

IN THE COURT OF THE ADDL. MUNSIF, KOTTAYAM

Present:- Sri K. George Oommen, Bsc.LLM, Addl. Munsiff

Saturday the 24th day of November 1990

3rd day of Agrahayana 1912.

O. S. 923/ 89

Plaintiff

1. Biju Uthup, S/o. Uthup, Christian, Aged 31, Employed as Project Manager, A.D.A. National Aeronautical Laboratory, Bangalore, from Oravankalayil House, Eranjal, Kottayam- 4.

By Adv. Sri. P.V. Thomas

Defendants.

1. Fr. George Manjungal, Vicar, Kizhakke Nattassery, Holy Family Catholic church, Nattassery, Kottayam-4.
2. Rt. Rev. Kuryakose Kunnassery, Bishop, Knanaya Catholic Diocese, Bishop's House, Cathedral Ward, Kottayam- 1.

Addl. 3 Knanaya Catholic Congress Kottayam represented by the President M.C. Abraham, Makil House, Chelliozhukkom, Muttambalam Kottayam.

Addl. D3 is impleaded as per order dtd. 02.03.1990 in C.R.P. 495/90D of the High Court)

D1. By Adv. M.J Thomas and D2- By Adv. K. George.

D3- By- KC Philipose Tharakan.

This original Suit Coming on for final hearing on 17-11-1990 in the presence of the above counsels for both sides and having to do over for consideration to this day the Court delivered the following.

JUDGMENT

1. Suit for mandatory injunction directing the defendants to issue a "vivahakkuri" to the Plaintiff.
2. Plaintiff is alleged to be a member of Holy Family Parish Church, Nttasery Kara of Kottayam Diocese. the 1st defendant is the Vicar of Holy Family Catholic Church and the defendant is the Bishop of Kottayam Diocese. Additional 3rd defendant is the Knanaya Catholic Congress, kottayam represented by its President and impleaded in the suit as per order in C.R.P. No. 495/90 D of the High Court of Kerala.
3. The relevant facts stated in the Plaint may be narrated thus:-Plaintiff, his parents and other members of the family are members of Knanaya catholic Community attached to Holy Family Parish Church, Nattassery. Plaintiff and other members of the family were accepted and acknowledged as members of the said church from 1977 onwards. Before that also they were members of other parish church coming within the jurisdiction of Kottayam Diocese. The marriage of the parents of the plaintiff was conducted in Little Flower Knanaya Catholic Church, Othara, a Parish Church coming under the Kottayam Diocese, on 22.10.1956. The plaintiff was baptized in the said church. According to the Canon Law and rules and practices governing the Kottayam Diocese and Parish Churches coming under it, the Plaintiff is entitled to have every religious rites performed and conducted by the

Vicar as a Member of the Parish Church and also as a member of the Diocese. Nobody has the right to deny the same unless the plaintiff is interdicted by a competent ecclesiastical authority disentitling him from enjoying the above privileges. Plaintiff is a true and faithful member of the Parrish Church and Diocese obeying all the Rules and Regulations of the Church in true Christian spirit and faith. Plaintiff's parents have made arrangement for the marriage of the Plaintiff with Leena, who is a member of St.Mary's Church, Vithura coming within the jurisdiction of Kottayam Diocese. Issue of "Vivahakuri" is a condition precedent for the conduct of the betrothal as well as marriage. Hence the Plaintiff and his father approach the 1st defendant, Vicar for issue of necessary "Vivahakuri" for the solemnization of the betrothal and marriage ceremony. Every vicar of all parish churches coming under the Kottayam Diocese is bound to issue such a kuri and also grant permission for the conduct of the marriage after due compliance of the procedure followed in the church. The vicar has no right to refuse the same. The 1st defendant vicar had initially agreed to issue such kuri but later on he refused to grant permission. Permission was so refused at the instance of the 2nd defendant, Bishop. Plaintiff's father had subsequently appealed to the 2nd defendant Bishop on 21.04.1989 about the conduct of 1st defendant. But inspite of repeated request by the plaintiff and his father, no decision has been taken by the 2nd defendant on the said appeal. The plaintiff under

such circumstances put up a representation on 26.06.1989 before His Holiness, the Pope. Plaintiff's father also made a representation on 01.05.1989 to the Apostolic Pronunciō, New Delhi. The Apostolic Pronuncio, in turn, after due consultation with Vathicanhas given necessary direction to the 2nd defendant. The Plaintiff had approach the 2nd defendant for directing the 1st defendant vicar to issue "vivahakkuri" for the conduct of the betrothal and marriage of the plaintiff. The representation met with fail. The conduct of the 1st and 2nd defendant is illegal and denial of the right of the plaintiff as a member of the Knanaya Diocese (Kottayam Diocese) and also as a member of the Parish Church to which he belongs. It is the duty of the defendant as a Parish priest and Bishop of the diocese respectively to issue necessary kuri to the plaintiff, for the conduct of Christian betrothal and marriage. The plaintiff, being a true and faithful member of the parish cannot even imagine of his marriage being conducted in any other manner or in any other church. It will be deemed as a social stigma for the plaintiff and members of his family forever. Defendants 1st and 2nd are acting in true violation of the sacred teachings and mandates of the church in an un-Christian manner. It is also understood that the 1st defendant Vicar has made a dependent of himself to file a suit before this Court as O.S. 1068 of 1988 for declaring that the plaintiff is not even entitled to be a member of the Knanaya Catholic Diocese. There is absolutely no legal or canonical objection for the

issue of a kuri to the plaintiff as demanded by him. The plaintiff, as a member of the parish church of the Kottayam Diocese is entitled under common law as well as under canon law and rules and regulations governing the affairs of the church to obtain such a kuri from the 1st defendant. The denial of the kuri by defendants 1 and 2 is highly unjust, unfair and unreasonable and opposed to all canons and principle of the Holy Catholic Church in these days of ecumenism. The denial of the said right to the plaintiff cannot be compensated in damages. There is absolutely no legal bar for Civil Court to grant a relief to plaintiff. Since the common law right of the plaintiff as a member of the Parish and Diocese is involved in the matter. Hence it is said that the court be pleased to invoke its equitable jurisdiction to give necessary directions to the defendants to issue "vivahakuri" for the conduct of marriage of the plaintiff.

4. A joint defence was setup by defendants 1 and 2 in their written statement. Contentions were advanced in detail on the following lines. The suit is not maintainable and it is not of a civil nature. The principle question in the suit is one relating to community. Therefore the court has no jurisdiction to try the suit. The prayer in the suit is for an order of injunction directing these defendants to issue necessary "vivahakuri" to the plaintiff. The basic question is whether the plaintiff is a member of the Knanaya Catholic Community who is entitled to get such a "Vivahakuri". The

plaintiff is not a member of the Knanite Catholic Community. Since there is no prayer for declaration that the plaintiff is a member of Knanaya Catholic Community and that he has a right to get "Vivahakuri", the suit is not maintainable. The statement in the plaint that the plaintiff, his parents and other members of the family are members of Knanaya Catholic Community attached to Holy Family Parish Church of Nattassery Kara Kottayam Diocese is not correct. They are not members of the Knanaya Catholic Community. A knanite is one who has born to knanite parents and who has not married a non knanite. Plaintiff's mother was not born to knaniteparents and her mother was not a knanite. Therefore plaintiff's mother is not a knanite. Though plaintiff's father was born to knanite parents, he ceased to be a knanite on account of his marriage with plaintiff's mother. Under these circumstances the plaintiff is not a knanite. The knanite community is a Christian community comprising of both Catholics and non-catholic Christian. The knanites are the descendants of KnaIThoma (Thomas Cana) and 72 families who migrated to India from the Middle East in 345 A.D. These people were composed of 72 families belonging to 7 Jewish clans (illams). The purpose of the migration under the leadership ofThomas Cana in 345 A.D was missionary activity. These immigrants were called Knanites. They were also known as Southists. The immigrants were given a warm welcome by the then ruling KingCheramanPerumal. Special privileges of high social status were also given which made them superior to other communities. The members of the present day Knanites Christian Community are the descendants of 72 Jewish Christian families, who arrived in Malabar In 345 A.D, under the leadership of Thomas Cana. They have retained many of their special customs and traditions until this date. In connection with the marriage, the Knanites have special customs of their own. The Knanites have remained anendogamous communityhaving

no marriage relations outside the community. They have zealously maintained their ethnic identity and integrity and racial purity. If any member of Knanaya community married from outside, he or she automatically ceased to be a member of the knanaya community. The knanites have never followed the system of the wife acquiring membership in the community of the husband. Whether it is man or woman, the person marrying a non knanite, lost membership in the Knanite Community and the knanite community always rejected such a person from their fold. Their children also are treated as non knanites. These traditions and customs relating to marriage have been followed by the knanites for centuries. The Christian Churches and the Society at large have accepted and approved the above traditions and customs. The knanite catholics have also their own churches and own Bishop i.e. the Catholic Bishop of the Kottayam Diocese. The non Catholic Knanites also have their own churches and their own Bishop. i.e. the Metropolitan of Chingavanam Bhadrasanam. They exercise personal jurisdiction over their respective people irrespective of the territorial limits. The Knanite Christians were divided into Knanite Catholic Community and Knanite Jacobite Community consequent on the division of the Malabar Church in the 17th century. Marriage between a Knanite Catholic and a Knanite Jacobite does not entail loss of membership in the Knanite Community. A separate Diocese exclusively Knanite Catholics was established in 1911. The Diocese was so established in response to the joint application made by Apostolic Vicars of Changanassery, Ernakulam and Trichur. Pope Pius X granted the decree establishing a separate diocese at Kottayam for Knanite Catholics. In the joint Application referred to above the existence of two distinct communities among the Syrian Christians of Malabar was particularly mentioned. These two communities were known

as the Southists and the Northists. It was also pointed out in the application that the two communities had no blood or marriage relations for the last 15 centuries. As a result of the Decree of Pope Pius X issued on 29th August, 1911 establishing Kottayam Diocese, all the Churches of Southist were separated and included in the newly established diocese. Bishop Mathew Makil was the 1st Bishop of the New Vicariate of Kottayam. Later by the Decree of Pope Pius XII dated 29th April 1955, the bishop of Kottayam was granted personal jurisdiction over all the Knanite Catholics within the Syro Malabar territory. With the establishment of the separate diocese for Knanites Catholics, the Knanite Catholic Community achieved progress and development in pastoral, religious and secular fields. The Knanite Catholics have no difference with the other Catholics in matters relating to faith and morals or in respect of the allegiance to the Pope. The essential difference between the two communities lies in the ethnic identity and integrity of the Knanite and in the endogamous character of the community. Though non knanite Catholics are allowed to participate in the religious and liturgical functions and to receive sacraments in a Knanite Catholic Church, they are not allowed to become members of the Church or Parish as the Knanite Catholic Churches and Parishes under the Kottayam Diocese are exclusively for the Knanites. A non knanite may be baptized in a Knanaya Catholic Church but he will not be accepted as a member of the Parish. Through baptism one becomes a member of the Catholic Church and not a member of the knanite catholic Community. A marriage between a knanite and a non-knanite is not allowed in the churches under the Kottayam Diocese because such a marriage is considered as an offence and insult to the Knanaya Catholic Community and its traditions and heritage. Such marriages are against the endogamous character and ethnic identity and integrity of the Community. Such marriages will undermine the very

basis of the establishment of the Kottayam Diocese and the existence of the Knanaya community. In order to protect and foster the heritage and traditions of the community and to prevent any attempts to offend or insult the feelings of the members of the community, a marriage between a knanite and a non-knanite is not allowed to be conducted in any of the churches under the Kottayam Diocese. In case a Knanite Catholic desires to marry a non-knanite he or she is advised to conduct the marriage in any Catholic Church other than those under the Kottayam Diocese and all necessary certificate and documents are furnished to facilitate such conduct of the marriage. The usual practice is that the person desiring to marry a non-knanite will become a member of the Parish of the other spouse or any other nearby parish and will conduct the marriage after obtaining vivahakuri from the new Parish. In the light of the traditions and customs of Knanite Catholics and the practices in the Churches and Parishes under the Kottayam Diocese, the allegation that the Plaintiff and other members of his family were accepted and acknowledged as members of the Holy Family Parish Church of Nattassery has no basis at all. Plaintiff and other members of his family might have been allowed to participate in the religious and liturgical ceremonies and to receive sacraments in the churches under the Kottayam Diocese as non-Knanites. It will not amount to accepting and acknowledging them as members of the Parish. Even if the Plaintiff and other members of his family were treated as members of the Parish, it was due to a mistake and without knowing that they are non-knanites. This cannot confer on the plaintiff any right to claim privileges due to a member of the Knanite Catholic Community or a member of a Parish under the Kottayam Diocese. In a letter dated 06.05.1989 addressed to the 2nd defendant, the plaintiff's father had admitted that the Plaintiff's maternal grandmother was not a knanite. It is

understood that the Plaintiff's maternal grandmother Smt. Lilly and her husband Chacko were Latin Catholics and that they were members of the St. Joseph's Cathedral Parish, Trivandrum under the Trivandrum Diocese. If the Plaintiff's maternal grandmother was not a Knanite, the plaintiff also cannot be a Knanite. These defendants are not aware of the circumstances under which the marriage of the parents of the plaintiff was conducted in the Little Flower Knanaya Catholics Church, Othara on 22.10.1956. The said marriage could not have been conducted in the said church. The plaintiff's parents might have managed to conduct the marriage in that church without disclosing the true facts. It is therefore clear that some fraud was conducted by plaintiff's parents or someone on their behalf to conduct the marriage in that church. Plaintiff's mother was also not a member of Little Flower Knanaya Catholic Church, Othara. None of the brothers and sisters of plaintiff's mother is a knanite or member of any Parish under the Kottayam Diocese. There are also no records in the church to show that plaintiff's mother Smt. Annamma was admitted as a member of Little Flower Knanaya Catholic Church, Othara or that any permission for that purpose or for her marriage was given by Rt. Rev. Dr. Thomas Tharayil, the then Bishop of Kottayam. If any such permission was actually granted, it would have been in writing and it would have been kept in the records of the Church. Even otherwise, the Bishop was not competent to give any such permission to admit a Non-Knanite as a member of the Knanite Catholic parish or to conduct the marriage of a Non-knanite to a knanite in a Knanite Catholic Church. Though the baptism in Little Flower Knanite Catholic Church, Othara, the plaintiff is could have acquired only membership in the Catholic Church and not membership in the particular parish or in the Knanite Catholic community. To be a member of the parish he should be eligible to be a member of the Knanite Catholic

community. Even if the plaintiff enjoyed any privileges of a member of the parish or community, it was only due to some fraud in respect of the marriage of his parents. Even if the plaintiff, his parents and other members of his family had obtained any benefit as if they were members of one or two parishes under the Kottayam Diocese, it was only by mistake. One P. M. Chacko had earlier sent a notice to the 2nd defendant alleging that plaintiff's parents and their children are not knanites and demanding that they should be expelled from the churches under the Kottayam Diocese. He had subsequently filed O. S. 1068/88 before the Munsiff's Court, Kottayam praying for a declaration that the parents of the plaintiff and their children are not members of the knanite community and that they cannot continue as members of parishes under the Kottayam Diocese. The 2nd defendant herein happened to be the 1st defendant in the other suit. Plaintiff's parents and other members of his family are defendants in the above suit. Plaintiff's father has submitted a petition before the 2nd defendant on 6-5-1989 for the issue of vivahakuri. It was disclosed that the maternal grandmother of the plaintiff was not a knanite or a member of the Kottayam Diocese. It was also stated in the petition that plaintiff's mother was admitted as a member of the Little Flower Knanite Church, Othara by Bishop Tharayil, the then Bishop of Kottayam Diocese. There are no records in the Diocesan office or in the Little Flower Knanite Catholic church, Othara to show that the plaintiff's mother was admitted as a member of the said church by the Bishop or with his permission. According to the customs, tradition and practice of the Knanite Catholics, a non-knanite cannot be admitted as a member of the churches under the Kottayam Diocese. The plaintiff's father had recently sent petitions to the Pope and to the Apostolic Pro-Nuncio in India, praying to direct the Bishop of Kottayam to allow the marriage of the plaintiff to be solemnized in any of the churches under the

