
(1997) 07 KL CK 0019
In the High Court Of Kerala
Case No : S.A. No. 436 of 1989-B

Varkey and Another

APPELLANT

Vs

St. Mary's Catholic Church and Others

RESPONDENT

Date of Decision : 07-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 9

Citation : AIR 1997 Ker 337 : (1997) 4 RCR(Civil) 364

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : P. Kesavan Nair and K.G. Cleetus, for the Appellant; M.I. Joseph, Legy Abraham, K.J. Arby and Roy Thomas, for the Respondent

Final Decision : Partly Allowed

Judgement

P.K. Balasubramanyan, J.—The suit O.S. 202 of 1983 was filed by the appellants herein in a representative capacity seeking a declaration of the right of the Periyappurathu family to have their family members alone buried in the eastern first row of the cemetery established and maintained by the first defendant church, a further declaration that the first defendant church is not entitled to permit burial of those who are not members of Periyappurathu family and for a consequential injunction restraining the defendants from permitting or carrying out burial of dead bodies of persons who do not belong to the Periyappurathu family in the plaint schedule property which is shown as I cent on the eastern side of the 14 cents which is the cemetery of the first defendant church. In addition to the church, the Bishop who was the head of the denomination was impleaded as defendant No. 2. The kaikars of the first defendant church were also impleaded as defendants 3 and 4. Additional defendants 5 to 7 were subsequently impleaded. The defendants resisted the suit questioning the jurisdiction of the Civil Court to entertain the suit and also disputed the right claimed by the plaintiffs to have the right to exclusively bury their dead in the first row of the cemetery. The trial Court held that the Court has no jurisdiction

to interfere in such a matter and that the plaintiffs have not established any customary right for the exclusive use of the first row of the cemetery for burying the dead in their family. It therefore dismissed the suit. On appeal by the plaintiffs the lower appellate Court also held that the Civil Court has no jurisdiction to grant a declaration as prayed for by the plaintiffs and that the plaintiffs had failed to establish any customary right enabling them to get a declaratory decree as sought for by them. The lower appellate Court therefore dismissed the appeal. This is challenged by the plaintiffs before me.

2. According to the plaintiffs, the first defendant church was established about 163 years back and the construction of the church building and the establishment of it was at the initiative of the members of the Periyappurathu family of which the plaintiffs are members. The first row on the eastern side of the cemetery of the church had been reserved for the burial of the members of the Periyappurathu family exclusively. This was for the reason that the members of that family had been among the founders of the church and in view of the further fact that they were prominent members of the diocese. The one cent on the eastern side of the cemetery shown as the plaint schedule property had been exclusively set apart for the burial of the members of the Periyappurathu family on receiving a sum of 151 Chakrams (coin of the realm of Travancore State). On 14-11-1982, in a meeting of the congregation of the first defendant church there was a decision to enhance the burial fees from 151 Chakrams to Rs. 151/-. There was a corresponding increase in the burial fees of the other rows also. The practice of reservation of space in the cemetery for burial of the members of particular families is not exclusive or peculiar to the first defendant church. Such reservation is made in almost every other cemetery. Since according to the faith special prayers are to be held on death anniversaries and other auspicious days and it is considered as the duty of every catholic to see the soul of his ancestor rest in peace, the practice of reservation of areas for burial had been resorted to so as to enable the members of the family to offer special prayers at the appropriate location. The members of the Periyappurathu family are thus exclusively entitled to be buried in the first row of the cemetery and the said right is a customary right which had acquired the force of law. On the instigation of certain interested persons who are enmity towards the plaintiffs and their family, the first defendant church is attempting to put an end to the custom or the right of the family and hence the plaintiffs, representing their family, were constrained to file the suit. The first defendant church in the written statement even denied the claim of the plaintiffs that they belong to the diocese of the first defendant church. The claim that the church was established at the initiative of the members of the Periyappurathu family was not admitted and the plaintiffs were put to proof of the same. The claim that the plaint schedule property, the first row in the cemetery has been reserved for burying exclusively members of the Periyappurathu family was denied. It was contended that the reservation of a row in the cemetery for a particular family was an obnoxious idea and was an objectionable practice contrary to the religion, rites and practices. Equality

