) is for a declaration that plaint "A", "B" and "C" schedule properties are owned and possessed absolutely by the Mukkad Thirukudumba Church Trust as also the Church, the parishioners and the plaintiffs. The plaintiffs necessarily were the Committee of Administrators, being the elected representatives, of the parishioners and did not by the said relief claim any vesting of property in themselves in exclusion to the parishioners, the Church or the trust. The prayer is not one coming under either sub-clause (c) or sub-clause (e) of sub-section (1) of Section 92 of the Code of Civil Procedure. The contention regarding the absence of leave of Court as provided u/s 92 CPC being intrinsically connected with the contention regarding lack of jurisdiction of the Munsiffs Court, both have to be rejected on the strength of the discussions above.

20. Admittedly, there is no dispute with respect to plaint "B" and "C" schedule properties and what survives for consideration is only the dispute on plaint "A" schedule property. The question of law raised as (iv) above is confined to plaint "A" schedule property. While plaint "A" schedule property was described as having an extent of 1 acre 75 cents, the Commissioner who inspected the properties along with the Surveyor found the same to be having only an extent of 1 acre and 27.5 cents. The defendants 1 and 2 claim title over 1 acre and 1.5 cents.

21. The plaintiffs claim title on behalf of the Church on the strength of Exhibit A3 document, being a sale deed bearing No. 3794 of the year 1116 M.E. According to the plaintiffs, Exhibit A3 is a document executed by Augustine Fernandez and

his wife Agneshya Fernandez. The husband and wife, who are the vendors in Exhibit A3, obtained the same by Exhibits B24, B27 and B28. Exhibit B24 is a "Streedhanakuri" (dowry deed) bearing No. 363 of 1080 M.E. The vendors of Exhibit B24 dated 8.2.1080 M.E. were Sebastian Fernandez, the father of Agneshya Fernandez, and her brother Francis Fernandez @ Frenchisk Fernandez. By Exhibit B24, the father and brother of Agneshya Fernandez settled on her property having east-west 12 Dhannu and north-south 18 Dhannu measurements. Exhibit B27, again on 8.2.1080 M.E., confers title on the husband Augustine Fernandez. That property is also in survey No. 2/63, on the western side of 3.51 acres and lying to the south of the property given as "Streedhana" (Exhibit B24). The said deed also showed the extent of the property as being east-west having 12 Dhannu measurement width. Exhibits B24 and B27 were conveyance of properties comprised in the 3.51 acres in Survey No. 2/63 and were situated in the western proximity of the properties comprised in Survey No. 2/63. The western boundary was also shown as a "vettuthodu" (a canal). On the northern boundary, was the backwaters. Again in 1099.M.E., specifically 26.9.1099 M.E., Exhibit B28 was executed by the father-son duo in the name of the husband and wife. Exhibit B28 covered property having east-west measurement of 12 Dhannu width, comprised again in Survey No. 2/63 and lying east of vettuthodu. Hence, from a reading of the various documents, it is revealed that Exhibit B24 property was to the south of the backwaters and lying east of the vettuthodu. Property described in Exhibit B27 had Exhibit B24 property on the northern boundary and again the vettuthodu on the western boundary. Exhibits B27 and B28 lie east of vettuthodu and Exhibit B28 lies south of Exhibit B27. The title of the father-son duo is not disputed and that was acquired by Exhibit B23 dated 23.4.1079 M.E. This vettuthodu had over the years, admittedly, transformed into a road, which lies to the western boundary of these properties.

22. There is a reference by the defendants 1 and 2 in their written statement with respect to a lease of land from the Quilon Diocese lying west of the road, wherein situated a jetty and diesel oil pump, said to have been operated by the 1st defendant's firm. The lease claimed of the said property is independent of the subject matter of the suit. I specifically refer to the lease only because, but for the contention of possession of such leasehold properties, defendants 1 and 2 does not at all claim possession of the property having 1 acre and 1.5 cents over which title is claimed by them. The specific contention in the written statement was that though the 1st defendant had purchased the properties for its business purposes, the Church had been preventing the 1st defendant from carrying on such business purposes in the land. The counter claim was also in the nature of an injunction from trespass and destroying boundaries and improvements. There is no appeal from the rejection of the counter-claim.