Kottayam diocese. The Apostolic Pro-Nuncio in his letter dated 4-8-1989 informed the 2nd defendant that the case being a local matter is to be resolved by the 'Sudhist or Knanaya' Catholic community itself. Since plaintiff's father admitted that plaintiff's maternal grandmother was not a knaniteor a member of the Kottayam diocese, according to the customs and traditions of the Knanite Catholic community, the Plaintiff is not a member of the Knanite Catholic community. The plaintiff could not establish his claim to be a member of the Knanite Catholic community inspite of the letter dated 4-8-1989 by the Apostolic Pro-Nuncio. The plaintiff is therefore not entitled to be a member of the Knanite Catholic Community or of any Catholic church or to have his marriage solemnized in any church under the Kottayam Diocese. The plaintiff is not entitled to any benefit or privilege asa member of the community or the Parish. There is also no provision in the Canon Law and Rules and practices which entitles the plaintiff to be a member of the Knanite Catholic Community or any Parish church under the Kottayam Diocese. The Plaintiff has no right which can be enforced through the Civil Court. The 1st defendant Vicar is competent to issue Vivahakkuri inrespect of a person who is eligible to be a member of the Parish Church. Moreover "vivahakkuri" is issued for the purpose of conducting the betrothal and the Marriage in a Church under the Kottayam Diocese. Since the plaintiff is not a member of the Knanite Catholic Community, he is not eligible to be member of the Holy Family Catholic Church,Nattasery. Hence " Vivahakkuri" was not issued as requested by the plaintiff. The Vicar of a Church under the Kottayam Diocese is bound to issue the "Vivahakkuri" only to a person who is eligible to be a member of the Holy Family Catholic Church,Nattassery. Hence "vivahakkuri" was not issued as requested by the Plaintiff. The Vicar of a Church under the KottayamDiocese is bound to issue the "vivahakkuri" only to a person who is eligible to

be a member of the Church and who is also eligible for marriage under the relevant rules. The Vicar has the right to refuse "Vivahakkuri" to persons who are not eligible to be members of the Church. The Plaintiff is not a member of the Parish under the charge of the 1st defendant. These defendants had offered to the plaintiff to issue necessary certificate or other documents to enable the plaintiff to conduct his betrothal and marriage in any Catholic Church other than those under the Kottayam Diocese. The allegation in the Plaint that no decision has been taken or intimated by the 2nd defendant on the appeal petition dated 21.04.1989 is also not correct. The plaintiff and his parents personally met the 2nd defendant and they were informed that the "vivahakkuri" cannot be issued. In the light of the contents of the letter of the Apostolic Pro-Nuncio, the Plaintiff can be treated only as a member of the Changanassery arch dioceses, the Syro Malabar eparchy of the territory in which the plaintiff has his domicile. The plaintiff has no right as members of the Kottayam Diocese or the Holy Family Church, Nattassery since he is not a member of the said Diocese and the church. Therefore, there has not been any denial of any right of the Plaintiff by the defendants. These defendants have no obligation to issue "Vivahakkuri" to the Plaintiff to conduct his betrothal and marriage in Knanite Catholic Church. Plaintiff's right to have his betrothal and marriage conducted according to the Catholic Faith and Religious ceremonies in Catholic Churches other than those under the Kottayam Diocese is not in any way affected. If the plaintiff's marriage is conducted in a Knanite Catholic Church, the feelings and sentiments of the entire community will be hurt and the centuries old tradition of the community will be violated. The allegation that the defendants are acting contrary to, and in violation of the sacred teachings and mandates of the churches is absolutely baseless and hence denied. The allegation that the 1st defendant has made a

dependent of himself to file O.S.1068 of 1988 is not true. The tradition and custom of the Knanite Catholic Community and the practices in the Kottayam Diocese do not permit the defendant to issue "vivahakkuri" to the Plaintiff as demanded by him. These traditions, customs and practices have the force of law, in so far as the affairs of the Kottayam Diocese and the Knanite Catholic Community are concerned. The plaintiff has no right under the common law or the Canon Law or under the Rules and Regulations governing the affairs of the church to obtain the "Vivahakkuri" from the 1st defendant to conduct plaintiff's betrothal and marriage in a church under the Kottayam Diocese. The refusal of "Vivahakkuri" to the Plaintiff is not against the principle of natural justice or the spirit of ecumenism as alleged. No religious or civil right of the Plaintiff has been denied by the defendants. There is no cause of action against these defendants. Under the circumstances it is prayed that the suit be dismissed with costs of these defendants.

5. Additional 3rd defendant filed a separate written statement raising the following contentions. The suit as framed is not maintainable in law. The relief claimed in the plaint is the enforcement of the plaintiff's alleged right of membership in the Kizhakke Nattassery Holy Family Catholic Church. Defendants 1 and 2 are impleaded only in their individual capacities and in the nature of the relief sought, the said church is a necessary party to the suit. Without the church in the party array, the relief claimed cannot be granted. The suit filed without sanction of the Court under Order 1 rule 8 of the Code of Civil Procedure is not sustainable. Additional 3rd defendant is an association established in the year 1938 with the object in protecting the interests of the Knanaya Catholic Community and for preserving the purity and tradition of the Community. The Knanaya Catholic Community is an endogamous society. If any member of the

community marries from outside, he or she automatically ceases to be the member of the Knanaya Community. The tradition and custom relating to marriage has been, scrupulously followed by the knanites for centuries. A marriage between a knanite and a non-knanite will not be allowed to be conducted in any of the churches under the Kottayam Diocese. The plaintiff has not ever been a member of the Kizhakke Nattassery Holy Family Catholic Church. Plaintiff's mother is not a knanite. Hence the plaintiff is not a knanite and the allegation that he is a member of Kizhakke Nattassery Holy Family Catholic Church cannot be accepted. Defendants 1 and 2 cannot grant "Vivahakkuri" as they do not represent the church. For a relief of injunction, the declaration that the plaintiff is a member of the church is a condition precedent and the result of a declaration decree on the question of status affect the whole community. Therefore the 3rd defendant congress is entitled to question the status and the right of the plaintiff regarding his membership in the Church. In any view of the matter the Plaintiff is not eligible or entitled to be a member of the Knanaya Catholic Community or of any Parish Church under the Kottayam Diocese, Since the Plaintiff is not a Knanite and not a member of the Parish Church, there cannot be any question of interdiction. The 1st defendant cannot in his individual capacity issue a " Vivahakkuri" . The vicar of the Church is entitled to refuse the issue of a " vivahakkuri" to persons who are not eligible to be members of the Church. This defendant is quite aware that the plaintiff's father made a representation to the Apostolic pronuncio of India. The Apostolic Pronuncio had issued a letter dated 4.08.1989 to the 2nd defendant in this matter. From the reply, it is clear that if the plaintiff is not born to Knanite parents, he is extraneous to the Knanite Community and could not claim to be a member thereof. The plaintiff has to establish that he is a member of the Knanite community and also of the Parish.

If plaintiff's marriage is allowed to be conducted in Knanite Church, the feeling and sentiments of the entire community will be hurt, and the centuries old traditions and customs of the community will be violated. The tradition, customs and practice have the forces of law as far as the Knanite Catholic Community is concerned. The plaintiff has no right under the common law or the canon law and under the rules and regulations governing the affairs of the Church. The mandatory injunction prayed for cannot be legally granted. No dispute of a civil nature involved in the case. It is therefore prayed that the suit be dismissed with costs.

6. Parties went to trial on the following issues.

1. Whether the suit is maintainable in Law?
2. Whether the plaintiff is not a member of Knananya Community and Holy Family Catholic Church, Nattassery as contented by the defendants? Are the defendants estopped from putting forward such contentions?
3. Is the prayer for mandatory injunction allowable?
4. Reliefs and costs.

Additional Issues.

1. Whether the KizhakkeNattassery Holy Family Catholic Church a necessary party and whether the suit is bad for non- joinder of the Parties?
 2. What are the qualification of a person to be a member of the KnaniteCommunity?
7. The evidence in this case consist of PWs. 1 to 8 on the side of the plaintiff. Exts. A1 to A19 also marked. On the side of the defendants DWs 1 to 5 examined and Exts. B-1 to B-29

marked. Exts. X1, X-1 (a) X-2, X-2(a), X-3, X-3(a) and X-3 (b) also marked.

8. Issue No. 1. The defendants had raised a specific plea in their written statement that the suit is not maintainable in law and that it is not of a civil nature. It is alleged by the defendants that the subject matter of the suit is not the right to property or to any office. The plaintiff, who is alleged to be a member of Holy Family Church, Nattassery coming under the Kottayam Diocese seeks relief of mandatory injunction in the suit for issue of necessary "Vivahakkuri" by defendants 1 and 2 for his betrothal and marriage.
9. The claim of the plaintiff is centered on an allegation that he is a member of the Kottayam Diocese and Knanaya Catholic Community. As a matter of defence, it is the defendants case that the subject matter of the suit is not the enforcement of a civil right or obligation and that taking cognizance of the matter in dispute will be an interference with the autonomy of the Knanaya Catholic community. Hence it is contended at the very outset that the civil court has no jurisdiction to try the suit. Secondly it is alleged that there is no breach of any obligation by the defendants which has to be prevented by a Mandatory injunction. This is also a plea of defense set up on the basis of Sec.39 of the Specific Relief Act, 1963, which has to be dealt with independently divorced from the question of issue of jurisdiction. It can be understood from the stand taken by the defendants that the main question to be decided is whether the suit is of a civil nature and even if so, the question as to whether cognizance is impliedly barred. Attention is therefore mainly focussed on Sec. 9 of the Code of Civil Procedure, 1908 to contend that the court has no jurisdiction. The point which arises for consideration is whether the Court is precluded from adjudicating the matter by the reason that the question

at issue is a community question which the court is precluded from trying.

10. The allegation that plaintiff and his family members are attached to Holy Family Parish Church of Nattassery Kara coming under the Kottayam Diocese is denied by the defendants. Defendants had pleaded a case in such a manner that the plaintiff, his parents and other members of the family are not members of Knanaya Catholic Community. According to the defendants, a knanite is one who is born to Knanite parents and who has not married a non-knanite. The fact that plaintiff's father was originally born to Knanite parents is not in dispute, but defendants contend that he ceased to be a knanite on account his marriage with plaintiff's mother who is a non-knanite. Therefore, it is alleged that the plaintiff is not a Knanite. Defendants would also highlight that the eligibility for membership of the parish churches coming under Kottayam Diocese is to be determined on the basis whether a person is a Knanite or not. The genesis of Knanites, otherwise called as Southists and the existence of Knanaya community with its ethnic identity are narrated in detail to enlarge the defence and to make it appear that the subject matter of controversy is merely a community question. Plaintiff's claim that he is a member of Holy Family Catholic Church, Nattasserykara and that he is entitled to get "vivahakkuri" must be viewed in this background.
11. Counsel appearing for defendants 1 and 2 submitted that social customs regarding marriage are within the exclusive jurisdiction of the community. According to him a marriage whatever else it is i.e a sacrament, an institution, etc. is undoubtedly a contract and that right of marriage is not a civil right. Even if it is assumed otherwise, it is argued that marriage among the Christians are governed by ecclesiastical law and when viewed as a sacrament also. It is a religious

function within the exclusive domain of ecclesiastical authority and hence the court has no jurisdiction.

12. A series of earlier decisions were cited to substantiate the contention that religious questions are outside the purview of the jurisdiction of the civil court. The learned counsel (for defendants 1 and 2) relies on the decision reported in I.L.R. 5 Bombay 80 (Vasudv V Vamnaji & Others). Where it is stated that suits as to religious rites or ceremonies, which involve no question of the right to property or to an office, are not suits of civil nature, nor are they intended to be brought within the jurisdiction of the civil courts. A suit, by the plaintiff, as member of a committee of management of a Hindu temple, to compel the hereditary Priests of the Temple to take out certain ornaments from the treasury and to place them upon the image of the God met with fail. It was also held that the courts have no power to interfere for the purpose of regulating the rites and usage peculiar to any dissenting sect or body. A claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honors at the hands of the members of the caste in virtue of that office is held to be a caste question and not cognisable by a Civil Court. In *Murari Vs. Suba and Others* (I.L.R. 6 Bombay 725) Sargent, C.J. had observed that the right to be recognised as the head of the caste, and to be entitled to receive from other members of the caste certain privileges and precedence is a caste question. Likewise, in *Jethabhai Narsey V Champsey Cooverji* (I.L.R. 34 Bombay 467) it was held that where rights to property are not involved all matters of internal management must be left to the decision of the caste. The subject matter of dispute in the case was between the caste and a section of the caste led by the plaintiff. By holding that the question in dispute was outside the jurisdiction of the civil court, The

high court has observed that the plaintiff, by reason of his holding a certain caste office, is not entitled under the caste rules to demand inspection of all caste documents.

13. In *Hukm Chand and others V MaharajBahadur* (A.I.R.1933 P.C 193) disputes between the two sects of jains as to their rights of worship on Prasanth Hill arose for consideration. Dwellings were erected on the top of the hill by one of the sects. Incidentally, PrasanthHik is considered as sacred by the whole Jain Community. The question to be considered was whether the construction by one of the sects was permissible. Their Lordship had observed that the right to worship is a civil right, but it was held that the disputes between the two sects regarding the construction of dwellings are matters for the Jains themselves to beresolved, and not by the civil court.
14. The decision referred above were cited to point out that the Civil Court has no jurisdiction to interfere with the autonomy of the caste, namely the Knanaya Catholic Community. It is urged that the question to be adjudicated is one in relation to the autonomy ofa caste recognised for 15 or 16 centuries. Since rights of property or office are not involved, according to the counsel appearing for defendants 1 and 2, there should not be a debate in a court of law and it is for the caste and not for the Court to pursue the matter. It must be particularly noted here that the best description of "Caste" is given by Farran. J, in *RahghhathDamodar V JanardhanGopal* (I.L.R. 15 Bombay 599) in the following words.

"The Caste is a social combination, the members of which are enlisted by birth, not by enrollment, its rules consist party of resolution passed from time to time, but for the most part of usages handed down

from generation to generation. The cast is not a religious body though its usage like all other Hindu usages, are based upon religious feelings. In religious matters, strictly so called the members of the caste are guided by their religious preceptors and their spiritual heads. In social matters they lay down their own laws.

15. Counsel for defendants 1 and 2 had also advanced arguments in such a manner that the question involved in the suit is one of getting married. It has been pointed out that, even if there are differs of opinion regarding marriage as to whether it is a civil right or sacrament, the right to continue in a community is not a civil right if it turns out to be a blot on the tradition and customs of the community. According to the learned counsel, as far as the marriage of the plaintiff is concerned, a marriage blessed by a Knanite Priest or a priest of other church is valid. The question focused is whether the plaintiff has a right to say that the community shall forsake its tradition. The rival contention of the parties are to be borne in mind. It is the definite allegation of the Plaintiff that he is a member of Knanaya Catholic Community attached to Holy Family Parish Church of Nattassery Kara of Kottayam Diocese. The defendants had contended that plaintiff is not a member of Knanaya Catholic Community. Therefore the crux of the matter is as to whether the plaintiff is a member of Knanaya Catholic Community and Holy Family Church, coming under the Kottayam Diocese and not something in relation to plaintiff's right to continue in the community. It may be true that the marriage ceremony is a religious ceremony, but the principle question that is to be considered is whether the plaintiffs is a member of the parish church attached to the kottayam dioceses and the Knanaya Catholic Community. The scope of Sec 9 of the

Code of Civil Procedure has to be examined in the light of the said contention advanced by the plaintiff.

Sec.9 of the Code of Civil Procedure provides as follows: Courts to try all civil suits unless barred. The Courts shall (Subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation. I. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decisions of questions as to religious rites or ceremonies.

Explanation II. For the purposes of this section it is immaterial whether or not any fees are attached to the office referred to in explanation I or whether or not such office is attached to particular place.

The position contemplated is that whether there is an express prohibition or not, the alternative remedy provided must be taken into consideration. Where elaborate provisions are made in a statute for alternative and adequate remedies, civil court's jurisdiction is barred. Where, however there is absence of adequate remedy under the statute or where the provisions of the statute are not elaborate, civil courts are not barred from entertaining a suit notwithstanding the fact that there is an express exclusion thereunder. Even where the jurisdiction is excluded, civil courts have jurisdiction to examine whether the provisions of the Act have not been complied with. In cases where there is no express prohibition, the general presumption adverted to above apply with greater force and unless the provisions of the statute give an indication of the exclusion of the jurisdiction of civil courts, Civil Courts jurisdiction cannot be

barred. Therefore generally speaking, Courts can try all suits which involve the determination of any civil right. On a reading of the Section it can be seen that two things are essentially necessary to give jurisdiction. Firstly, the suit must be of a civil nature; and secondly its cognizance must not be expressly or impliedly barred. According to explanation-I of the Section, a suit in which the right to property or to an office is contested, is cognizable by a Civil Court, despite the fact that such right may depend entirely on decisions as to religious rites and ceremonies. Though the learned Counsel appearing for defendants 1 and 2 had argued that Explanation I, referred above curtails the jurisdiction of the Civil Court, on a close analysis and literal interpretation of the explanation it can only be said that there is nothing in it to curtail the jurisdiction of the Civil Court, but it can only the other way found. Explanation-I to the section implies two things, namely (i) a suit for an office is a suit of a civil nature; and (ii) it does not cease to be one even if the said right depends entirely upon a decision of a question as to religious rites or ceremonies. It implies further that questions as to religious rites or ceremonies cannot independency of such a right form the subject matter of a civil suit. But the current trend is that the civil courts are competent to discuss and deal even with a caste question where the membership and character of a member are seriously affected.