among the believers is the principle of the church. The claim of the plaintiffs for enforcement of inequality among the dead of the community in the cemetery through the assistance of the Civil Courts is unacceptable. It was admitted that the fee payable (kuzhikkanam) varied from row to row. All parishioners have no claim as of right to have their dead buried in the church cemetery and they had to obtain the consent of the Vicar and without obtaining such consent and without paying kuzhikkanam no dead person could be buried in the church cemetery. Burial in the first row of the cemetery after obtaining such consent will not confer on the plaintiffs any right to bury in the first row, any other member of their family who dies later. Nor can such a claim mature into a right to bury the dead in the first row. The first defendant church had every right to permit the members of the parish to bury their dead relatives in the first row or in any other row in the cemetery. The plaintiffs have no right to object to the same. The declaration sought for could not be granted and the suit was, not maintainable. The plaintiffs were not entitled to any relief. The second defendant Bishop, Palai filed a written statement contending that the suit is not maintainable and the cognisance of the suit is barred. The plaintiffs had not claimed or made out any legal right for the grant of the reliefs prayed for by them. The second defendant adopted the written statement of the first defendant and further denied the custom asserted in the plaint. The second defendant also pleaded that inequality and exclusion of the other parishioners from burying in the first row of the church cemetery is contrary to the laws of the church. The church cemetery belongs to the church and no member of the parish has the power to claim as of right, the privilege to bury him after his death or his dead relative in the church cemetery. The church cemetery being the church property, the Vicar has the right to refuse to bury a parishioner or his relative in the church cemetery according to the laws of the church. The burial in the church cemetery and the rites attached to burial are religious practices and rituals. Under Article 26(b) of the Constitution of India every religious denomination, or any section thereof has the right to manage the affairs of the church in religious matters. The church cemetery is a sacred place for catholics and the burial in the church cemetery is accompanied by the priest and in the manner provided by the laws of the church and hence it is a matter of religious faith and the Court cannot interfere or curtail that fundamental right by way of an injunction. It was further contended that the plaintiffs were not entitled to the injunction sought for. The dismissal of the suit was prayed for. Defendants 3 and 4, the kaikurs of the church adopted the contentions of the first defendant.

3. The trial Court took the view that the factors pertaining to the burial in the church cemetery are controlled by the Canon Law. Canon 1184 lists the persons who are to be denied the funeral rites in the church cemetery. Canon 22 provided that when the law of the church remits some issue to the civil law, the civil law has to be observed with the same effect as Canon Law in so far as it is not contrary to Divine Law and provided it is (not) otherwise stipulated in Canon Law. It also referred to Canon 24 which provided that no custom which is

contrary to Divine Law can acquire the force of law. According to the trial Court, these provisions in the light of Article 26(b) of the Constitution of India, would preclude the Civil Court from interfering in the matter in dispute in the present case in the absence of other specific enactments defining the civil rights of parties in this regard. According to the lower appellate Court what is sought by the plaintiffs is a decree directing the church not to interfere with the right to bury the dead members of the Periyappurathu family as well as to forbid the church from granting permission to bury the dead bodies of other parishioners belonging to other families and that right is essentially a matter relating to the internal religious affairs of the church. There was no law which governed or provided as to how a church and the cemetery should be governed or run as enacted by Parliament and hence going by the Canon Law the Civil Court has no jurisdiction to grant a decree as prayed for by the plaintiffs. So long as there was no law enacted by the Parliament which would cover the matter, the Canon Law should be applied to the matter in dispute and if that be so, the Civil Court had no jurisdiction to grant the declaration sought for by the plaintiffs. In this context I must observe that neither of the Courts below have considered what is the nature of the right of burial, whether it is a mere religious right or a civil right which could be enforced through a Court of law before coming to the conclusion that the Civil Court had no jurisdiction to grant any relief to the plaintiffs in this case.

4. Section 9 of the CPC provides that the Court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Explanation I to the Section explains that a suit in which the right to property or an office is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. Explanation II added in the year 1976 by amendment is not relevant for the present purpose. Explaining the scope of Section 9 of the Code in the context of Explanation I, the Madras High Court in *Srinivasalu Naidu Vs. Kavalmaru Munuswami Naidu and Others*, has held :--