23. The 1st defendant claimed 1 acre and 1.5 cents purchased as per Exhibits B7 and B8, being sale deeds executed respectively on 10.4.1973 and 11.3.1973. The vendors in Exhibit B7 were the widow and children of one Joseph Camoins

and those in Exhibit B8 were the widow and son of the said Joseph Camoins. They claimed title on the strength of Exhibits B5 and B6 documents said to have been executed by the legal heirs of Agneshya Fernandez. The 1st defendant, however, traces its title also to Exhibit B15 sale deed dated 10.8.1106 M.E. executed by the son of the father-son duo, viz., Francis Fernandez, by which 50 cents was sold to Joseph Manuel. Joseph Manuel sold the said 50 cents again by Exhibit B14 in the year 1957. The property so acquired by Exhibits B14 and B15 was described as having actually an extent of 51.5 cents in sale deed No. 3078/1957 (Exhibit B13), executed in favour of one Fr. Albert Camoins. Fr. Albert Camoins by Exhibit B12 gift deed of the year 1958 gifted the said 51.5 cents to Joseph Camoins. The description of the property in Exhibit B12 was that it was 51.5 cents "purayidam" lying to the north of the property of the Church.

24. Agneshya Fernandez, sister of Francis Fernandez, then; along with others, filed a suit, O.S. No. 778 of 1966, for recovery of the said 51.5 cents from Joseph Camoins. Exhibit B16 is the judgment by which the suit was decreed in favour of Agneshya Fernandez and her children. Exhibit B16 specifically shows that the claim set up by Agneshya Fernandez was relatable to Exhibit B28 document executed by her father and brother in favour of herself and her husband in 1099 M.E. The Church was not a party in the suit; nor was Exhibit A3 referred to by the plaintiffs therein. The decree and judgment in the said suit was the subject matter of an appeal, resulting in Exhibit B17 judgment. The decree and judgment by the trial Court were reversed by the first appellate Court. On second appeal to this Court, the same was remanded. At that point, the legal representatives of Agneshya Fernandez, the plaintiffs before the trial Court in that suit, executed Exhibits B5 and B6 documents in favour of the widow and children of Joseph Camoins.

25. Having set out the claim of title by both parties, this Court is set with the task of examining how the Courts below have appreciated the evidence, for the purpose of understanding whether the findings of the Courts below are one possible from the evidence available. This Court does not intend to go on a reappreciation of evidence; nor is it possible in the contours of the jurisdiction conferred on this Court. However, the evidence as examined by the Courts below is put in the perspective of this Court.

26. The plaintiffs claim plot "A" schedule property having an extent of 1.75 acres. The Commissioner has, by Exhibit C1 report, identified the property in existence, as revealed from the documents, to be an extent of 1.27 acres. Evidently much reliance cannot be placed on the extent of the property; nor can any weight be attached to the difference in extent, since, as noticed above, "Dhannu measurements" in the earlier documents does not at all give a correct picture of the extent of the property. The Courts below, hence, relied on the boundaries. What is clearly discernible is that the northern boundary is the backwaters and the western boundary is the vettuthodu. This vettuthodu was subsequently converted into a road, which is admitted by both parties. Exhibits

B24, B27 and B28 shows the western boundary as the vettuthodu. Exhibit B27 also indicates that it lies to the south of Exhibit B24 property. Both the said properties are comprised in Survey No. 2/63 and lie on the western extremity of the total 3.51 acres comprised in Survey No. 2/63. Exhibit B28 shows that property to be on the east of the vettuthodu. Exhibit B28 also, by the recitals therein, lies to the south of the properties held by Agneshya Fernandez and her husband. There can be no dispute with respect to the said identity of the property as has been clearly earmarked in the Commissioner's report, more specifically Exhibit C4 sketch. Plaint "B" and "C" schedules, as noticed above, does not raise any dispute and lie contiguously to the south of plaint "A" schedule property. The identity of the property described in Exhibit A3 on the basis of the descriptions in the said document as also in Exhibits B24, B27 and B28 as found by the Courts below is unassailable. They lie with the backwaters on the north and vettuthodu on the west and are located on the western portion of the properties comprised in Survey No. 2/63.

27. Exhibit A3 is challenged as having been not acted upon. The consideration as indicated in Exhibit A3, it is contended on behalf of the 1st defendant, has not been paid. Possession also was not granted. The 1st defendant relies on Exhibit B10 and B11 to urge the above contention. Exhibits B10 and B11 are proceedings under the Transfer of Registry Rules. By Exhibit B10, the claim of Agneshya Fernandez regarding approximately 80 cents of property was allowed. The claim was only with respect to mutation being made in the name of the said Agneshya Fernandez. Exhibit B10 is dated 2.4.1957 and is after Exhibit A3. It is contended that these proceedings would show that Exhibit A3 was not acted upon. It is also contended that Exhibit B11 being an order in revision before the District Collector, confirmed Exhibit B10 order, thus affirming the claim of Agneshya Fernandez. As noticed, the claim was only with respect to mutation and did not at all confer any title on Agneshya Fernandez. Exhibit B11 also specifically noticed this and while rejecting the revision petition filed by the Church, the pendency of the earlier suit was also noticed. Exhibit B10 being not conclusive of the title as a proposition of law, was also noticed specifically in Exhibit B11 order.