16. Coming to the case in hand, it is stated by the plaintiff in Paragraph 7 of the plaint that he is a member of the Parish church of the Kottayam Diocese and that he is entitled under common law as well as under Canon Law and rules and regulations governing the affairs of the church to get 'Vivahakuri' from the 1st defendant. The claim of the plaintiff is on the basis of a plea that he is a member of

Kottayam Diocese. Kottayam Diocese of the Roman Catholic Church is synonymous with a voluntary Association. The question of membership of a voluntary association is undoubtedly, a civil right. The sum and substance of the plaintiff's allegation is that plaintiff's status as member of the voluntary association is refuted by defendants 1 and 2 by denial of certain privileges for which he is entitled to as a member of the Diocese. There cannot be any doubt that, when the right of membership of a voluntary association is disputed, it is a civil right which can only be adjudicated by a civil court unless the bye-laws or rules debar any member thereof from invoking the jurisdiction of civil Court and providing other forums for redressal of the grievance. The defendants have no such case in their written statement. Moreover there is nothing on record to show that there is a bye-law for the Holy Family Parish Church of the Diocese, as the case may be to make an express bar on jurisdiction of the civil court. It can only be understood that the relief prayed for in the suit is only on the basis that plaintiff is a member of the Holy Family Parish Church Nattassery and Kottayam Diocese. When a person approaches a court of law for redressal of the grievance, in view of Sec. 9 of the Code of Civil Procedure, unless it is expressly barred by any statute, the court is left with no other alternative, but to presume in favour of jurisdiction.

17. Defendants went one step further in contending that the question of membership of the Plaintiff in the Parish Church of Kottayam Diocese and Knanaya Community must be determined with reference to certain religious question and hence

civil court has no jurisdiction. Existence of a valid custom prevalent in the Knanaya Community is also pleaded. The short point to be considered at this juncture is whether the plea of defendants will determine or change a forum. The principle that has been applied by the various High Courts is that it is the substance of the plaint and the true object of the suit that has to be taken for the purpose of determining the question of jurisdiction. *In Abdulla Bin Ali & Others V. Galappa and Others (A. I. R. 1985 S. C. 577) it was emphatically held that the allegation made in the plaint decides the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement.

Ugam Singh V. Kesvimal (A. I. R. 1971 S. C. 2540)

renders the best exposition as to how Sec.9 operates with reference to right to worship in the following words.

"A right to worship is a civil right interference with which raises a dispute of a civil nature though as noticed earlier dispute which in respect of rituals or ceremonies alone cannot be adjudicated by civil courts if they are not essentially connected with civil rights of an individual of a sect on behalf of whom a suit is filed"

18. Placing reliance on the above decision the learned counsel for defendants 1 and 2 had submitted that the court will go in to the question at issue if a right to worship is not involved. According to him, relief can be granted only
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* Municipal Board, Faizabad. V. Edward medical hall
Faizabad, A.I.R. 1976 ,Alahabad- 349, Hans Raj Bausal
V. Hardev Singh, A.I.R. 1984 Punjab and Haryana 229

to the extent of which interference is vested with right of worship and not on any other grounds. In other words, the position sought to be canvassed is that the Court can travel only to a limited extent. It is also urged by the learned Counsel that the plaintiff's claim for continuation in a community or a church is not a civil right and that the suit matter is on the threshold of ecclesiastical law and not civil law. In view of the dictum laid down by the Supreme court in. A.I.R.1971 S.C.2540 (Supra) that a right to worship is a civil right, however limited the Civil court's jurisdiction may be, by no stretch of imagination can it be said that plaintiff's right of membership of the Holy Family Church, Nattassery, and Kottayam Diocese is not a civil right. The Supreme Court is only of the view that disputes in relation to rituals or ceremonies alone cannot be adjudicated and that too, if they are not essentially connected with civil rights of an individual. The position contemplated is that disputes as to rituals or ceremonies can also be adjudicated if they are essentially connected with civil rights of an individual. In the present case, right to membership of a parish church is primarily agitated and undoubtedly it is a civil right. If the right to be a member is dependent on the custom and certain religious practices followed by the community, it implies that these questions are to be necessarily looked into for setting the dispute at rest. That being so, there is no merit in the contentions advanced by

the defendants that the civil court has no jurisdiction to try the subject matter of controversy.

19. In this connection, I may also refer to a decision of the High Court of Kerala in Joshua V. His Grace Geevarughese Mar Discorus (I.L.R.1985 Kerala Vol.1) where it was held that orders passed by the religious heads affecting civil rights of persons can be questioned in Court. The subject matter of the suit was essentially for a declaration that two orders passed by the vicars are void and for an injunction restraining the enforcement of those orders and the refusal of the sacramental communion to him and for enabling the plaintiff to exercise his rights as a member of the Trivandrum Parish and the managing Committee thereof. While dealing with the question of maintainability, His Lordship, Sukumaran. J. had observed in Paragraph 23 of the Judgment as follows'.

"The civil rights of the plaintiff, particularly in relation to his claim as a member of the parish Committee, and his right to contest and continue the suits already pending now, are affected by the actions complained of in the present suit. They are clearly matters affecting the Civil rights of the plaintiff for which resort to a Civil court is fully justified",

20. Another ground of attack pertaining to the maintainability of the suit is on the basis that the plaintiff has not sought for a relief of declaration. While making an outright denial of plaintiff's claim that he is a member of Holy Family Catholic Church, Nattassery, the 3rd defendant had advanced a plea that a prayer for declaration that the

plaintiff is a member of the concerned church is inevitable. As I have mentioned earlier, it is to be noted that the plaintiff had initiated the suit on a definite allegation that he is a member of Holy Family Catholic Church coming under the Kottayam Diocese. Despite all other contentions raised by the defendants in the suit, the prima facie evidence makes it crystal clear that plaintiff and his family members are associated with the Holy Family Catholic Church. It is pertinent to note here that no order has been ever passed by the 1st defendant-Vicar or the 2nd defendant-Bishop under any provisions of law, either common law or ecclesiastical law, expelling the plaintiff or members of his family from the membership of the Church. Even on an assumption that the interest of Community is involved in the matter, it can be seen that there is no decision by the Knanaya Community to the effect that plaintiff is expelled or that he is not a member of the Parish Church or the Community as the case may be it is worthy of note at this juncture that the plaintiff has put up a definite case in his pleadings that he is entitled to have every religious rites performs and conducted by the Vicar as a member of the Parish Church and that nobody has the right to deny the same unless he is interdicted by a competent ecclesiastical authority disentitled from enjoying the privileges as a member, Ext. B23 dated 21-4-1989 is an appeal petition filed by plaintiff's father before the 2nd defendant Bishop to direct the Vicar to issue the 'Vivahakuri.' Ext. B 23 (a) is the report of the Parish Priest (1st Defendant) saying that the plaintiff's father is an active member of the Holy Family Catholic Church, Nattassery and that he had promised to give 'kuri' for the plaintiff's marriage. It can be seen that

Ext. B 23 (a) recommendation is made by the Vicar himself, who is having the authority to decide the question of membership. The upshot of Ext. B 23 (a) can only be on the basis that plaintiff is attached as a member to the Holy Family Catholic Church, Nattassery coming under the Kottayam Diocese. That being so, the contention raised by the defence side that a prayer for declaration is a condition precedent for a relief of injunction does not hold good.

21. I am also fortified in view of the decision of the Kerala High Court in *Sathyon V. Manager*, 1.O.B, (1988 (1) K.L.T. 553). In that case, the dispute arose, as to payment of Court fee and the question was whether a suit filed for injunction alone restraining the Bank from paying the amount covered by a fixed deposit receipt be treated as a declaratory suit. It was held that the suit will be treated only as a suit for injunction for purpose of court fee and the reasons were stated as follows:

"In the plaint now filed, the actual relief prayed for is only for an injunction. It is clear from the plaint averments that the petitioner asserts that he alone is entitled to the amount covered by the fixed deposit receipt on the bank, and does not seek any declaration of the right. He, therefore, proceeds on the footing that the bank has no power to pay the amount to any other person. It may be that while deciding to grant injunction or not, the court might have to consider the question as to whether the plaintiff is entitled to the amount. The suit in which the plaintiff does not pray for the money cannot be treated on exactly the same footing as a suit in which he does pray for such relief".

Applying the principle to the facts of the present case, it can be seen that the plaintiff proceeds on the basis that he is

entitled for "vivahakuri" for his betrothal and marriage on the ground that he is a member of the Holy Family parish Church, Nattassery and Kottayam Diocese. The question as to whether the plaintiff is entitled for an injunction as prayed for depends upon plaintiff's entitlement on that behalf. This must happen in almost every case where an injunction is prayed for. That being so, it is idle to contend that a prayer for declaration is inevitable. The contention raised by the defense side that a prayer for declaration is a condition precedent cannot be sustained at all. The issue regarding maintainability of the suit under the circumstances is found in favour of the plaintiff.

22. Additional Issue No.1 Additional 3rd defendant had raised a contention in the written statement that the KizhakkeNattassery Holy Family Catholic Church is a necessary party to the suit. It is contended by the additional 3rd defendant that the relief sought for could not be granted without the Church in the party array. What the additional 3rd defendant would contend is that defendants 1 and 2 are impleaded in the suit only in their individual capacities. It can be also seen from the plaint allegations that the 1st defendant is impleaded as the present vicar of Knanaya Holy Family Catholic Church, KizhakkeNattassery and the 2nd defendant as the Bishop of Kottayam Diocese under whose jurisdiction the parish Church is functioning. It is an admitted fact that it is the duty of a Vicar of the Parish Church to issue "Vivahakkuri" to the members of the Parish. On going through Ext.B-23(a) it can be understood that the 1st Defendant Vicar was prepared to issue "Vivahakkuri" to the Plaintiff the same was not issued on the basis of specific instructions given by the office of the 2nd Defendant- Bishop.

23. It is pertinent to note in this context that the plaintiff does not seek any relief from Holy Family

Catholic Church, KizhakkeNattassery or the members thereof or the Kottayam Diocese. Reliefs are angled against defendants 1 & 2 in their capacities as Vicar and Bishop on the allegation that it is their duty to issue 'Vivahakuri'. It must be noted that there is no resolution or decision taken by the members of the parish Church with regard to the grant of 'Vivahakuri' to the plaintiff. There is nothing in evidence to show that a General Body Meeting was convened to discuss the matter. If the 1st defendant was acting on the decisions of a General Body Meeting of the members of the church, then the question regarding seeking reliefs against them would have arisen. Additional 3rd defendant has no such case in the written statement. Suit is initiated on a specific allegation that plaintiff is a member of the Parish Church and that certain duties are posited on defendants 1 and 2. It can be said that even the 2nd Defendant Bishop is not necessary party to the suit but for Ext.B-23(a), where it was disclosed that the office of the 2nd defendant had instructed the Vicar-1st defendant not to issue "Vivahakkuri" to the plaintiff. It must be also noted that there is no decision by General Body of the Parish Church, expelling the Plaintiff from the membership. As I said earlier, suit is instituted seeking a direction against defendants 1 and 2 their capacities as Vicar and Bishop respectively. PW-2, DW-2 and DW-5 are all working as Priests of the Kottayam Diocese. They have stated that it is the duty of the Vicar to issue 'Vivahakuri'. It must be therefore understood that members of the Parish Church are entitled to get such 'Vivahakuri' unless they are disqualified by Canon Law or other rules relating to the affairs of

the Church. Under the circumstances, it is only safe to hold that Holy Family Parish Church is not a necessary party to the suit. Moreover, it should be noted that the plaintiff, being the master of the litigation has an option to choose the relief and the defendants as well. Impleadment of parties are dependent upon the allegations contained in the plaint and when the Plaintiff categorically says that he is a member of Holy Family Parish Church, KizhakkeNattassery and Kottayam Diocese and since no reliefs are claimed against the members of the Parish or the Kottayam Diocese, there is no merit in the contention raised by the additional 3rd defendant that the KizhakkeNattassery Holy Family Catholic Church is a necessary party to the proceedings. The issue is answered accordingly.

24. Issue No.2 and Addl.Issue No.2. The case of the Plaintiff's built upon a foundation that his parents and other members of his family are members of Knanaya Catholic Community attached to Holy Family Parish Church, Nattasserry of Kottayam Diocese. Plaintiff's case is that he along with other members of the family were accepted and acknowledged as members of the Kottayam Diocese. The fact that plaintiff's father happened to be a member of Kottayam Diocese is not disputed by the defendants. But the allegation that the plaintiff, his parents and other members of the family are members of Knanaya Catholic Community is denied by the defendants. What the defendants would actually contend is that plaintiff's mother was not a 'Knanite and since plaintiff's father, a Knanite when married a non-Knanite, had ceased to be a Knanite. Therefore it is alleged that neither the plaintiff nor his parents are members of Knanaya

Catholic Community of Katayam Diocese. Plaintiff's brothers and sisters are also contended to be non-Knanites for the same reason. Thus, plaintiff's claim regarding membership of the Parish Church coming within the Diocese is strongly refuted. In support of the contention that plaintiff and his family are members of the Kottayam Diocese and that they have been acknowledged as such, plaintiff has produced certain records which are not in dispute. Ext.A-1, marriage certificate dated 13-8-1986 issued by the Vicar of Little Flower Knanaya Catholic Church, west Othara would stand to show that plaintiff's parents were married in that Church on 22-10-1956. It should be however noted that Little Flower Knanaya Catholic Church, West othara is a Parish Church coming within the jurisdiction of Kottayam Diocese. PW-6, the present Vicar of Little Flower Knanaya Catholic Church west othara has produced X-2, the marriage register of the relevant period kept in the Church. The second entry contained in Ext.X-2 Marriage Register pertaining to the marriage of plaintiff's parents is marked as Ext X-2(a) in Ext.X-2 (a) plaintiff's father Uthup is shown as member of the Kumarakom Church and plaintiff's mother Annamma is shown as the member of the Othara Parish Church. Despite the fact that plaintiff's mother Annamma was not born of Knanaya Parents, it can be seen through the records referred above that Plaintiff's mother has been admitted as a member of west othara Parish Church and on that basis the marriage was conducted on 22-10-1956. PW-6 had occasion to state in cross examination that marriage ceremony between a Knanite and non-Knanite could not be blessed in a Knanaya Parish Church. But PW-3 had categorically stated that plaintiff's mother was admitted as a

member of Little Flower Knanaya Catholic Church before her marriage and that marriage was also conducted there. I see no reason to dis-believe PW-3, who is none other than the brother of plaintiff's mother. Thus, the oral evidence given by PW-3 is corroborated through Ext.A1 and Ext.X 2 (a) which will prove beyond all doubt that Plaintiff's mother (Annamma) has been admitted as a member of Little Flower knanaya Catholic Church, west othera and Kottayam Diocese before her marriage.

25. Defendants 1 and 2 had contended inter alia that plaintiff's father ceased to be a member of the Knanaya Community and Kottayam Diocese on account of his marriage with plaintiff's mother. It is further alleged that children born to them are disentitled to be members of the Knanaya community and Kottayam Diocese. The fact that the marriage of plaintiff's parents was conducted in Little Flower Knanaya Catholic Church West othera is proved beyond doubt. But what is borne out from the pleadings of defendants 1 and 2 is that the marriage so conducted was a mistake and that plaintiff's mother was never made a member of the west othera Parish Church. It is further alleged that the plaintiff's parents might have managed to conduct the marriage in that church without disclosing the fact that plaintiff's mother is not a knanite. It is an admitted fact on the side of defendants 1 and 2 that Rev.Fr.Jacob Chackacheril was the Vicar of Little Flower Knanaya Catholic Church, West Othera during the relevant period. Ext A2 is a certificate dated 20-4-1989 issued by Rev.Fr.Jacob Chackacheril to the effect that plaintiff's mother was made a member of Little Flower Knanaya

Catholic Church before her marriage and that membership was given on the basis of permission granted by Rt. Rev. Thomas Tharayil, the Bishop of Kottayam Diocese during the period. PW-3 has spoken that he went to the Carithas Hospital and got the certificate from Rev. Fr. Jacob Chackacheril. It is also stated by PW-3 that he had seen Rev. Fr. Jacob Chackacheril signing the document. Since Rev. Fr. Jacob Chackacheril passed away before the commencement of trial, he could not be examined as a witness in the proceedings. Defendants 1 and 2 had particularly averred in the written statement that the said certificate issued by Rev. Fr. Jacob Chackacheril regarding the Marriage of plaintiff's parents has no evidentiary value.