"Section 9 is in very broad terms. It stated that all suits of a civil nature are within the jurisdiction of the Court, except those of which cognizance is either expressly or impliedly barred. The explanation to this section states that such a suit, in which the right to property or to an office is contested in a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites and ceremonies. The explanation states is only that though religious rites and ceremonies may form the basis of a right that is claimed, such right being a right to property or to office, a suit to establish such right would be a suit of a civil nature. The section takes within its broad sweep all questions where one person claims any privilege in himself as against others. The assumption that only a right which is claimed in relation to a temple such as the right to perform worship or the right to receive religious honours or privileges attached to an office as its perquisite or remuneration, could be agitated u/s 9, C.P.C. and that as the right claimed is not of that kind it is not within the purview

of S. 9 is not correct." (Headnotes)

In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , the Supreme Court has laid down that the exclusion of jurisdiction of the Civil Court is not readily to be interfered. In *Fulchand Mohanlal Vs. Harilal Nansa*, , the High Court of Bombay held that where the question at issue was not a matter relating to the internal administration and affairs of a caste, or to the property of the caste, the Civil Court has jurisdiction to interfere, although there has been a division of opinion in the caste. It has also been recognised clearly that the right of burial is a civil right and interference with that right is an invasion of a civil right and can be enforced by a suit. In *Poulose Athanasius v. Bassalios Catholocos* 1957 Ker LT 63 the Full Bench of Kerala High Court held :--

"Civil Court has nothing to do with spiritual offences as such. But where the commission of spiritual offence has a direct bearing on the question of the offender's right to property, the Civil Court will have the undoubted jurisdiction to go into the question of the consequence of the commission of the spiritual offences to the extent they affect the offender's right to the property. In view of the explanation to Section 9 of Civil P. C. it cannot be said that the Court has no jurisdiction to go into the question of heresy or schism where such heresy or schism has a direct bearing on the right of the party concerned to property or to an office."

Though the decision itself was reversed in *Moran Mar Bassalios Catholicos v. Avira* 1958 Ker LT 721 : (AIR 1959 SC 31) the view of the Full Bench on the scope of Section 9 of the CPC was not interfered with by the Supreme Court.

5. The question to be considered is whether the right to burial is a civil right or merely a religious or spiritual ritual or observance. This question is not *res integra*. In *Kooni Meera Sahib v. Mahomed Meera Sahib* ILR (1907) Mad 15, the Division Bench of the Madras High Court after referring to the decision of the Bombay High Court in *Anandray Bhikaji Phadke v. Shankar Daji Charya* ILR(1883) 7 Bom 323 and the decision of the Privy Council in *Brown v. Cure of Montreal* ILR(1874) 6 PC 157 held :--

"That in suits relating to ritual or religious observance only the Civil Courts in this country have no jurisdiction is undeniable. On the other hand, it is equally clear that Courts of Justice are bound to enquire into questions of religion or ritual which are material for the determination of civil rights in dispute between the parties.

When the matter is a mixed spiritual and temporal character, the question will depend upon the nature of the connection between the facts, and will be infact, whether the spiritual question is so intimately connected with the temporal as to be inseparable from it. If such is the case it would be the duty of the Courts in trying the civil disputes to enquire into the spiritual matter thus intimately related." And proceeded to hold that there can be no doubt that the right of burial is a civil right.

6. The question then, is what is the nature of that right? The Privy Council in AIR 1950 56 (Privy Council) , held that the right to use land by the inhabitants of a village as cremation ground can be supported only by custom. The Allahabad High Court in *Jwala and Another Vs. Ram Dutta and Others*, has held that the members of a village community can enforce a right of burial as a customary right through a Civil Court. Our High Court in *Sathyabhamakutty v. Chinnathan Master* 1976 Ker LT 78 has also held that the right to bury the dead in another's land claimed by a section of people can only be a customary right. If it were a customary right, clearly, the Civil Court will have jurisdiction to entertain a suit to enforce that right. What is here claimed by the plaintiffs is a right to bury the members of their family in a particular row in the burial ground of the church. If we go by the authorities referred to it is clear that the suit is maintainable. The Courts below have therefore clearly erred in law in holding that the suit is not maintainable. A denial of the right of burial claimed, if denied, can be established in a Civil Court by way of a suit. It cannot be termed as an internal matter of the church or part of its internal administration to deny jurisdiction. It is not necessary for any law to specifically provide for the right of burial before it could be enforced through the Civil Court as erroneously held by the Courts below. They have clearly misconceived the ambit of Section 9 of the Code of Civil Procedure, have not comprehended the nature of the right claimed and have misunderstood the effect, of the Canon Law referred to by them. I have therefore no hesitation in reversing the findings of the Courts below and in holding that the suit as laid is maintainable.