28. The contention on behalf of defendants 1 and 2 with respect to Exhibit A3 being not acted upon is, hence, two fold. One plea is no consideration having been paid and the other being the mutation effected in the name of Agneshya Fernandez, who was one of the vendors in Exhibit A3, even after the execution of Exhibit A3; by Exhibit B10. With respect to the absence of payment of consideration, it is not at all discernible from the recitals in Exhibit A3. That in any event would be a fact within the knowledge of the vendors who would have urged it, if that was so. I say this, because, it is not as if the vendors of Exhibit A3 merely faded into oblivion. Agneshya Fernandez, wife, at least had been tenaciously pursuing the proceedings before the authorities claiming mutation and also filing litigations with respect to the properties which her father and brother conveyed to herself and her husband. She neither has such a case in

Exhibit B11; nor is such claim revealed from a reading of Exhibit B16 judgment. The contentions raised by the plaintiffs therein does not at all refer to Exhibit A3. If no consideration was paid, then that would have been her contention before the revenue authorities. In the suit against Joseph Camoins and others, she suppressed the sale to the Church.

29. In feet, the defendants in O.S. No. 778 of 1966, under whom the defendants 1 and 2 herein claim, specifically referred to the sale of 1.75 acres made by the 1st plaintiff by deed of 1116 M.E. (i.e., Exhibit A3). The contention of the defendants therein was that Agneshya Fernandez had no such title. Agneshya Fernandez's title was established in the suit; but, however, reversed and then remanded in appeal. No reliance can be placed on such title having been established. But, however, the title is clear from Exhibits B24, B27 and B28, as has been held by the Courts below. But, Agneshya Fernandez refused to state anything about Exhibit A3 in the said suit filed against third parties, and that too without the Church in the party array. Exhibit A3 was swept under the carpet. She had no claim of absence of consideration in that suit or before the revenue authorities. She maintained a studied silence, which goes against the plea of absence of consideration. In any event, absence of consideration cannot at all be a stumbling block on the passing of title by a registered sale deed.

30. The learned counsel for the respondents/plaintiffs relies on the decisions reported in *Kamta Prasad v. Lachmi Sah*, AIR 1929 Patna 550, *State of Kerala Vs. Cochin Chemical Refineries Ltd.*, , *Narayanan Moopil Vs. Narayanan Prabhakaran*, , and *Latif Estate Line India Ltd. Vs. Mrs. Hadeeja Ammal*, The Inspector General of Registration and The Sub Registrar Ambattur, . The learned counsel for the appellants/defendants 1 and 2 would place reliance on *Kaliaperumal Vs. Rajagopal and Another*, .

31. *Kamta Prasad's* case (supra) clearly held that a sale once registered results in passing of the title unless it is established that the intention of the parties was that the title should pass only after the payment of consideration. In *Cochin Chemical Refineries'* case (supra), the State of Kerala sought invalidation of an indenture of mortgage on the ground that the State had not advanced the loan as specified under the indenture. The State resiled from its obligation to purchase goods under the indenture on the ground of absence of the payment of the advance money. The Supreme Court held that breach of contract by one party does not automatically terminate the obligation under the contract. The injured party, it was held, has the option either to treat the contract as still in existence or to regard himself as discharged. If he accepts the discharge of the contract by the other party, the contract is at an end; and in the event he does not accept the discharge, he could insist on performance. The Supreme Court quoted with approval the observation of the Bombay High Court reported in *Tatia v. Babaji*, (1898) ILR 22 Bom. 176:

I am not, however, prepared to assent to the train of thought which puts conveyances of lands in the mofussil perfected by possession or registration

where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration.

This decision was relied on by a learned Single Judge of this Court in Narayanan Moopil's case (supra), to hold that if the price of the property which is the subject matter of a registered sale deed is not paid, the vendor cannot get the sale deed avoided only on that account. *Latif Estate Line India Ltd.* (supra) is a Full Bench decision of the Madras High Court, wherein the execution of a deed of cancellation by the vendor of a sale deed executed by him was held to be not creating a new right or extinguishing any right that flowed from the earlier deed.

32. The reliance placed on *Kaliaperumal's* case (supra) by the learned counsel for the appellants also does not aid the appellants in so far as the Supreme Court in that case also held that on registration, the title will normally pass to the purchaser from the date of execution of the sale deed; registration being prima facie proof of intention to transfer property. Any contra intention or condition of payment of consideration as a pre-condition for passing of title was held to be a conclusion on facts, to be gathered from the recitals of the deed. In the instant case, neither the recitals nor the subsequent conduct of the vendors reveal any such intention. The plea has to fail.