26. Learned counsel for defendants 1 and 2, Shri. K. George had argued that there is no legal evidence with regard to the authenticity of Ext.A-2. Placing particular reliance on the oral evidence of PW-3 in relation to the statement that Rev. Fr. Jacob Chackacheril was in very close terms with plaintiff's maternal grandfather. Shri. K. George had pointed out the possibility that plaintiff's mother Annamma was given a membership in the west Othera Church at the instance of Rev. Fr. Jacob Chackacheril. A logical analysis of the situation is also brought out to highlight the defence. It is argued that Ext.A2 is a certificate issued on 20.04.1989 with reference to certain facts which took place on 22.10.1956 and since it is evidence that Ext. A2 was written without reference to any documents, the same is not reliably proved. According to the learned counsel, since the bystander who is stated to have written the contents of Ext.A2 was not examined,

there is no other corroborating circumstance to show that plaintiff's mother was admitted as a member of the West Othera Parish Church.

27. It is true to say that Ext.A2 does not specify the nature of permission, whether oral or written granted by Rt. Rev.Dr.ThomasTharayil, the then Bishop of Kottayam for solemnizing the marriage of plaintiff's parents at West Othera Parish Church. It can be also seen from the evidence in the case that the marriage was solemnised by Fr. Baselious in the Malankara rite. It May even appear that Rev. Fr. Jacob Chackacheril never tookpart in the solemnisation of marriage of plaintiff's parents, though he was Vicar of the Parish Church during the period. Ext.X-2 (a) will prima facie show that plaintiff's mother was admitted as a member of the parish Church. It may be that something which was not normal was done at that time. But the moot question to be considered is as to whether Rev. Fr.JacobChackacheril had acted in such a manner to give membership to plaintiff's mother in the Parish Church in a Clandestine manner, without the knowledge of the ecclesiastical authority.
28. The Oral evidencegiven by PW-3 narrates thecircumstances under which he had obtained Ext.A2. It is stated by PW-3 that he had visited Rev. Fr. Jacob Chackacheril at the Priest Home of Kottayam Diocese along with plaintiff's father to get Ext.A2. The statement of PW3 is that the contents of Ext. A2 were written by a bystander who has come to see Rev.Fr. Jacob Chackacheril. It may be true to say that Ext. A2 was not written without reference to any documents, but for that reason, it cannot be said that the contents of Ext. A2 are not in par with the true state of affairs that had actually happened. It is quite

possible to draw an inference that the subject matter came up for discussion between PW3 and Rev. Fr. Jacob Chackacheril when they met at Carithas Hospital. It might have been quite probable that, as an upshot of the said discussion and in the light of the reflections as to the past events and on satisfaction that the marriage of plaintiff's parents was so conducted in the West Othera Little Flower Knanaya Catholic Church, that Rev. Fr. Jacob Chakacheril had caused to issue such a certificate.

29. On a consideration of the facts and circumstances of the case, it can be seen that the oral evidence of PW3 alone throws light on the situation regarding the marriage of plaintiff's parents at Little Flower Knanaya Catholic Church at West Othera. It is to be borne in mind that the marriage is admitted by the defendants. What is disputed is the grant of membership to plaintiff's mother in the Knanaya Catholic Church at West Othera. PW3 is a teacher by profession. It is stated by PW3 that plaintiff's mother Annamma was made a member of the Parish Church before her marriage. The circumstances under which membership was given is also explained by PW3. It is stated by PW3 that he along with his father had met Rev. Fr. Jacob Chackacheril and that they were given to know that permission of the Bishop is required for solemnising the marriage. PW3 had further stated that permission was so sought from Bishop Tharayil of Kottayam Diocese and that plaintiff's mother was made a member of the Little Flower Knanaya Catholic Church, West Othera. It has also come out in the evidence that Bishop Tharayil had occasion to visit plaintiff's mother's family house at West Othera along with the 2nd defendant during, the period in which the

Parish Church constructed. The 2nd defendant was a priest at that time. The fact that plaintiff's maternal grandmother was not a member of Kottayam Diocese and not a Knanite is stated to have known to them. Though it is particularly urged by the defendant's counsel that PW3 is an interested witness, on a careful scrutiny of the evidence given by PW3 with reference to the circumstances of the case, it can only be said that what is stated by PW3 is nothing but the truth. It therefore follows that there was ecclesiastical permission for the marriage of plaintiff's parents and that the marriage was conducted after granting membership to plaintiff's mother Annamma in the west OtheraKnanya Catholic Church.

30. The authenticity of Ext.A2 must be viewed in this circumstance also. It is an admitted fact that Rev. Fr. Jacob Chackacheril was in his old age and that he was leading a retired life during the period specified in Ext.A2. It is specifically contended by defendants 1 and 2 in their written statement that Ext.A2 is not a contemporaneous document and that on 20-4-1989 Rev. Fr. Jacob Chackacheril was in his sickbed in Caritas Hospital. It is also alleged by defendants 1 and 2 that Rev. Fr. Jacob Chackacheril was not in a physical or mental condition to issue a certificate like Ext.A2. The competence of Fr. Jacob Chackacheril to issue such a certificate is also disputed by defendants 1 and 2. It must be noted here that PW3 had stated in his cross examination that Rev Fr. Jacob Chackacheril was undergoing treatment in the hospital during the period and that he was not physically all right. But there is nothing in the evidence of PW3 to show that Rev. Fr. Jacob Chackacheril was senile or that his

mental condition was in the decline. The contents of Ext.A2 is stated to have written by the bystander only on account of Rev. Fr. Jacob Chackacherils physical weakness. DW2 is Fr. Josephputhenpurayll. It has come out in the evidence of DW2 that Rev. Fr. Jacob Chackacheril was suffering from general weakness for some time before his death. Loss of memory was also attributed. The testimony of DWI is also to the effect that Rev. Fr. JocabChackacheril was mentally and physically weak. Since the extent of the disability or its characteristic feature is not brought out in evidence, it must be inferred that the infirmity of Rev. Fr. Jacob Chackacheril was only on account of his general physical weakness and that he was not senile. Though the evidentiary value of Ext.A2 is subjected to severe attack in the written statement, no mention regarding the same has been made in the chief examination of DWI. Nothing has been stated by DWI in cross examination also except admitting Ext.B24(c) the photo stat copy of Ext.A2. In fact, Ext.A2 is a reproduction of Ext.X2(a), the entry regarding the marriage of plaintiff's parents in Ext.X-2 register. It is borne out in evidence that the real nature, background and blood of plaintiff's mother was known to the 2nd Defendant also who is evidenced to have visited the family house of plaintiff's mother. When Ext.A1 and X-2(a) prove that plaintiff's mother was admitted as a member of Little Flower Knanaya Catholic Church, wast Othara. Ext.A2 strengthens the testimony that plaintiff's mother was admitted so with the full knowledge of the concerned ecclesiastical authority.

31. DWI had no hesitation in stating in his cross examination that the marriage is sacramentally valid.

But the stand taken by the defenceside is that plaintiff's mother has never been a member of Kottayam Diocese, before or afterher marriage. Moreover, it is also stated by DWI that the membership of plaintiff's father is lost automatically when he enteredinto marriage with plaintiff's mother. If the contention raised by the defence side is accepted plaintiff's father has lost his membership in the Kottayam Diocese on 22.10.1956 the day on which he entered into marriage with Plaintiff's mother. Curiously enough the marriage of plaintiff's parents was conducted in a Parish Churchcoming within the jurisdiction of Kottayam Diocese. Even if it is assumed that Plaintiff's mother Annammawas not made a member of the West Others Parish Church, as contended by the defendants and that a fraud has been played upon by plaintiff's parents with the help of a handy priest, is it reasonable to think that this particular marriage was unnoticed by the ecclesiastical authority? The answer should be obviously in the negative. Admittedly Plaintiff's Father was a member ofKumarakom Parish Church coming under the KottyamDiocese, during the period of marriage. His marriage with Plaintiff's mother however secret it might have been, could not have escaped the eyes of a section of Parishioners of the KumarakomChurch to ring the alarm in pursuit of purity of blood. By no stretch of imaginationcan it be considered that the marriage of Plaintiff's father was conducted without the Knowledge of the Parish Priest of the Kumarakom Church. But the fact remains that plaintiff's parents continued as members of the Kottayam Diocese even after their marriage. Though plaintiff's mother is not born of Knanaya parents, Ext.X2(a) would show that she was accepted as a

member of the Others Parish Church and Kottayam Diocese even before her marriage. Ext.X-2(a) entry would not have made, if plaintiff's mother was not made a member of the Othera Parish Church. It is therefore argued that plaintiff's mother is a member of Kottayam Diocese both under Common Law and Canon Law.

32. Learned Counsel for the Plaintiff, Shri. P. V, Thomas submitted with reference to the decision of the Kerala High Court in Dr. Kunjamma Alex V. Public Service Commission (1980 K.L.T. 18), that the effect of marriage of plaintiff's parents is that they became members of the Kottayam Diocese. The decision says that in the case of a bride who belongs to a rite different from her bridegroom, she may at the time of her marriage or at any time during the marriage joins the rite of her husband. The question that had arisen for consideration in the case was as to whether a Syrian Catholic girl could, on marrying a Latin Catholic become a Latin Catholic. The High Court has said that it is possible for a Syrian Catholic taking a Latin Catholic husband and living with him in his parish can become a Latin Catholic. While commenting on the effect of a Christian marriage. Subramonian Poti, J. had observed in paragraphs 4 and 6 of the Judgment as follows:—

"Latin Catholics and Syrian Catholics cannot be said to belong to two castes in the sense we generally understand the term caste. Both belong to the same faith of the Christian religion. "In matters of faith and morals all Catholics, without distinction of race, nationality or rite are bound by the authoritative pronouncements of the Holy See. There can be but one rule in these matters for all

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who belong to the Catholic Church". The essential distinction between the Syrian and Latin Churches is founded on the difference in the adoption of religious rites. "To maintain the disciplinary laws of the Oriental Rites in their purity and in harmony with their ancient customs, the Holy See has established a special Sacred Congregation of Oriental Rites"(Page 2, Practical Commentary on the Code, by Woywod and Smith). In the State of Kerala the Latin and Syrian Catholic Churches have their followers generally from distinct sections of people. Naturally, because of the different classes of adherents in the two churches marriages between the members of these churches are not the general rule though such marriages take place quite often. There does not appear to be any objection on the ground of prohibited religious practice to marriages between the Latin Catholics and Syrian Catholics. A Syrian Catholic becoming a Latin Catholic cannot be said to be a process of conversion or transformation into a different caste".

"The essential properties of marriage, as indicated by the Code of Canon Law are "Unity and indissolubility which obtain a special firmness or stability in Christian marriage by reason of it being a sacrament". The spouses are bounded together for life. Pharisees came up to Jesus" and tested him by asking, "Is it lawful to divorce one's wife for any cause"? He answered: 'Have You not read that He who made them from the Beginning made them male and female and said. For this reason a man shall leave his father and mother and the two shall become one flesh'? So they are no longer two

but one flesh. What, therefore God has joined together, let not man put as under". (New Testament, Mathew 19(3-6). "This man is the head to which the woman's body is united, just as Christ is the head of the Church, He, the Saviour, on whom the Safety of his body depends.(The Epistle of Blessed Apostolic Paul to the Ephesians, 5-23). It is to illustrate the Christian approach to matrimony that these citations have been made. There is nothing unnatural or unsavory in assuming that on marriage it is possible for the spouses to live as parishioners of the Church to which the husband belongs".

33. The term rite is an act or ceremony in religious services. (Eg. burial rites, rites of baptism etc;), Various groups can be distinguished within the church and since these groups may be differentiated from each other not only by a peculiar system of Canon Law but also by peculiar forms of worship, the term rite is often used in a liturgical sense. The best definition of the terms rite from the canonical stand point was given by Emil Herman. S. J. *

"A rite is a group of faithful who are governed by laws and customs of their own based on ancient traditions, not only in regard to liturgical matters, but also in respect to the canonical order, and which group is acknowledged by the Holy See as autonomous and distinct from others'.

Rite, as referring to forms of worship, designates the whole system of ceremonies, texts, patterns, etc. of divine services of a certain group of faithful. The term rite is hence applied to the sum of legal regulations affecting a particular group or peculiar to

a particular church. Canon 9 of Code Oriental Canon Law deals with transfer of wife to the rite of husband. It says that a wife who belongs to another rite is at liberty to join the rite of her husband at the time of marriage or during its duration and when the marriage has been dissolved she is free to resume her own rite. What the Canon Law says is that a wife may aggregate herself to the rite of her husband without needing any special permission.

34. What is pressed before me with considerable force by Mr.K.Georgeis that a person who is not a member of Knanaya Community cannot acquire the status of a Knanite on the basis of marriage. It is therefore arguedthat Plaintiff's mother cannotgot status as a Knanite and that change of rite has no bearing in the present case. By making a decision of Canon 9, it is submitted that a wife belonging to another rite has only the option to choose the rite and that marriage does not automatically change the rite. According to the defence counsel, in order that Canon 9 has to apply, the option regarding conversion ought to have been pleaded and proved and that proof of marriage cannot enable the court to presume change of rite. It may be that, the reception of sacraments in another rite, even if exclusive and protracted for a long time does not affect a change of rite. On the other hand, if the reception of sacraments is obtained in another rite by a wife on marriage by grant of membership as indicated by Ext.X-2 (a), an inference can he drawn that the wife had aggregated herself to the rite of her husband. It should be how ever noted that rite is understood in the sense that it is so often identified with group of faithful who are governed by the same rules and regulations of Canon Law peculiar to them

and distinguished from others and is always acknowledged as autonomous. Since this autonomy is a characteristic feature accepted by the Holy See, there is no merit in the contention put forward by the defence counsel that the decision in Dr. Kuniamma Alex v. Public Service Commission (Supra) has no application the facts of the case.

35. The unit in a Christian Church is a family and not individual. Therefore, under common law and Canon Law, plaintiff's mother who was admitted as a member of Little Flower Knanaya Church, West Othara and Kottayam Diocese continues to be a member of Kottayam Diocese for all purposes. Even if the contention raised by the defendants that a marriage between a Knanite and a non-Knanite is not allowed in the churches under the Kottayam Diocese is accepted to toto, there cannot be any doubt that membership of a Parish Church coming within the Kottayam Diocese is exclusively dealt with by the parish priest (Vicar). When there is an entry like Ext.X-2 (a), according to Common Law and Canon Law, plaintiff's mother Annamma' is a member of Kottayam Diocese. Subsequent events will also affirm these and show that it is not an isolated incident happened 34 years ago. In this connection, the upshot of the membership of plaintiff's mother arising out of her marriage with plaintiff's father has to be examined. The evidence in this case would clearly indicate that the plaintiff's mother was accepted as a

* Sec Code of Oriental Canon Law, P-19.

member of the kottayam dioceses and the community and that she continued as a member.

36. Ext. A3 is the Baptism certificate dated 26-02-1989 issued by the Vicar of Little Flower Knanaya Catholic Church, West Othara with regard to plaintiff's baptism in that Church. PW-6, the present Vicar of Little Flower Knanaya Catholic Church, west Othara has produced Ext.X-3 Baptism Register. Ext. X-3 (b) entry is in relation to the baptism of plaintiff which would show that the plaintiff was baptized in the Little Flower Knanaya Catholic Church, West Othara on 11/10/1959. Page No.1 of Ext.X-3 Register is marked as Ext.X-3(a) and item No.11 of Ext.X3 (a) is the entry with regard to the baptism of plaintiff's brother which would show that plaintiff's brother was baptized in the West OtharaKnanaya Catholic Church on 13/11/1957. PW-6 had stated in his evidence that there is a rule in the Kottayam Diocese that the details of the baptism would be intimated to the parent church. Since plaintiff's father was at that time a member of St.John'sVallara Church Kumarakom coming within the Kottayam Diocese, soon after plaintiff was baptized in the West Othara Parish Church, this fact was intimated by the Vicar of the West Othara Parish Church to the Vicar of the Kumarakom Church to make necessary entries in the register of the said Church. Ext. A4 is certificate dated 24/02/1989 issued by the Vicar of St.John'sVallara Church, Kumarakom with regard to the baptism of plaintiff. Fr.JoseCherusseril, the Vicar of St.John'sVallara Church, Kumarakom is PW-2 in this case and he has produced Ext.X.1 Baptism Register for a period from 1930-1969. Page No.111 of Ext.X.1 register is Ext.X1 (a) where item No.68 relates to the baptism of plaintiff (Ext.A4). The circumstances under the entries are mad in the register and the rule that is followed is stated by PW-2 in his Chief Examination as follows:-

"If the child of any member of a parish of the Kottayam dioceses is baptized in any other church, it should be informed to the parent parish. The priest in the church in which the baptism is take place is inform to the parent church, thus the same include in the register. In Ext A4 the name and parish of the parent of the baptized child is recorded" (recorded in Malayalam and translated to English).