7. In the present plaint, the plaintiffs have put forward their case on the basis that it is a customary right and by long and uninterrupted user that right has acquired the force of law. There is no specific agreement with the church or any other basis set up for the claim of right and therefore it has become unnecessary to consider whether the right could be acquired by grant or could be acquired by contract. As observed by the Privy Council in *Abdul Hussain v. Bibi Sona* AIR 1917 PC 181, it is of the essence of special usages modifying the ordinary law that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence and they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. In AIR 1950 56 (Privy Council) , the Privy Council has reiterated :

"What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use." Incidentally in the said decision their Lordships have also indicated referring to the earlier decisions on the question that a question whether a custom exists or not is a mixed question of law and fact and that it is a question of law whether such a custom is to be recognised or not although the facts upon which the question is to be decided cannot be a matter of appeal beyond the first appellate Court.

8. In the present case, the Courts below while refusing to uphold the claim of the plaintiffs have placed too much emphasise on the fact that a child from the family of the plaintiff has been buried other than in the first row and another person who did not belong to the family of the plaintiffs has been buried in the first row of the cemetery and these two instances would be fatal to the recognition of the right put forward by the plaintiffs. In making this approach, the Courts below have erred because as observed by the Privy Council in *Ekradeshwar Singh v. Janeshwari Bahusin* AIR 1914 PC 76 a well established custom cannot be defeated by the fact that in one case the custom was not enforced. Therefore even if it be assumed that the instances referred to by the Courts below did come to exist, that would not in any manner affect the customary right set up by the plaintiffs if they are otherwise able to establish that right. The Courts below have therefore committed a substantial error in their approach to the question of deciding whether the plaintiffs have established a customary right of burial as claimed by them. Though the trial Court referred to the text book "The Law of Usages and Custom" by J. H. Balfour Browne and the ingredients to be established for a valid custom, it did not discuss the evidence adduced on the side of the plaintiffs since it proceeded on the basis that instances of non-adherence to the custom are seen brought out and that the plaintiffs have failed to meet the argument raised on behalf of the defendants that the enforcement of the right claimed by the plaintiffs would create inequality among the parishioners and it will be violative of the orders of the church. The trial Judge therefore proceeded to assert that a custom which is beneficial only to a few persons is repugnant to the law of reason. The lower appellate Court also was obsessed by the fact that other persons have been buried in the first row and since the original plaintiff family Periyappurathu had separated itself into sub families, the custom cannot be recognised and it had not been specifically pleaded whether all the members of these sub-families are entitled to any customary right as claimed in the plaint. It brushed aside the argument of counsel for the plaintiffs that D.Ws. 1 and 2 examined on the side of the first defendant church had admitted that no other parishioner except the members of the Periyappurathu family had been buried in the first row for the last more than 150 years and that this itself establishes the custom pleaded by reference to the fact that there have been instances where a member of the plaintiffs' family had been buried elsewhere and a person not belonging to the family had been buried in the first row. The appellate Court also stated that the customary right as seen set up in the plaint itself, was a grant allegedly given as a quid pro quo for the initiative taken by the members of the Periyappurathu family for establishing the church. Since the plaintiffs have not established that the church has been constructed by the members of that family or at their initiative, the right put forward by them cannot be taken to be established. As I see it, in the light of the principles of law referred to above, both the Courts below have really made an erroneous approach to the question whether the plaintiffs have established the right claimed by them by way of custom and thus they committed a substantial error of law in negating the customary right claimed by the plaintiffs thereby

inviting the exercise of jurisdiction by this Court u/s 100 of the Code of Civil Procedure.

9. In *Gokal Chand v. Parvin Kumari* AIR 1952 SC 231 the Supreme Court has held :--

"A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has by common consent, been submitted to as the established governing rule of a particular locality AIR 1941 21 (Privy Council) ." (Head Note)

Their Lordships have also laid down

"A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the *Riwaj-i-am* or *Manual of Customary Law* AIR 1925 267 (Privy Council) ." (Head Note)