33. The defendants 1 and 2 claim title under Exhibits B7 and B8 from the vendees in Exhibits B5 and B6. They also claim title from Exhibit B15. Hence, the defendants 1 and 2 claim title from Francis Fernandez, the brother of Agneshya Fernandez and tries to perfect it by Exhibits B5 and B6 executed by the legal heirs of Agneshya Fernandez. The claims, at best, are conflicting and self-defeating. Francis Fernandez, as noticed above, along with his father executed Exhibits B24, B27 and B28 in favour of his sister Agneshya Fernandez and her husband. Exhibits B24 and B27 were in the year 1080 M.E. Subsequent to the execution of Exhibit B24 and B27, the father-son duo, viz., Sebastian Fernandez and Francis Fernandez, entered into Exhibit A9 Udampadi on 5.2.1088 ME Exhibit A9 Udampadi specifically referred to Exhibits B24 and B27 Francis Fernandez, hence, did not retain any title over the properties transferred under Exhibits B24 and B27 after 1088 M.E. and that was confirmed by Exhibit A9. Subsequent to Exhibit A9, by Exhibit B28 in the year 1099 M.E., Francis Fernandez along with his father again conveyed properties to his sister and her husband. Exhibit B15 sale, which is said to have occurred in 1106 M.E., is after Exhibit B24, B27 and B28. Francis Fernandez could have sold only those properties which remained with him and, obviously, the properties conveyed by Exhibits B24, B27 and B28 were not in his ownership or possession in 1106 M.E. The Courts below have categorically found that Francis Fernandez had no ownership, title and interest in the properties in the 50 cents conveyed by Exhibit B15. Exhibits B14, B13 and B12, hence, could not at all have created any interest or title over the said property on the vendees therein. At that point of time, comes the suit by Agneshya Fernandez and others, instituted in the year 1966. Nothing came of it as noticed above, since it was remanded and was settled out of Court by

execution of Exhibits B5 and B6. Her claim was on the basis of Exhibit B28, which properties she conveyed to the Church by Exhibit A3.

34. What conferred title on Agneshya Fernandez or her legal heirs to execute Exhibit B5 and B6? Exhibit B5 dealt with 51.5 cents of property and Exhibit B6 with 50 cents of property. With respect to 51.5 cents of property, despite this Court finding the various conveyances beginning from Exhibit B15 to be not conferring any title on the vendees; at least traces a link through Exhibits B12, B13, B14 and B15, in that order. The 50 cents covered by Exhibit B6, however, surfaces only through Exhibit B6. Agneshya Fernandez definitely did not get her claims established in the suit after remand. She, or her legal heirs, chose to settle it. The defendants went along with such settlement. She could not have definitely conveyed any property over which she had no subsisting ownership or title based merely on a prior ownership. Exhibits B5 and B6 could not confer on the vendees any interest over and above that the vendor had. Francis Fernandez did not have title to the properties he sold by Exhibit B15. Agneshya Fernandez's claim was based on the deed executed by Francis Fernandez, her brother, and their father Sebastian Fernandez in favour of herself and her husband, i.e. Exhibit B28. Those properties were conveyed in the name of the Church by Exhibit A3. The claim is self-destructive. The defendants 1 and 2 cannot have any claim over the properties covered by Exhibits B7 and B8. They cannot claim any title under Francis Fernandez, since he did not have interest, title or ownership over the properties he sold by Exhibit B15. In any event, he could not have sold the properties covered by Exhibits B24, B27 and B28 and specifically referred to in Exhibit A9. Exhibits B24, B27 and B28 confer title on Agneshya Fernandez and her husband, which title was conveyed to the Church by Exhibit A3. Agneshya Fernandez by way of compromising a dispute with third parties and executing a deed settling such properties on the basis of that compromise with such third parties could not confer any title on such third parties. The defendants 1 and 2 cannot at all perfect any title through Agneshya Fernandez or her legal representatives. Hence, it cannot be held that the plaintiffs were not competent to file the instant suit for merely lack of sanction from their "ordinary". The suit has been properly instituted in a representative capacity after publication under Order 1 Rule 8 of C.P.C. It is not a suit which comes within the mischief of Section 92 C.P.C. and no leave is required. The Munsiffs Court rightly exercised its jurisdiction. Looking at the evidence, it cannot be said that there is an erroneous approach in its appreciation nor does it by any stretch border on perversity. Irrelevant considerations have not weighed with the lower Courts and the conclusions are reasonable and eminently possible from the materials on record.

In the result, this Second Appeal is dismissed, with costs.