37. The story did not end here. Marriage took place in plaintiff's family when the time necessitated and first marriage was conducted in the year 1985. Ext.A5, the marriage certificate dated 20/10/1987 issued by the Vicar of St.Xavier's Church, Kannankara would show that the marriage was solemnized in a Church within the jurisdiction of Kottayam Diocese. A child was born to plaintiff's sister and the child was also baptized in a Knanaya Catholic Church. Ext.A6 dated 01/02/1989 is the birth certificate issued by the Vicar of St.Xavier's Church Kannankara. Ext.A7 is a letter dated 05/07/1989 sent by the 1st defendant Vicar regarding plaintiff's brothers marriage. Ext.A7 would clearly show that plaintiff and his parents are members of Holy Family Knanaya Catholic Church, Nattassery East. Ext.A7 would further show that plaintiff's sister-in-law was admitted as a member of the Holy Family Parish Church before the marriage. Ext.A8 dated 05/09/1988 is the Marriage certificate of plaintiff's brother issued by the Cathedral Administrator of 2nd defendant Bishop. It is worthy of notice that the marriage of plaintiff's brother was conducted in the cathedral Church of the Kottayam Diocese on 12/07/1987. Ext.A9 is a receipt dated 12/07/1987 issued by the 1st defendant in favour of plaintiff's brother's wife for Rs.1500/-. It has also come out in evidence that special sanction was accorded to plaintiff's brother's marriage dispensing with the necessity of

'VilichuChollu' and it cannot be said that the marriage was solemnized without the knowledge of the office of the second defendant. The fact remains that the marriage of plaintiff's brother was conducted in the cathedral Church of Kottayam Diocese. Ext.A15 dated 08/07/1987 is the Photostat copy of the application filed by ReebaAchamma Thomas (Plaintiff's brother's wife). Though the original of Ext.A 15 was called for, it was not produced by the defence side: Ext.A7 and A15 will clearly show that no special formalities are prescribed for making a member of the parish church under the Kottayam Diocese. Plaintiffs' brother's wife was made a member of the Parish Church for the purpose of marriage. This will amply correlate with the circumstances tracing back to the days of Ext.A1 and show that plaintiff's mother Annamma was actually made a member of Little Flower Knanaya Catholic Church at West Othara prior to Ext.A1 marriage. Ext.A14 series are receipts three in number (Exts.A14(a), A14(b) and A14(c) issued to plaintiff's father from the Holy Family catholic Church, Nattassery Ext.A14(a) relates to a receipt for Rs.30/- and Ext.A14(b) for Rs.500/-. Likewise, Ext.A14(c) dated 17/07/1988 would stand to indicate that plaintiff's father had paid a sum of Rs.5000/- to the parish Church infurtherance of the Church share in the contribution of 'Family Cemetery' (Family Tomb (recorded in Malayalam and translated to English))Ext.A10 dated 31/05/1989 is the baptism Certificate of plaintiff's brother's child issued by the 1st defendant which would go to show that the child was baptized on 25/09/1988 by the 1st defendant in Holy Family Catholic Church, Nattassery. Genuineness of the documents issued by the 1st defendant is not disputed by the defence side. It is also significant to note at this juncture that the 1st defendant has not gone into the box to speak on the facts and circumstances of the case relating to the membership of plaintiff and his family members in the Holy Family Catholic Church, Nattassery of Kottayam Diocese.

38. The documentary evidence produced on the side of the plaintiff would categorically show that Plaintiff's parents and the entire family were acknowledged as members of the Parish churches coming within the Kottayam diocese from 1956 onwards. The alarm was sounded on 22/12/1988 when O.S.1068/88 was filed by one P.M. Chacko before this court for a relief of declaration praying that the Kottayam Diocese is exclusively meant for Knanaya Catholics under the Holy See and seeking further reliefs in the nature of question of status as to certain members of plaintiff's family. The copy of the plaint in O.S.1068/88 is marked as Ext.A13. Even on a plain reading of Ext.A13, it can be seen that plaintiff's family were accepted as members of the Kottayam Diocese. Plaintiff is not a party in Ext.A13 suit. But defendants 2 to 7 figuring in Ext.A13 are members of plaintiff's family. The 1st defendant in Ext.A13 suit is the 2nd Defendant herein. It is stated in paragraph 30 of Ext.A13 that the 2nd defendant bishop was served with a registered notice way back in 1986 (by the Plaintiff in Ext A13) saying that Plaintiff's father and Plaintiff's sister's husband have ceased to be Knanites and that they should be excommunicated. The said notice is stated to have been received by the 2nd defendant-bishop on 16/05/1986. The fact that the plaintiff in Ext.A13 had put up a representation to the 2nd defendant is admitted by him. When he gave evidence as DW1, though he could not remember the exact period, it is further admitted by DW1 that he had received the notice on 16/05/1986. But despite this, sanction was accorded by the 2nd defendant for the marriage of plaintiff's brother and the marriage was conducted in the Cathedral Church of Kottayam Diocese on 12/07/1987. What is therefore borne out from the circumstances of the case is that the 2nd defendant had knowledge as to the state of affairs and the permission granted by him for the marriage of Plaintiff's brother is on the basis of acknowledgement on his part that plaintiff and

his family are members of the Nattassery Holy Family Catholic Church. In any event, Ext.A13 squarely shows that these persons are treated as members of the said Parish Church coming under the Kottayam Diocese. It is also relevant to note that the contentions raised by defendants 1 and 2 in their written statement are in identical terms with the main reliefs sought in Ext.A13 suit which is instituted in a representative capacity. That being so, it is only safe to arrive at a conclusion that unless and until Ext.A13 is decided on merits, the plaintiff is entitled to get all the benefits as a member of the Nattassery Holy family Catholic Church and Kottayam Diocese.

39. In the recently decided SABHA CASE(unreported), the Kerala High Court in Para 64 of the judgment had occasion to quote a passage from Halsburys' Laws of English Fourth Edition, volume 14, P,184) regarding rights of Parishioners. It is stated as follows:-

"A parishioner has a right to enter his parish church and remain there for the purpose of participating in divine worship so long as there is accommodation available. Subject to certain rights he is entitled to seat so long as there is a seat available and, although he must obey the reasonable directions of the church wardens, acting as the officers of the Bishop, as to which seat he shall occupy, he cannot be prevented by them from entering and standing if no seat is available. A parishioner is entitled to receive the ministrations of the church and of the parish clergy in the parish church and other proper places and to be buried in the church yard or burial ground of or belonging to the parish". Subject to such special condition as are imposed by law parishioners are entitled personally to attend and take part in the meetings, if any, of the vestry, the meetings of parishioners for the

choosing of church wardens and all parochial church meetings".

40. Counsel for defendants 1 and 2 submitted that the attempt of plaintiff to claim membership in the Kottayam Diocese and Knanaya Community is a futile exercise. It is urged by the learned counsel that there is no plea regarding the application of canon law or estoppel in the case and that the Court is not entitled to look into it in the absence of a specific plea, even if there is evidence. By stretching his arguments in these points at considerable length, the learned counsel Shri.K.George stood like an unyielding granite wall to tear into the plaint allegations. It is particularly argued that the issue regarding estoppel does not arise for consideration in the case and that it has to be discarded. Reliance has been placed on behalf of defendants 1 and 2 on Ramachandradas V. HiralaModi (A.I.R. 1978 Orissa 172) to canvass the position that no evidence should be allowed contrary to pleadings. VelemelliV.Chanabasappa (A.I.R. 1979 Karnataka 52) was also referred wherein it is laid down that relief cannot be granted at variance with cause of action made out in the plaint. According to the learned counsel, by applying these principles and on giving a literal construction of the plaint, one cannot make out a plea on the various aspects enumerated and it is contended that the plaintiff is not entitled to succeed on evidence produced by him, the same being at variance with the case as pleaded in the plaint. Reference was made in this connection to A.GangadharaRaoV.G.Gangarao(A.I.R.1968 Andhra Pradesh 291, Malakayyav.AvatiButchamma (A.I.R.1973 Andhra Pradesh 208, and Shri.Venkataramanna and Others v.state of Mysore and others(A.I.R. 1958 Supreme Court 255). The general law regarding pleading is that material facts are to be stated and not evidence. The object of requiring a party to put forward his pleas is to enable the opposite party to

controvert them and to adduce evidence in support of his case. In other words, the underlying principle is that the opposite side shall be given a fair chance of meeting out the case and not taken by surprise. The plaintiff in this case has specifically advanced a case that he, as a member of Holy Family Parish Church, Nattasserry and Kottayam Diocese is entitled under Common Law and Canon Law governing the Church as well to obtain 'Vivahakuri' from the 1st defendant. Denial of that right is contended to be opposed to all canon and principles of the Catholic Church. The pleading in its simplest terms suggests that the plaintiff's is invoking the protection of Canon Law applicable to the Church to boost up his claim. That being so, it is idle for defendants 1 and 2 to contend that they are not provided with an opportunity to set up the defence and to controvert the case pleaded by the plaintiff. In any view of the matter, defendants 1 and 2 are not entitled to say that the realm of Canon Law is something which is foreign to them. It therefore follows that the defendants are given a fair chance of making out the case pleaded by the plaintiff and that the allegations are not worded in a vague manner. It is pertinent to note here that the defendants who had relied too much on the principles on pleadings have failed to specify the material particulars relating to fraud and mistake pleaded by them in their written statement though Order VI. Rule 4 C.P.C provides that allegation of fraud, misrepresentation or undue influence must be set forth in full particulars. As laid down in Udhav Singh v. MadhavRaoSindia (A.I.R 1976 Supreme Court 744) a pleading has to be read as a whole to ascertain its true import and the intention of the party concerned is to be gathered- Primarily from the tenor and terms of his pleading taken as a whole. Even on accepting the arguments of defendant's Counsel, I am of the view that the current trend is to give a liberal attitude to the principle of pleading, though not in the strict sense. But the principle

remains that parties are bound by the pleadings and a contention not raised in the pleading cannot be heard for the purpose of taking the opponent by surprise. It should be however understood that every rule has its exception in the interest of justice. In this connection, I may refer to PemChodenBhutianiv.RinchenDorjee(A.I.R 1986 Sikkim 22) where it was held that the Court may depart from the strict enforcement of the general rule, if it is satisfied that rigid compliance of the rule will lead to injustice. Even if it is taken for granted in this case that there is variance between pleading and proof, by applying this principle, the contention of the defence counsel that there is no necessary plea cannot be sustained on the particular circumstances of the case.

41. It is the definite case of the plaintiff that he and other members of his family were accepted and acknowledged as members of the Holy Family Parish Church 1977 onwards. Defendants 1 and 2 in their written statement had denied this allegation and contended inter alia that plaintiff and his family members are not members of the Knanaya Catholic Community. According to the defendants, plaintiff's father had ceased to be a Knanite consequent on marrying plaintiff's mother and hence plaintiff or his family members are not Knanites or members belonging to the Kottayam Diocese or Holy Family Parish Church of Nattassery Kara. The learned counsel appearing for defendants 1 and 2 approached the issue at question by submitting that the case of the plaintiff as pleaded in the plaint is on the basis that he is a member of the Knanaya catholic Community. It is therefore contended for and on behalf of defendants 1 and 2 that the basic question in the suit is as to whether the plaintiff is a member of the community. Placing reliance on the contentions raised by defendants 1 and 2 in their written statement, it is argued by the learned counsel that a Knanite

is one who was born to knanite parents and who has not married a non-knanite. It is particularly stressed that since plaintiff's father had lost his status as a Knanite by virtue of his marriage, plaintiff, a progeny arising out of the marriage cannot claim a membership in the Knanaya community and since Kottayam Diocese is exclusively meant for Knanaya Catholic Community, neither the plaintiff nor members of his family are members of Holy Family Parish Church, Nattasserykara of Kottayam Diocese. The trend of arguments is made out on the basis that Kottayam Diocese is synonymous with the Knanaya Catholic Community and the membership of Knanaya community is obtained only by birth. Therefore it is contended that the claim of membership cannot be brought out by the conduct of any person, if at all that person is an ecclesiastical authority like the 2nd defendant-bishop. According to the learned counsel for defendants 1 and 2, it is out of the question that a membership can be conferred to plaintiff's mother since grant of membership is something beyond the control of the ecclesiastical authority. What the learned counsel would contend is that no such status can be given to plaintiff's mother, or to plaintiff or other members of his family through a human agency.

42. I have stated earlier that the marriage of plaintiff's parents was conducted in a Parish Church in 1956 after granting membership to plaintiff's mother in the said Church. Membership is particularly evidenced from the immediate subsequent events; i.e. two children born to plaintiff's mother were baptised in the same church and brought up as members of the Kottayam Diocese and the Knanaya Catholic Community. Even if it is assumed that plaintiff and his family members are transgressors who are not eligible for membership in the Kottayam Diocese, the sum total of the circumstances and evidence in this case would clearly show

that they were accepted as members of Parish Churches coming within the Kottayam Diocese all these years and ministrations obtained. A different turn came up after a period of 33 years since the marriage of plaintiff's parents. That was when request for 'Vivahakuri' was refused by the 1st defendant-Parish priest. It should however be noted that the same Parish Priest had promised to give 'vivahakuri' for betrothal and marriage of plaintiff which is evident from Ext.B23 (a). Ext.B 23(a) is a report tendered by the 1st defendant recommending issue of 'Vivahakuri' to the plaintiff. Ongoing through Ext., B 23(a), it can be seen that the 1st defendant-Vicar had not only promised to give 'Vivahakuri' to the plaintiff but also strongly recommended for issuing the same. Despite all this, the 1st defendant who alone can speak about the membership of the plaintiff in the Holy Family Parish Church, Nattassery had conveniently turned around and put forth a plea in the written statement refuting the allegation regarding the membership of plaintiff in the Holy family Catholic Church. On a consideration of the entire facts and circumstances of the case and in the light of Ext. B 23(a), the only conclusion that can be drawn is that plaintiff and his family members are members of Kottayam Diocese and that they were accepted and acknowledged as such for the last 33 years by concerned authorities. When I say so, it goes without saying that plaintiff and other members of his family were also acknowledged a members of the Kananaya Catholic Community for all these years. It is pertinent to note here that the defence is in one way style don the basis that the membership of plaintiff's mother was as a result of mistake, for which no cogent evidence was adduced.

43. The point regarding the application of the principle of estoppel has to be understood in this context. Estoppel is based on the principle that it would be most inequitable and

unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. Section 115 of the Evidence Act dealing with estoppel is founded upon the doctrine that where a person by his words or conduct willfully causes another to believe the existence of a certain status of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different status of things as existing at the same time. Counsel for defendants 1 and 2, at the time of hearing had dissected word by word of Section 115 of the Evidence Act with illustrations to highlight the defence contention that the principle of estoppel had no application to the facts of the case. It is pointed out that estoppel depends on the existence of some duty; and that is peculiarly so in the case of an omission and in order to succeed on a plea of estoppel it must be shown that there was a neglect or some duty owing to the person led into a particular belief. Counsel had also argued that plea of estoppel is not simply stating as to the fact that plaintiff and members of his family were accepted as members of the Parish Church and something more has to be done. Since the basic of estoppel is misrepresentation of fact, it is contended that estoppel has no bearing on the facts of the case pleaded especially to blind defendants 1 and 2. Strong reliance was placed in R.S, Maddamnappav. Chandramma and another, (A.I.R. 1965 Supreme Court 1812) where it was held as follows:

The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore, where one person makes a misrepresentation to

the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation".

The decision in Chhaganlal v. Narandas(A.I.R.1982 S.C.121) is also cited before me for my consideration in support of the contention that issue of estoppel does not arise for consideration. In that case, the Supreme Court has laid down as to what exactly constitutes estoppel and has observed at page 125 thus:-

"To bring the case within the scope of estoppel as defined in S.115 of the Evidence Act: (1) there must be a representation by a person or his authorized agent to another in any form – a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee".

