

In the High Court of Kerala at Ernakulam

13th December 1956

P r e s e n t

The Hon'ble Sri M.S. Menon, Judge, a n d

The Hon'ble Sri T. K. Joseph, Judge.

A. S. No. 23 of 1955 (T-C)

O.S.No. 30 of 1124 of Mavelikara District Court.

Appellant - Mathai Guseph of Manamprathu Puthenveettil,
Kuttemperoor Muri, Mannar Pakuthy - plaintiff (died)

Legal heirs. 2. Guseph Mathai of Manamprathu, Puthen-
veettil, Kuttemperoor Muri, Mannar Pakuthy.

3. Guseph Abraham of do.

4. Guseph Mathew of do.

Impleaded as additional appellants vide order on C.M.P.
1509/55 dated 14-8-56.

By advocate Sri T.K. Kurien

Respondents - 1. Velayudhan Pillai Narayana Pillai of Maratte-
thu Padeettathil, Kulanjikarua Muri,
Mannar Pakuthy - 1st defendant.

2. Sankaran Nair, Velayudhan Nair also called
C.V. Velu Pillai, of Chudukattilaya Palakka
Vadakkethil, Kuttemperoor Muri, Mannar Pakuthy
2nd defendant.

No.1 by advocate Sri A.S. Narayanan Asan.

This appeal coming on for final hearing on 12-12-1956
and having stood over for consideration till this day the
court delivered the following

delivered by H. S. Menon, J. Judgment

This is an appeal by the plaintiff in O.S.No. 30 of 1124
of the District Court of Mavelikara. He died subsequent to
the filing of the appeal and his heirs have been impleaded as
additional appellants, 2 to 4, in pursuance of the order in
C.M.P. No. 1509 of 1955 dated the 14th August 1956.

2. The present suit, O.S.No. 30 of 1124, is a suit to
set aside the ex parte decree in O.S.No. 45 of 1112 of the Dis-
trict Court of Quilon. The plaintiff had filed a petition to
set aside the ex parte decree on the ground of fraud in the
service of summons. That petition, it seems, was dismissed by
the trial court and the dismissal confirmed by the High Court

of Travancore in C.M.A.No. 38 of 1123.

3. Issue No.4 of the seven issues raised is:

"Whether the order rejecting the application to set aside ex parte decree operates as res judicata?".

The lower court quoted the following passage from XXIII T.L.J.132:

"If the very fraud that is set up in the suit was set up in the application to set aside the ex parte decree and the court after going into the question of fraud rejected the application, the suit would be barred as res judicata unless the fraud was of such a nature that it could not properly come within the scope of inquiry under Order IX, r. 13 of the C.P.C.".

and held that:

"the present suit is clearly barred by the rule of res judicata".

4. Even the petition filed to set aside the ex parte decree was not before the court and the Judge was very much in the position of the Privy Council in I.L.R. 28 Calcutta 471 wherein they said:

"We have nothing before us, but the bare fact that the plaintiff endeavoured to get an ex parte decree set aside under s. 108 of the Code of Civil Procedure, under which the Court may try whether the summons was served or whether the plaintiff was prevented by any sufficient cause from appearing".

No documents have been marked or oral evidence adduced in this case.

5. Definite evidence is certainly required before a conclusion can be reached as to whether the present suit is barred by res judicata or not and we have come to the conclusion that we should set aside the decree and remand the case to the trial court for fresh disposal according to law after giving the parties an opportunity to adduce all relevant evidence. Judgment accordingly.

6. The costs of the appeal will be costs in the cause.

7. The court-fee paid on the memorandum of appeal will be refunded to the appellants as provided by section 10 (b) (1) of the Travancore-Cochin Court Fees Act, 1125.

✓ 13-12-1956.

Sd./V.S. Menon, Judge

Sd./T.K. Joseph, Judge.

(True copy)

*Copy sent to
A. J. Joseph*

*Copy sent to
A. J. Joseph*
Deputy Registrar
for Registrar.