What falls for decision now is whether on the evidence in the case the plaintiffs have established that there was a valid custom as alleged by them and such custom had been exercised without controversy and that it had been acted upon in practice for such a long period and with such invariability. In the suit the plaintiffs filed I.A. 2676 of 1983 praying for the issue of a commission authorising that Commissioner to report on the matters referred to in that application after verifying the relevant records of the first defendant church including the accounts of the first defendant of income and expenditure from the year 1850, the death register kept in the first defendant church from the year 1850 with particular reference to the information recorded therein about the dead members of the plaintiffs family and also report on whether from the year 1850 onwards anyone other than the member of the family of the plaintiffs have been buried in the first row of the cemetery shown as the plaint schedule property. A formal objection was filed to that application by the first defendant essentially referring to the problem created by the plaintiffs seeking production of the death register in Court and at the same time asking the Commissioner to verify it from the spot. The plaintiffs also filed I.A. 2677 of 1983 calling upon the first defendant to produce the death register for 50 years kept by the church and also the decision of the parish (*Edavaka*) on 14-11-1982. The Commissioner filed Ext. C1 report. He reported that the first defendant church was established in the year 1850. The records available with the church were only from the year 1929 and the present Vicar had informed the Commissioner that he had been able to get only the records from the year 1929 when he took charge. The Vicar also informed the Commissioner that he had not been able to trace the books relating

to the periods prior to 1929. He reported that the family of the plaintiffs had divided into branches. He reported that there was no information furnished in the death register after 4-8-1983. He reported that according to the death register only the members of the family of the plaintiffs had remitted 151 Chakrams which was the rate admittedly charged for a burial in the first row of the church cemetery which is the plaint schedule property. The minutes of 14-11-1982 indicated that it was decided to charge for burial in the first row at the rate of Rs. 151/- and the rates for burial in the other rows at various figures. An order of the Metropolitan directing that there should be equal right for burial in any row of the cemetery was also referred to by the Commissioner. The Commissioner has appended a statement showing the burials of those who had paid 151 Chakrams for the purpose of burial. The Commissioner had examined the registers concerned while making this report.

10. P.W. 1 the second plaintiff aged 71 when he was examined, gave evidence to the effect that it was his forefathers who had established the first defendant church and that right from the establishment of the church and the cemetery the members of his family had been buried in the first row of the cemetery. He also claimed that nobody had interfered with or prevented the members of the plaintiffs family from burying their dead in the first row of the cemetery. He explained that the reason for the suit was the attempt made by the Vicar of the first defendant church in the year 1982 to change the pattern of burial till then in vogue on his theory that the right should be universalised. An attempt was made to bury others who did not belong to the family of the plaintiffs in the first row and that led to the plaintiffs filing the suit. In cross-examination he claimed that there were records in the first defendant church to show that the first row was reserved for burying the dead in the family of the plaintiffs. He claimed that this was an old decision taken by the first defendant church. He denied the suggestion that no burial could be done in the cemetery without the permission of the Vicar. He stated that there was a special fee collected for building the vaults. He did not have to object to the attempt to make the right of burial a common right in the meeting that was called, in the year 1982. This system was prevalent in other churches also. P.W. 2, the former Vicar of the church from the year 1968 to 1972 gave evidence to the effect that the plaintiffs are members of the parish, that there are four rows for burial in the cemetery of the church, that while he was the Vicar no one other than a deceased members of the family of the plaintiffs had been buried in the first row of the cemetery. There was a practice of praying at the graves of those buried that he had been a priest for 50 years. In cross-examination he gave evidence that the death register kept in the church was regularly kept, that there was no record to show that only the dead of the family of the plaintiffs are entitled to be buried in the first row of the cemetery, that the rows in the cemetery were created for convenience and to meet the requirements of making fresh burials in the same rows, that the permission of the Vicar was needed for burying the dead in the cemetery, that he had been the Vicar for 16 churches in his career, that he was not shifted from the

first defendant church because of any complaint against him. P.W. 3 was examined to say that in the first row except the members of the family of the plaintiffs, no one else had been buried and that he had knowledge of the relevant matters for about 45 years. He seems to be 58 years old when he gave evidence. It was brought out that he was a member of the family of the plaintiffs. He denied that his mother had been buried in the second row. He asserted in cross-examination also that till then, only the members of his family had been buried in the first row. He admitted that the permission of the Vicar was needed before burial. D.W. 1 the present Vicar was examined more to prove the entries in the death register and the accounts maintained by the first defendant church. He admitted that the documents were produced by the first defendant only after P.W. 1 was examined, that there was no item in the agenda for the meeting of the year 1982 regarding the right of burial in the first row. He admitted that the plaintiffs were the parishioners of the first defendant church. He had not denied the right of the plaintiffs and was not giving evidence because of the influence exerted on him by the other rich people of the parish. He has not spoken about any practice in the church. D.W. 2 stated in his chief examination that no row in the cemetery had been reserved for any family. He also referred to certain entries in the register of the church to show that there have been burials of others in the first row and of the members of the family of the plaintiffs in rows other than the first row. He stated that there are no separate rows in the cemetery of the first defendant church and if it had been stated in the written statement that there are such separate rows, that statement was not correct.