44. Shri.K.George wanted me to hold that the law of estoppel is confirmed to the provisions of S.115 of the Evidence Act and that apart from the provisions of this section there is no estoppel to be dealt with. The law on the point says that a man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention which the rules of equity and good conscience prevent his using as against his opponent. The learned counsel for the plaintiff, Shri.P.V.Thomas, however wanted to import the principle of equitable estoppel to the case at hand by making reference to some decision of the High Courts. In InderParkash v Deputy Commissioner Delhi and others (A.I.R.1979 Delhi 87) the principle of equitable estoppel came up for consideration. That was a case in which the action of the University of Delhi and the authorities of the Maulana Azad Medical College was challenged for cancelling the admission of the petitioner as a medical student on the ground that he had obtained admission on the basis of a false representation that he belonged to the Scheduled Caste. The authorities had found out after a long period, i.e. after 4 years that the petitioner is not a schedule caste and hence cancelled the admission. The order of cancellation of admission was quashed by the High Court and it was held as follows:-

"I would, therefore, have no hesitation in holding that, on account of inordinate delay of about four years, during which the petitioner continued his studies, the authorities would be disentitled to revoke the admission of the petitioner, whatever may have been the nature of the petitioner's representation and whether or not the petitioner did or did not belong to the schedule caste. The impugned order of cancellation of admission, therefore, be liable to be quashed on this ground alone". Applicability of the principle of equitable estoppel again came up for consideration in Miss.

Sangeeth Srivastava v. prof. U.N. Singh and others (A.I.R. 1980 Delhi 27) Wherein the petitioner was admitted to M.A Class though she was not actually eligible. The University subsequently informed the College that the admission be cancelled, but the College did not inform the petitioner and she was treated as a regular student throughout the academic year and the fact was intimated only a few days before the examination. It was held that the principle of equitable estoppel operated and the High Court has observed thus:-

"The present situation however has arisen because the petitioner continued to attend the classes, paid her fee, continued as a student of the College and participated in other activities, as student and it was only in April, 1979 when the examination was to take place that she was 'denied admission to sit in the examination. It is this silence and inaction on the part of the respondent that makes the petitioner invoke the rule of equitable estoppel to urge that after such a long time the respondents are barred from denying her the right to continue her studies on the ground that as per regulation she could not have got admission".

In Amresh Kumar V. Principal, Bhabgalpur Medical College (A. I. R. 1982 Patna 122) where the petitioner, belonging to Schedule Caste was admitted to M. B. B. S. course by Principal of a Medical College on the ground of misrepresentation and admission cancelled subsequently in the 4th year, the principle of equitable estoppel was found to be attracted, and the petitioner had succeeded on this very simple ground. The High Court has stated in Paragraph 5 of the Order as follows:

"Learned counsel for the petitioner rightly pressed into service a decision of the Rajasthan High Court in the case of Harphool Singh v. State of Rajasthan. A. I. R. 1981 Raj.

8). In that case, a student had secured admission in Medical College on reservation quota by giving a false declaration. It was held that the cancellation of his admission to the Collage after 3-4 years by the authorities was barred by the principal of estoppel. Although in strict terms the principle of S. 115 of the Evidence Act may not be said to have been attracted, the principle of quasi estoppel or equitable estoppel would apply to such a case. We were in full agreement with the learned Judge in Harphool Singh's Case (Supra)

45. Coming to the case in hand, on a careful scrutiny of the circumstance of the case, it can be seen that the plaintiff has never misrepresented or played upon a fraud upon anybody. As far as the plaintiff is concerned, the only sin he committed is that he was born to Uthup and Annamma. Even according to DW 1 marriage is a sacrament and there is no dispute regarding the validity of marriage of plaintiff's parents (Uthup and Annamma). Undoubtedly, it is a valid marriage under Canon Law. The fact that Uthup and Annamma were accepted by the Community is evidenced from the circumstances that their 'children were baptised and married in Churches under the Kottayam Diocese, inspite of the alleged custom of endogamy prevalent in the community. The evidence in this case clearly shows that, since the baptism of the plaintiff in the West Othera Parish Church [Ext. X-3 (b)] the plaintiff was brought up within the Knanaya fold attending Parish churches within the Kottayam Diocese as a member. This was so for more than 30 years when the blast regarding status ripped away precipitating in the filing of the suit. During the cross examination of DW1, when questioned as to whether he knew the fact whether plaintiff's father and mother were accepted as members of Parish churches under the Kottayam Diocese, it was deposed by DW1 that he did not know. It is further stated by DWI

that they might have got some services from the church. The circumstances of the case would stand to indicate that DWI could not emphatically deny the fact regarding membership of plaintiff or his parents, especially in a situation when there is canonical sanction behind the marriage of plaintiff's father and mother. In this context, the oral evidence of PW5 is worthy of notice. PW5 is Fr. Dr. Joseph. Koikudi, Doctor of Laws in Canon Law and Professor of Apostolic Seminary at Vadavathoor. It is stated by PW5 in his cross examination at Page 22 as follows

Can any privilege enjoyed anybody by mistake or misses understanding, be denied on the discovery of such mistake (O) can it be deny as per canon law. First correct Mistake , but the same time it will not amount any denial of justice to anybody .what is mean by denial of justice. I believe that the rightfulness of truthand justice.....it is depend on, whether the person who denies the rights is responsible for the error. (recorded in Malayalam and translated to English)

46. Now I shall turn to the custom pleaded by the defendants. The qualification as to who is a Knanite is stated in the written statement at the very outset. It is alleged that a Knanite is one who was born to Knanite parents and who has not married a non-koanite. The genesis of the Knanite Community comprising of Catholic and non-Catholic Christian is stated in Paragraph 7 of the written Statement of defendants 1 and 2. According to the defendants, the Knanites are descendants of Thomas Cana (Knal Thoma) and the seventy two families who migrated to India from the Middle East in 345 A.D. It is contended that Thomas Cana was a Jewish Christian and that he was accompanied by Mar Joseph, the Bishop of Edessa (Urah) and a few Priests and Deacons and approximately comprising of 400 people consisting of men and women. The main contention of the

defendants is that the descendants have retained many of their customs and traditions to the present day and that they have remained an endogamous community having no marriage relations outside the community. The trump card of the defence is that, in any member of Knanaya Community married from outside of he or she automatically ceased to be a member of the Knanaya Community and his or her Children are treated as non-Knanites. The Characteristic features of the community are contended to be ethnic identity and integrity. It is further stated that the Kottayam Diocese was established in 1911 by the Decree of Pope exclusively for Knanite Catholics and marriage between a Knanite and non-Knanite is not allowed to be blessed in the Kottayam Diocese as such considered as an offence and insult to the Community. By raising such pleas, it is the defendant's case that plaintiff is not a Knanite and that he or members of his family are not members of Holy Family Catholic Church or Kottayam Diocese.

47. It is an admitted fact that Plaintiff's maternal grandmother was not a Knanite. Plaintiff's father, a Knanite who married Plaintiff's mother in the year 1956 continued to enjoy the privileges as a member of the Kottayam Diocese and evidently he and Members of his family were accepted as members of the community for more than 30 years. In any event, it may not occur that this particular incident was unnoticed by other members of the Community or office bearers or the Kottayam Diocese. The custom pleaded by the defendants must be viewed in this particular context. Though the Plaintiff, as PW1 was reluctant to admit the existence of the Knanaya Community (Southists), may be reasons or his own, the overwhelming circumstances and evidence in this case would point out that such a community is in existence. History also categorically speaks of the arrival of a body of 400 Persian immigrants under the

leadership of Thomas of Cranganor in 345 A. D. The evidence on the side of the defendants would also highlight that Knanaya Christians are descendants of a group of people landed in this land in 345 A. D. under the leadership of Thomas of Cana.

48. Counsel for Plaintiff, Shri. P. V. Thomas has submitted that the custom pleaded by the defendants is not established. The learned Counsel had travelled through the pages of history prior to a period in 345. A. D. to make it a point that there was no custom of endogamy among the Jews. As, an answer to the contention that Knanites are Jewish Christians and that they practiced endogamy particular reference was also made to the Book of Ruth in the old Testament of Bible. The said book contains one story of Ruth which is one of the most lovely idylls in literature. Ruth, a Moabitish damsel came back with Naomi out of the country of Moab to Judah was married to a Jew and the child born to her was Obed, who became the grandfather of David, the great Jewish King, The story narrates as to how a Gentile stood side by side with the Jew as the recipient of a Common Divine Fatherhood. Attention was particularly drawn at this juncture to the oral evidence of DWI, where he had gone to the extent of saying that the marriage of plaintiff's parents is an insult to the community. But whatever it be, there is no reliable evidence to prove that Jewish Christians practiced or followed endogamy prior to 345 A.D.

49. Ext.B20 is a book edited by Dr. Jacob Vellian containing Symposium on Knanites. The Symposium was conducted in connection with the Platinum Jubilee Celebrations of the Kottayam Diocese. DWI had stated in his cross examination that the endogamous character of the community did not appear in a morning and that it is the result of century old custom. It is further stated by DWI that what is reported in Ext.B20 is only about the custom which the community

followed after they landed in 345 A.D. and not before they came to Malabar, On going through Ext.B20 Book Chapter VI Page 9, it can be seen that reference has been made to the Hindu wives of Thomas Cana and when questioned as to its implication, it is deposed by DWI that this is only an opinion stated by historians. Chapter 5 page 7 of Ext.B20 Book also states that Thomas Cana had married in this country and related himself with the Nair people. If Thomas Cana had married from the country it is out of the question that there can be a tradition contrary to this such being the situation, it can only be said that the origin of custom pleaded by the defendants is wrong. It must be noted here that, in order that a custom to acquire legal force, it has to be proved to the hilt and the burden is always on the defendants to prove that it has been invariably acted upon for so long and has been submitted to as the established governing rule of the community. Ext. B2 is a collection of ancient songs of the Syrian Christians of Malabar relied by the defendants to show the endogamous character of the community Page 8 of Ext.B2 was referred to by the defendants to impress upon the position that the settlers were given direction at the place of descent in the Middle East that they should not change their moorings. On a Plain reading of the relevant portion at Page 8 in Ext.B2, it can be seen that there is nothing in it to show the endogamous character of the community. The first part of the relevant extract can only be interpreted in such a manner that advice was given at the place of descent that connections should not be severed. Second portion of the extract requires much importance and on a literal interpretation, it can be only understood that the advice was only in relation to the upholding of ten commandments and keeping the Christian faith intact. This should be so because the settlers were leaving for a distant land where Hinduism reigned supreme. Since the object of the migration is stated to be missionary

work, it does not in any way appeal to reason that the settlers, who migrated to this land for preaching Gospel stayed aloof and followed endogamy. On this ground also, Ext. B2 will not give any sanction to the custom pleaded by the defendants.

50. Ext. B11 (a) dated 1-3-1911 is the Malayalam translation of the joint representation made by three Bishops of the Syro Malabar Church to Pope Pious X in the Vatican (Ext. B11 is in Latin). Both PW5 and DWI had occasion to speak about it and the original is evidenced to be kept in the Vatican. It is stated in Ext. B11 (a) that two communities are in existence among the Syrian Christians as 'Northists' and Southists' and that they do not enter into marriage relationship for centuries. The representation was made with certain suggestions to the Holy See on account of difficulties in administration of Changanacherry Vicariate as there were clashes between the 'Northists' and Southists'. It must be noted here that Changanacherry Vicariate was presided over by Bishop Mathew Makkil, a 'Southist' during the period and the Ernakulam Vicariate by a 'Northist' Bishop. It is true to say that Ext. B11 (a) B (11) representation was made by the most competent persons who had the best knowledge regarding the custom and traditions of the two communities. But the mere acceptance by the Holy see of these different sects" cannot attribute endogamous character to one of the sects, namely the Southist. When it is stated in Ext. B11 (a) that the Northists and 'Southists do not enter into marriage relationship, it can only be understood that the reasons are social and economical rather than the practice of endogamy. Besides there is absolutely nothing stated in Ext. B11 (a) to arrive at a conclusion that there is endogamous character for the 'Southists' or 'Knanites'. Again, it can be seen that pursuant to Ext. B11 representation, the Holy See issued a bull dated 29-8-1911, the true Malayalam translation being

Ext. B3 (a) (Ext. B3 in Latin.) Ext. B3 (a) (B3) is with regard to the erection of Kottayam Diocese. The purpose for which the Diocese was erected finds a place in Ext. B3 (a) and it is specifically stated that the object is spiritual advancement and also with a view to compromise the warring groups of believers. It is also made clear in Ext. B3 (a) (B3) that the churches of the southists are constituted within the new Kottayam Diocese. What is relevant in this context is to see that no reference is made in Ext. B3(a)(B3) to speak on the endogamous nature of the community. On going through Ext. B11(a), which has been already referred to, it can be made out that three dioceses (Trichur, Ernakulam and Changanacherry) were formed in 1896 for Syrian Christian community at request and before that the Syrians were ruled by the Latin Bishop of Varupuzha Arch Diocese. By virtue of erection of these dioceses, no endogamous character is seen to have attributed to the Syrians. Likewise, Vicariate Apostolic of Kottayam was erected for Southists vide Ext. B3, though there is nothing in it to show that there has been an ancient 'custom invariably followed by the community. As I have said earlier, the fact that there is a community like Knanite Community is an admitted fact though it cannot be argued, that the very existence of the race itself is evidence of the custom. Ext. B4 (a) is the true English translation of the Decree of Pope dated 29-8-1955 granting personal jurisdiction of the Bishop of Kottayam for the Southist race (Ext. B4 in Latin). This will not in any way spell out the use or practice of an ancient custom as pleaded by the defendants. On a consideration of the facts on record, it can be seen that the Kottayam Diocese was erected with a view for spiritual, advancement of the Knanaya Community (Southists). It must be noted here that a diocese is the creation of ecclesiastical law and that it is a juridical person. What is of paramount importance is that community considerations always play a significant role in such matters, i.e. carving

of the situation, the inference is that inter diocesan marriage is not considered as an offence as alleged.

52. It has also come out in evidence that permission for such marriage is being so often sought by the parents for and on behalf of their children and that permission is granted accordingly without any controversy. The parents who were instrumental in doing so are found to sit at ease in the driver's seat as torch bearers of heritage and custom and no action has ever been seen taken against them by the diocesan authorities. If the allegation regarding endogamous character is the Crux of the creed, would they be made party to something which is in violation of the creed and the heritage they cherish? If the marriage between a Knanite and a non-Knanite is deemed as an insult as alleged. What is in it for the Curia to sanction an easy walk over without creating a furor? The answer to the question on the basis of Ext.B5 is that the custom pleaded by the defendant is only a matter of convenience and that it is not rigid as alleged. If the custom is so vital to the community, the curia should not have entertained series applications in quick succession as seen from Ext.B5. What is evidenced from Ext.B5 to B10 is that the custom pleaded by the defendants is a matter of convenience and that there is no rigid principle attached to it. As mentioned earlier it can be understood from the evidence that applications are so often made by the parents of the bride or bridegroom as the case may be, but as a matter of caution it is stated by DWI at Page 73 of his deposition that requests for inter diocesan marriage are granted respecting the desire of the individuals and that does not vitally affect the endogamous nature of the community and the existence of the Kottavam Diocese. It is also stated by DWI that the vast majority of people wanted to maintain the endogamous nature and the existence of the diocese. It is thus clear from the evidence of DWI that

endogamy is not a strict rule. Therefore, it is clear that the custom pleaded is not a common usage in entirety and the consequence regarding the breach is not followed at all. This is also evidenced from Ext.A1 to A9 through which it is shown that plaintiff's father had associated himself with the Kottayam Diocese for the last 33 years.

53. Another instance is the evidence tendered by PW7 Rosamma, who is presently attached to St. Stephen's Catholic church, Uzhavoor coming under Kottayam Diocese. It has come out in the evidence of PW7 that she was originally a member of St. George Orthodox Church, Pathiyoor coming under the Kollam Bhadrasanam of the Orthodox Church (Jacobite) prior to her marriage. She was baptised in a parish church of the Orthodox Church at Kayamkulam where father is stated to have membership as a Parishioner. There is nothing in evidence of PW7 to give an indication that her parents have ever been associated as members of Knanaya Churches. It is clearly evidenced from the testimony of PW7 that her sisters and brothers were married to Jacobites or Catholics of other sects. Ext.B25 is an application dated 19-3-1965 preferred by PW7 to the Bishop of Kottayam Diocese seeking membership in St. Stephen's church, Uzhavoor. Ext B26 is a letter dated 18-3-1965 sent by the Vicar of St. Stephen's Church Uzhavoor to one Rev. Fr. Mattathil recommending Rosamma's (PW7) admission to the Kottayam Diocese. Ext.B27 dated 22-3-1965 is a petition submitted by the husband of PW7 before the then Bishop of Kottayam Diocese seeking permission for the marriage on admitting PW7 to St. Stephen's Church Uzhavoor. There is also nothing in Ext.B26 to show that PW7 is a Knanite while Ext B27 application submitted before the Bishop struck a note in the following lines:-

The said Rosamma submitted an application with the consent of her parents, to solemnize her marriage with

me after reorganize her by giving membership in Uzhavoor parish. The said application also produced here with. on the bases of there admission and the vicar of Rani St. Theresas church is admitting that some knanites are migrated to other place. It very clear that they are knanites, he also admitting such migration of Knanaites and not establish that they are not knanaites.(recorded in Malayalam and translated to English)

54. Exts.B28 and B29 are two certificates alleged to have been issued by one Mathai Kathanar tracing the roots of the parents of PW7. There is no reliable evidence to speak as to the contents of Ext.B28 and B29 or to the circumstances pertaining to the issue of these certificates. The identity of this Mathai Kathanar remains as a mystery and even according to the evidence tendered by DW4 husband of PW7, no authority is seen to have conferred on Mathai Kathanar to issue such certificates. On going through Ext. B28 and B29, it can be further seen that no authority with an elementary notion of Common sense will act upon these records. A mere glance on the records will show that these are having no credibility at all. What is more important is that these records were acted upon by the persons at the helm of affairs of the Kottayam Diocese without any hesitation in granting membership to PW7 in St. Stephen's church at Uzhavoor. DW5 is the present Chancellor of Kottayam Diocese and his oral evidence would stand to indicate that the 2nd defendant was the Chancellor at that time. It is also stated by DW5 that enquiry would be made on the basis of the documents produced by the parties before granting membership in the diocese. But what had happened in the case of PW7 is that no enquiry has been made. If this is the practice followed by the diocesan authorities, it can be easily inferred that the custom is not rigidly followed and the plea is only to be repelled with.

55. Ext.A13, referred to earlier throws light on other various transactions to attack the ghost of traditions and the modality of the alleged custom. Ext.A13, the copy of the plaint in O. S. 1068/88 of this Court categorically status that many persons continue as members of the Kottayam Diocese under the pretext that they are Knanites. It should not be forgotten here that defendants 2 to 7 in Ext.A13 suit are members of plaintiff's family and that the suit is one for declaration to that effect that defendants 2 to 7 are not Knanites and also seeking further reliefs. Paragraph 33 of Ext,A13 reads as follows:-

Except Defendant 2 to 7 there are so many people,who are not born as a Knanaite or walking out by marrying non Knanaite, Infiltrated in to the parishes of kottayam dioceses by acting as knanaites (recorded in Malayalam and translated to English)

At page 26 of Ext.A13, in the relief portion headed as (J) it is stated thus:-

To direct the 1st defendant to conduct a detailed and unbiased enquiry, after giving notice to the plaintiff, to find out that any disqualified are joined as member in the knanays parishes under the kottayam Dioceses, other than Defendant 2 to 7 and their children. (recorded in Malayalam and translated to English)

Interestingly enough, the additional 3rddefendant, Knanaya Catholic Congress, the only laity and secular organisation of the Knanaya Catholic Community responsible to protect the lay interest of the Community at large has not done anything at any time to find out whether there has been any transgressions, under these circumstances, it can only be said that the custom pleaded by the defendants is not established. It may by true that the Knanites do not

generally marry outside from the community but the circumstance of the case and the various transactions will show that the custom pleaded is not proved to the hilt. In this connection, it must be remembered that, whilst custom is so closely linked with religion and taboo that any departure from it is almost unthinkable. There is also nothing in the evidence to show that persons who had voluntarily married from outside the community had ever been expelled. Such being the situation, neither the endogamous character nor the allegation that those who marry from outside the community will go outside is thoroughly established, the burden being upon the defendants.

56. Under Sec.13 of the Evidence Act, a custom is proved by particular instances in which the custom was asserted or recognised. What the law requires, before an alleged custom can receive the recognition of the court and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, district or country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty (See, *Nalla Koya v. Administrator, Union Territory of Laccadives*, 1967 K. L T. 395): Essentials of a custom to be recognised by a Court of Law is stated in Sir John woodroffe and Amir Ails Law of Evidence, 15th Edition Volume 1, Page 624: "Custom " as used in the sense of a rule, which, in a particular district, class, or family, has, from long usage, obtained the force of law, must be (a) ancient (b) continued, unaltered, uninterrupted, uniform, constant (c) peaceabland acquiesced in (d) reasonable (e) certain and definite (f) compulsory and, not optional to every person to follow or not. The acts required for the establishment of customary law must have

been performed with the consciousness that they spring from a legal necessity, and (g) must not be immoral. It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature".

It is further stated with regard to caste custom at page 663 as follows:— " In the case of a Caste custom or a custom of any sub caste, it must be shown to be ancient, certain and reasonable and not opposed to public policy and it cannot be enlarged beyond the usage by the parity of reasoning since it is the usage which makes the law and not the reason of the thing".

57. The rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" cannot be taken as a strict rule in proving custom. A custom must be ancient, though it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. But what is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability and uniformity to show that it is a binding rule. Besides, a custom to be recognised by a court of law should be certain and compulsory and in the case at hand, the transactions referred in the earlier paragraphs will show that the custom pleaded by the defendants is loosely and variably practiced to suit the time and convenience and that is not compulsory in the strict sense. The custom pleaded by the defendants in their written statement is therefore not established and hence the defence in relation to it is only to be repelled with on the particular circumstances of the case.

58. Ext. B2I is the Bull regarding appointment of the 2nd defendant as Co-adjutor Bishop of Kottayam by the Supreme pontiff on 9-12-1967. It is admitted by DWI that

similar bulls are issued to the diocesan bishops by the Holy See throughout the world during their appointment. When questioned as to whether there is any canonical prohibition for the Supreme Pontiff to appoint anybody outside the Kottavam Diocese as the Bishop of Kottayam, it is stated by DW1, that there is no canonical prohibition in the code. It is further stated by DW1 that the supreme pontiff will respect the legitimate customs basing on which the kottayam dioceses was constituted. Part 2 of the code of canon law applicable to the roman catholic church deals with the hierarchical constitution of the church Canon. 381 of the Code says that the Diocesan Bishop has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which, the law or a decree of the Supreme Pontiff reserves to the Supreme or to some other Ecclesiastical Authority. Canon 391 further says that the diocesan bishop governs the particular church entrusted to him with legislative, executive and judicial power in accordance with the Canon Law. Likewise, a Parish is defined in Canon 515 as a certain community of Christ's faithful stably established within a particular church, whose pastoral care, under the authority of the diocesan bishop is entrusted to a Parish Priest as its proper pastor. The position therefore makes it clear that, under the Canon Law, a Parish Priest or a bishop whoever it be, holds an office and both are juridical persons. That being so, community and diocese are not synonymous in the eye of Canon law and the creation of a diocese by the Holy See does not imply the existence of a valid custom.

59. Ext. A16 is the Code of Oriental Canon Law on Marriage. PW5, an Authority on Canon Law has stated in unambiguous terms that Ext. A16 is binding on all the Orientals and all dioceses of the Syro—Malabar Church under the Holy See. It is stated by PW5 that the Syro—Malabarian Ecclesiastical

provinces in Kerala are Changanacherry and Ernakulam and that Kottayam Diocese comes under the Changanacherry province of the Syro—Malabar Church. The marriage law applicable to the Oriental churches was published by Pop: Plus XII in 1949. PW5 had also stated in his chief examination that by promulgation of Canon Law on marriage, even if there is any custom, it is deprived of legal force as far as Oriental Churches are concerned. The declaration of the Pope (Motu Proprio) is contained in Pages 37 and 38 of Ext.A16. The Mow Proprio on the sacrament or Matrimony reads thus:

"We now promulgate, by this Apostolic Letter, given on Our Own accord, the above mentioned canons, bestowing upon them legal force for all the faithful of the Oriental Church, Wherever they may be on earth, and though they may be subject to prelate of a different rite. Forthwith when in virtue of this Apostolic Letter the mentioned canons come in force, any statute, whether general or particular or special, even issued by synods which received approval in special form, any prescription and custom hitherto in force, either general or particular, is deprived of its legal force; so that the discipline of the sacrament of matrimony shall be tied only by the same canons: and particular law too contrary to them shall have no more force, unless and as far as it is conceded by them. In order that the knowledge of this our will come in time to all who are interested. We wish and order that this Apostolic Letter, given on our own accord, shall begin to be executed from the second day of the month of May of the year 1949, on the feast of St. Athanasius, Bishop and Doctor, and nothing contrary shall hinder, though worthy of the most special mention".

60. It is relevant to note here that defendants 1 and 2 in their written statement had contended that the Knanites

have special costuming connection with the marriage like clasping of bands, by the uncles of the bridegroom and the bride at the betrothal, ceremonial shaving of the bridegroom on the eve of marriage, ceremonial welcome, ululation etc.:. The oral evidence tendered by PW5 would show that marriage is a sacrament and that those usage do not constitute part of the sacrament or its binding nature. When questioned as to it, PW5 had stated thus:

As per Liturgy a sacrament become an agreement binding throughout the life, which starts and end in the church. As per liturgy, ministry in church is enough for the performance of a sacrament, the ceremonies there after have no connection with the sacrament.

(recorded in Malayalam and translated to English)

Canon 9 referred earlier in Ext.A16 deals with the transfer of wife to the rite of husband and it says that a wife who belongs to another rite is at liberty to join the rite of her husband at the time of marriage or during its duration. On the basis of this principle, plaintiff's father uthupu when married plaintiff's mother Annanima, she became a member of the Kottayam Diocese without needing any special permission from the Holy See. Canon 28 provides that the Supreme Authority of the Church alone is empowered to declare authentically in which case divine law forbids or annuls marriage. It further says that the supreme authority alone is entitled to establish other prohibitive or diriment matrimonial impediments. Therefore, the power to legislate on impediments and to interpret their limits is vested exclusively with the pope. Canon 29 in Ext.A16 specifies the circumstances under which a local Bishop can refuse marriage and the said circumstance can be attributed only for a just reason, PW5 has also stated as, to what exactly constitute a just reason at page of 7 of the deposition which

cannot, be equated to the present facts of the case. Canon 30 is Ext.A16 deals with legal custom and impediments and the effect of the provision is that a custom which introduces a new impediment, or one contrary to existing impediments is invalid. It has been pointed out on behalf of defendants 1 and 2 that the decree of pope, granting personal jurisdiction of the Bishop of Kottayam in the year 1955 (vide Ext.B4) has overriding effect over Ext.A16. Even on going through Ext.A16, it can be seen that the law on marriage was enacted on account of differences in the matrimonial impediments of the Eastern Churches. It is to be particularly noted (that the Kottayam Diocese was erected in 1911 and if the endogamous character, of the community was sole bases of its formation, the Motu Proprio promulgated in 1949 should have made a mention of it. Perhaps, it would have been open, to the rule making authority to have provided in the rule that for proper reasons and in appropriate cases an immemorial custom could be followed. The rule making authority deliberately,refrained from doing so. The mandateof Motu Proprio and the Canons is that a custom in force, either general or particular is deprived of its legal force. That being so, Ext.B1 dated 4-8-1989,a letter issued by Apostolic pro Nuncio in India to the 2nddefendant, admitted by PW1, and ExtB4 will not any way put an embargo on the various provisions contained in Ext.A16.

61. At this point, it may also be useful to go through the realm of Divine law. Canon 24 of the Code of Canon Law says that a custom contrary to Divine, Law is null and void. Reference as to what is Divine Law came up in the oral evidence of DWI and he has stated that Divine Law is either the content of the revelation or substantially based on revelation. It is also stated by DWI, that the Universal brotherhood is taught by Jesus and it cannot be said as law. DW1 being a diocesan bishop of the Roman Catholic Church went one step further

in stating without any hesitation that all what Jesus Christ taught is not necessarily Law. The oral evidence of PW5 would categorically prove that the Church is founded on the teachings of Jesus Christ and that it is a missionary church and there cannot be any custom or usage contrary to the teachings of Bible. What is borne out from the evidence of PW5 is that the teachings of Bible is Divine Law and that the very origin of Christianity is against the distinction between caste or creed. It is to be borne in mind that the message of Christianity is oneness in Christ and the spirit-de-core of Gentiles, Greeks and Jews. Since the Church is found on the basis of teachings of Christ with a view to propagate the Gospel. It is out of the question for a custom to have a force of law, both under Canon Law and Divine Law.

62. To my mind, the principle is forcefully brought out by a decision of the Supreme Court in S. Rajagopal v. Armugham and others (AIR. 1969 Supreme Court 101) where the Supreme Court has observed in paragraph 15 of the Judgment as follows:-

"The Christian Religion does not recognise any caste classifications. All Christians are treated as equals and there is no distinction between one Christian another of the type that is recognised between members of different castes belonging to Hindu religion. In fact caste system prevails only amongst Hindus or possibly in some religions closely allied to the Hindu religion like Sikhism. Christianity is prevalent not only in India, but almost all over the World and nowhere does Christianity recognise caste division. The tenets of Christianity militate against persons professing Christian faith being divided or discriminated on the basis of any such classification as the caste system".

63, Membership of plaintiff in the Kottayam Diocese and his status as a Knanite is disputed by the defendants on the ground that members are enlisted by birth and not by enrolment. Detriment is attributed on the ground that plaintiff's maternal grandmother is not a Knanite. I must casually mention that there is the extra ordinary case of Sridharan v. Commissioner Wealth Tax (73 I. T. R. 360, A. I. R. 1970 Madras 249) in which it was held that a Christian baby could be a Hindu coparcener. The case was a land mark in the understanding of religion in the thorny field of the Indian Personal Laws, a challenge but not an impossible one. The trend of judicial decisions is not to cling on to rigid ways and means but to enliven the area with pastures in green, The question that falls for consideration in the case is as to whether the plaintiff is a member of the Kottayam Diocese and in the nature of contentions raised by the defendants, the question of status also Springs up for decision on the basis of the marriage of plaintiff's parents. I have already entered into a finding that plaintiff and his family members are attached to the Holy Family parish church Nattassery and the Kottayam Diocese. The custom pleaded by the defendants is found against. Apart from what is said earlier in relation to the canon Law applicable to the Church about the wife taking the rite of the husband in a valid marriage, there is judicial pronouncement on the point by the highest Court of the land that even if a female is not a member of a tribe by virtue of birth, she having been married to a tribal after observance of the formalities Would belong to the community to her husband belongs. In N. E. Horo v; Smt. Jahan Ara Jaipal Singh (A. I. R. 1972 Supreme Court 1840) an identical question arose. This was as to whether a Non-Munda (wife) merely by virtue of the marriage with Munda, the Munda tribe being an ethnic group could become a Munda in status. The question arose for consideration was whether the strict rule of endogamy of the Munda tribe has

been deviated from. It was held that the marriage of a Munda male with a non-Munda female is approved or sanctioned, they became members of the community. The relevant observations of the Supreme Court which find place in paragraphs 22 and 23 of Judgment may be quoted thus:

"The contention of Mr. Antony that a person can be Munda by birth alone can be sustained only if the custom of endogamy is established without any exception. We have already held that the rule of endogamy has not been proved to exist in the rigid or strict, form canvassed by Mr. Antony If a non-Munda women's marriage with a Munda male is valid it is difficult to say that she will not become a member of the Munda tribe. The concept of a tribe is bound to undergo changes, when numerous, social, economic, educational and other like factors in a progressive country start having their impact....."

"A person who, according to the strict custom of a tribe, cannot be regarded as a member of that tribe may well be regarded as a member of that tribal community. Where a non-Munda woman is married to a Munda male and the marriage is approved and sanctioned by the Parha Panchayat of the tribe and the marriage is valid she may not, on the assumption that the rule of endogamy prevails, become a member of the Munda tribe in the strict sense as not having been born in the tribe. She cannot, however, be excluded from the larger group, namely, the tribal community. The High Court has taken the view that the use of the term "tribal communities" in addition to the term "tribes" in Art 342 shows that a wide import and meaning should be given to these words and even if the respondent is not a member of the Munda tribe by virtue of birth. She having been married to a Munda after due observance of all formalities and

approving the elders of the tribes would belong to the tribal community to which her husband belongs on the analogy of the wife taking the husband's domicile. Even without invoking the doctrine of domicile the respondent's marriage with late Shri. Jaipal Singh who was a Munda having been approved and sanctioned by the Parba Panchayat of the Munda tribe, it can well be said that she became a member of the Munda tribal community. We have not been shown any infirmity in the reasoning of the High Court on this point. When a person, in the course of time, has been assimilated in the community it is somewhat difficult to comprehend how that person can be denied the rights and privileges which may be conferred on that Community even though tribal by constitutional provisions"

In the instant case, having regard to the nature of the grounds established and by applying the principles laid down by the Supreme Court in N. E. Horo's case [Supra]. I can very well say that there is hardly any justification to find fault with the plaintiff in relation to his contention that he is a member of Knanaya Catholic Community attached to the Holy Family Catholic Church, Nat02assery of the Kottayam Diocese. Since plaintiff's mother having been married to plaintiff's father on 22-10-1956 and continued to live as a member of the Knanaya Catholic Community, she could only be treated as one belonging to the Knanaya Catholic Community. I therefore hold without any hesitation that plaintiff also belongs to the Knanaya Catholic Community. The issues are answered in favour of the plaintiff.