He asserted that if a person was willing to pay the rate fixed for burial in any particular row, the burial could be done in that row on being permitted by the Vicar and there was no discrimination in that. 11. The documents produced in the case are only the accounts and the death register kept in office of the first defendant church. They only show as reported by the Commissioner and as spoken to by the witnesses the collection of burial fee and the details of burials that had taken place. It is seen that there are a number of occasions when the members of the family of the plaintiffs had been buried in the first row. There have also been sporadic instances of some persons belonging to the family of the plaintiffs being buried in a row other than the first row and some entries, one of which is seen corrected showing that 151 Chakrams had been collected from one or two persons who were not members of the family of the plaintiffs.

12. Though as observed by the Privy Council in *Sathya Narain v. Sathya Niranjan* AIR 1924 PC 5, a family custom may differ entirely from a local custom, the nature of evidence required to establish the custom would be the same except that the instances of custom in the other localities may not be relevant in the matter of family custom. But it is necessary for the plaintiffs to clearly establish the elements which are required to be satisfied before the court could recognise a custom as having the force of law. On a scrutiny of the documents produced in the case, the report of the Commissioner and the oral evidence of the witnesses it is not possible to say that the plaintiffs have proved the custom set up by them

of having the exclusive right of burial in the first row of the cemetery which has been shown as the plaintiff schedule property. There is no sufficient evidence of long usage of excluding other families from burial from the first row of the cemetery. According to me, it is not sufficient for the plaintiffs to show that the members of their family have always been buried in the first row of the church cemetery but it is also necessary for them to show that such right had been denied to others though not for so long that memory of man runneth not to the contrary but for sufficiently long to prove that the same has acquired the force of a custom. According to me, there is no sufficient evidence on the side of the plaintiffs to establish that the members of other families within the parish have been denied the right of burial in the first row of the cemetery or that the right had been exclusively conferred on the family of the plaintiffs alone. The plaintiffs are therefore not entitled to the declaration that the eastern first row of the church cemetery of the first defendant church is exclusively reserved for burying the members of their family and that it is not entitled to permit burial of strangers in the first row. But at the same time, there is clear evidence to establish that almost invariably the members of the family of the plaintiffs have been buried only in the first row of the cemetery and therefore I am satisfied that the plaintiffs have made out a case for the issue of an injunction to the defendants not to deny permission to the members of the plaintiffs' family for being buried in the eastern first row of the cemetery in case they are willing to abide by the other conditions set by the church for burial and to pay the burial fee as fixed at the relevant time. I am therefore satisfied that to that extent, the plaintiffs are entitled to relief in this suit. Though what the plaintiffs have claimed is a permanent injunction restraining the defendants from permitting the dead of any other family to be buried in the eastern first row of the church cemetery, I think that in view of my conclusion on the evidence, the relief ought to be moulded and the plaintiffs granted the limited relief as referred to above.

In the result, I allow this Second Appeal in part. I set aside the judgment and decrees of the courts below dismissing the suit. I dismiss the suit filed by the plaintiffs in so far as it seeks the declaration that the eastern first row of the cemetery in the first defendant church is exclusively reserved for burying the members of the Periyappurathu family and that the first defendant is not entitled to permit burial of strangers in the said place. I therefore dealing the plaintiffs the decree for injunction restraining the defendants and their agents from permitting the burial of the dead of the other parishioners in the first row of the church cemetery. But, I grant the plaintiffs a decree for a permanent injunction restraining the defendants, their agents or servants from denying permission to the members of the family of the plaintiffs and all its branches to bury their dead in the eastern first row of the cemetery of the first defendant church if they are willing to abide by the conditions imposed by the church in that behalf applicable to all the parishioners and also to pay the burial fee as in vogue at the relevant time. I make no order as to costs.