64. Issue No.3. In the light of the above discussion, I shall now examine the issue at question as to whether a Mandatory Injunction is sustainable on the circumstances of the case. The point was argued at length by the Senior Counsel appearing for defendants 1 and 2, Sri. T. R. G.

Warder with particular reference to the maintainability of the suit to contend that mandatory injunction can be issued only when the act is capable of enforcement by the Court. It has also been strenuously argued that there is no obligation on the part of the 2nd Defendant- bishop to issue 'Vivahakuri' to the plaintiff. According to him Section 39 of the Specific Relief Act 1963 (for short the Act) is an answer to the plaint and since the relief sought by the plaintiff is not capable of enforcement, the suit is only to fail. Section 39 of the Act deals with mandatory Injunction and it reads as follows:

"When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts".

The term obligation is defined in Section 2 of the Act and it includes every duty enforceable by law. In the words of Dr. S. C. Banerjee (Law of Specific Relief, of 7th Edition page.22), the term 'obligation' has been used in the Act in its wider juristic sense covering duties arising either 'ex contractu' or 'ex delicto' and every duty enforceable at law is 'obligation'. Obligation had been defined as a tie or bond which constrains a person to do or suffer something. It implies a right in another person to which it is correlated and restricts the freedom of the obligation with reference to definite acts and forbearance: but in order that it may be enforced by a Court, it must be a legal obligation and not merely a moral, social or religious one.

65. The question, therefore that falls for consideration in the present case is as to whether there is a right for the plaintiff and a corresponding obligation on the part of the defendants. I have already entered into a finding that the

plaintiff is a member of the Holy Family Catholic Church, Nattassery and Kottayam dioceses. Plaintiff's membership in the parish church and diocese is disputed by the defendants on a plea basing on his status and the defendants case is that plaintiff or his family members are not eligible for membership in the Parish Church of the Kottayam Diocese. The said plea has also been repelled by me. The question is thus narrowed to a point as to whether there is an obligation. It is admitted by almost all the witnesses in unambiguous terms that every member of a Parish has got the right to get a 'Vivahakuri' for conduct of betrothal and marriage. It is also brought out in evidence that there is an obligation on the authorities concerned to issue necessary 'Vivahakuri' as a condition precedent to marriage. PW-2, PW-6, DW-2 and DW-5 had absolutely made it clear that there is a right on one part and corresponding obligation on the side of Parish priests to issue 'Vivahakuri' as and when it is sought for. DW5 is Fr. Thomas Nedumkumbil, the Chancellor of the Kottayam -Diocese whose official duties are in assisting the Bishop and Vicar General in the administrative matters had particularly stated his evidence that the administration is being carried on in accordance with Canon Law and that there is no specific bye-laws for the Kottayam Diocese. DW5 had categorically stated that a Parishioner is entitled to get. 'Vivahakuri' as a matter of right and that the Parish Priest is under an obligation to issue the same. As it has been pointed out earlier, these are matters which are not in dispute though 'Vivahakuri' was refused to the plaintiff on the question of status. Since the plaintiff has agitated the claim on the basis of his membership in the Parish church and the Diocese and as it is clearly evidenced that there is not only a right, but there is a corresponding obligation, it simply means that the obligation is legal and not a religious or moral obligation.

F. 5

66. According to the definition given by Salmond, a mandatory injunction is an order requiring the defendants to do a positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfillment of the legal obligations. The commonly accepted view of modern times is that there is no difference between the conditions under which mandatory and those under which a restrictive injunction may be issued, the rule being that every injunction requires to be granted with care and caution. At the same time the position is that the grant of a mandatory injunction is purely discretionary as in the case of perpetual injunction and it should be granted with safe guards in cases of special injury or substantial damage and also if the defendant violates a legal right and acts unfairly. This is a case where the plaintiff is subjected to special injury on the threshold of his marriage in his thirtieth year. When his membership in a Parish Church and the diocese is challenged by the defendants on the question of his status. What is important to note is that neither the plaintiff nor his father has been excommunicated from the Parish Church or found guilty of any offences under the province of ecclesiastical law. The parochial stand adopted by the defendants is highly unfair and in violation of the plaintiff's right as a parishioner of Holy Family Catholic Church, Nattassery. The question whether a relief can be sustained on the special circumstances of the case is the crux of the matter.

67. It may be said that the 2nd defendant is having under no direct obligation to the plaintiff in relation to the matter in dispute. It should be however noted that when the 1st defendant was ready and willing to issue 'Vivahakuri' to the plaintiff and even promised to issue the same (vide Ext. B23 (a)), the 2nd defendant intervened to put the plaintiff in quarantine. The underlying principle to be understood is

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that, even though the obligation should normally exist towards the plaintiff an injunction may be granted against a defendant who was under no direct obligation to the plaintiff. (Raghunathy V. Mathura Municipality, A. I. R. 1952 Allahabad 465). That being so plaintiff being a member of the Holy Family catholic church, there is a breach of an obligation existing in favour of him at the hands of the defendants by denial of plaintiff's right in getting 'Viyahakuri'. On a close analyses of Sec 39 of the Act, it can be seen that the main purpose in granting an injunction under the provision is the prevention of the breach of an obligation existing in favor of the plaintiff and the compelling of the performance of certain acts is merely secondary yet, it may appear from the wordings used in the section that, a condition for the grant of a mandatory injunction is that the injunction must be necessary to compel the performance of acts which the court is capable of enforcing under the Act. The earlier view was that the court will not interfere by granting a mandatory injunction in cases where it cannot pass a decree capable of execution. The main reason for refusing to enforce the remedy is the practical impossibility and want of instrumentalities. But it is very much relevant to note that there is nothing in the provision to debar the court from entertaining its jurisdiction and I am of the view that the court can very well presume jurisdiction and exercise discretion in the grant of injunction under the section, as the devoir of the court is to render justice to the suitors. The court in granting or refusing to grant a mandatory injunction, will consider how far if granted it would affect the defendant. But in the first place, the court must consider the plaintiff's position, whose rights have been interfered with.

68. Time is changing. Judicial pronouncements have made inroads into the intricacies of interpreting statutory provisions to discover new horizons in the interest of justice.

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In *Visvanatha Pilled v. Shanmugham Pillai* (A. I. R. 1969 Supreme Court 493), a benamidar of motor vehicles obtained permits in his name though the transport business was conducted by application for transfer of permits in the name of the true owner. The benamidar subsequently withdrew his consent to transfer and the application was dismissed by the Regional Transport Authority. The true owner filed a suit for declaration that the vehicles belonged to him and for mandatory injunction directing the defendants to execute documents for effectuating transfer of permits. It was held by the Supreme Court that relief to the plaintiff can be granted for a mandatory injunction directing the defendant to execute necessary documents required to effectuate the transfer of the permits.

69. The Kerala High Court in *Joshua v. Geevarughese Mar Discorus* (1985 I. L. R. Kerala, 1) considered the scope of balance of convenience in relation to the excommunication of the plaintiff in that case from the parish church 31 by the parish priests. The Observation made by the High Court has a bearing on the facts of the present case where plaintiff's membership is denied by the defendants. While making an observation that the plaintiff in that case will be entitled to receive sacramental communal or other spiritual benedictions from such of the priest of the Orthodox Syrian church as are willing to give the same, the High Court has stated in Para. 46 and 48 of the Judgment as follows:-

"It is thus evident that no person can associate himself with a person who has been so ex-communicated; not even the members of his family; nor the other parishioners, nor even others belonging to the Arch-Diocese. He will become a social recluse as it were, and will be cut off from the community in which he was born and brought up. If by nature and by nature, he is a true follower of the faith of the church (and there is absolutely

nothing indicative of his questioning the same at any time or in any manner), an order of nature of Exts.A-2 and A-3 and of Ext.A-9 would cause untold mental agony and torment to him. The social ostracism to which he is thus exposed is not easily composable by award of monetary compensation, after years of litigation. When the strong indication is that the order is without jurisdiction, the plaintiff is entitled to the assistance of this court, in wading of the evil consequences thereof".

"This right to have spiritual services has got a link with his right to continue as a member of the Parish. The inclusion of the name in the confessional register is condition precedent to the membership of the Parish. Membership of the Parish is essential to defend the suits filed by the Catholicos and to pursue the suits instituted by the Parish Committee in 1979 and 1981. It would be possible for the plaintiff to insist on the inclusion of his name in the confessional register, if despite his demand in that behalf, the priests decline to attend to his demand to confess before them"

The above positions, obviously bring into light that a mandatory injunction can be sustained on the particular circumstances of the case. It is however, unnecessary to wander in that area too much. Whenever there is an unfair dealing, it is the duty of the Court to evolve necessary mechanism to bring out justice between the parties. On a consideration of the entire facts of the case, I am of the view that a relief can be granted to the plaintiff. Even otherwise, I would say that the plaintiff is entitled to succeed on equitable considerations. It should not be forgotten here that plaintiff has pleaded a specific case that he is entitled to get a relief in equity. In this connection, lastly, I may also make a peep into the decision *Vasudevan Pillai v, Malathy Amma* (1987 (2)

K.L.T.802) where equity is explained in the following passage.

"There is no reason now, when the area is well illuminated by decisions, for the ghost of old forms and rigid views to haunt the courts of Law. As to how exceptional circumstances would justify invocation of equity principles has been clearly illustrated by the law laid down by the highest court in the land, Equity jurisprudence is flexible and meets the challenge of new situations without the law: for, as noted in the Current Legal Problems, 1952 Vol.5, Page 1.

New days may bring the people into new ways of life and give them new outlooks: and with new rules of law. The Supreme Court further clarified that:

"Equity is not penalty but justice and even where neither party is at fault equitable considerations may shape the remedy our equitable jurisdiction is not hide bound by tradition and blinkered by precedent, though trammelled by judicially approved rules of conscience".

70. Issue No. 4 Now I close. On the basis of my discussion enumerated above, the plaintiff is entitled to get a decree in the suit. However, in considering the special circumstances of the case, it is only just and necessary that the costs shall be borne out by the respective parties.

71. In the result, suit is decreed in the following terms: —

(a) Defendants are directed by an order of injunction to issue 'Vivahakuri' to the plaintiff for his betrothal and marriage within a period of one month from date.

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(b) Parties are directed to suffer their respective costs.

Dictated to the Confidential Asst. transcribed and typed by him, corrected by me and pronounced in Open Court on this the 24th day of November. 1990/3rd day Agrahayana 1912.

Sd/-
K. George Oommen,
Addl. Munsiff.

APPENDIX

Plaintiff's Exhibits

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|----|------------------|--|
| A1 | filed on 16-2-90 | Certificate issued by Rev. Fr. Abraham Paradiyil Vicar Little flower Knanaya Catholic Church dated: 13-8-86. |
| A2 | filed on 16-2-90 | Certificate issued by Rev. Fr. Jacob Chokkacheril on 20-04-89 |
| A3 | filed on 16-2-90 | Baptism Certificate issued by Rev, Fr. Jose Tharapputhottiyil Vicar Little flower Knanaya Catholi Church West Othera dtd: 26-2-89. |
| A4 | filed on 16-2-90 | Baptism Certificate issued by Parish priest of St. John's Vellara. Church, Kumarakom dtd.24-02-89 |
| A5 | filed on 1-3-90 | Marriage Certificate issued by Vicar St. Xavier church Kannankara dated 20-10-89. |
| A6 | filed on 2-3-90 | Birth Certificate issued by Vicar St. Xavier, Church Kannankara dtd: 1-2-89. |
| A7 | Dtd, 16-2-90 | Letter issued by the Vicar Holy family Church Nattassery East dtd. 5-7-87. |
| A8 | filed on 2-3-90 | Marriage Certificate issued by Rev. Fr. Thomas Nedumkombil Cathedral Administrator dat 5-9-88. |
| A9 | Dtd 16-2-90 | Receipt Issued by Ft. George Manjungal Holy Family Church Nattassery East dtd.12-7-87 |

A10	filed on 2-3-90	Baptism Certificate Issued by Fr, George Manjungal Vicar Holy Family Church Nattassery dtd 31-5-89.
A11	filed on 9-11-89	Appeal petition by O. M. Uthup dtd: 21-4-89 along with the report of Parish priest.
A12	filed on 9-11-89	Photostat Copy of the representation by O. M. Uthup to Apostolic Pro-Nuncio in India dtd. 1-5-89.
A13	filed on 1-12-89	Photostat Copy of the plaint in a S. 1068/88 the Munsiff's Court, Kottayam
A14	filed on 16-2-90	Receipt for Rs. 30 issued by the Holy Family Church Nattassery dt. 1-1-87.
A14(b)	filed on 16-2-90	Receipt for Rs. 500/- issued by the Holy Family church Nattassery dt: 1-1-87.
A14(c)	filed on 16-2-90	Receipt for Rs. 5000/- issued by the Holy family church Nattassery dtd: 17-7-88
A15	filed on 1-12-89	Photostat Copy of the Application - Reebha Achemma Thomas dt: 8-7-87.
A 1 6	filed on 2-3-90	Code of Oriental Canon Law-Law on marriage.
A17	filed on 2-7-90	Photostat Copy of Page No. 96 of the marriage Register.
A17(a)	filed on	Column No. 6 of the Ext. A17
A18	filed on 7-1-90	Photostat Copy of the Marriage register Uzhavoor Church.
A18 (a)		Column No. 2 of Ext. A18
A19	2-7-90	Letter issued from Catholic Bishop house, kottayam to the Vicar Uzhavoor Church

Defendants Exhibits

B1	filed on 1-3-90	Letter issued by apostolic.Pro-Nuncio to Rt. Re Kuriakose Kunnacnerry on 4-8-89
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B2	filed on 8-3-90	Ancient Songs of the Syrian Christians of Malabar.
B3	filed on 1-3-90	Bulla of crection of the Kottayam Diocese.
B3 (a)		MalzIyalam translation of Ext.B3.
B4	filed on 1-3-90	Decree from the Original Congregation extending Jurisdiction of the Bishop of Kottayam.
B4 (a)	filed on 1-3-90	English translation of Ext.B4
B5	filed on 1-3-90	Curia application. File for Inter-Marriage from Feb: 1989 .to Jan: 1990.
B6	filed on 1-3-90	Interdiocesal marriage permission Register from 7-1-70 to 16-8-77.
B7	filed on 1-3-90	Interdiocesal marriage permission register aug 1977 to Nov.1983
B8	filed on 1-3-90	Curia Letter book from 3-1-1949 to 26-1-1950
B8(a)		Page No. 144 of Ext.B8 Entry No. 253 of 1949 (Permission for Marriage)
B9	filed on 3-1-90	Curia Letter book from December 1953 to May 1955.
B9(a)		Page No. 61 of Ext.B9 permission for marriage.
B9(b)		Page No. 123 of Ext.B9 permission for Marriage.
B10	filed on 1-3-90	Latter book of curia from May 1955 to 1956.
B10(a)		Page No.50 of Ext.B10 marriage permission No. 204 dtd. 24-10-54
B10(b)		Page No.147 of Ext.B10 Marriage Permission No.80 of 1956.
B11	file on 1-3-90	Representation made to Pope Plus X by Mar Mathew Makil Abrocioas Puzheparambil and John Menacherry on 1-3-1911.
B11(a)		Malayalam translation of Ext.B11.
B12	1-3-90	Marriage Certificate Chacko and Lilly Fernadas issued by the Parish

		priest of St. Joseph's Cathedra Trivandrum on 14-9- 88.
B13	file on 1-3-90	Petition dtd: 6-5-89 given to the Bishop of Kottayam by Uthuppt Oravanakalam.
B14	file on 1-3-90	Constitution of Jacobite Knanayites
B15	file on 1-3-90	The St. Thomas. Christian Encyclopaedia of India, Edited by George Menachery.
B15(a)		Page No. 74 and 75, of Ext.B 15
B16	file on 31-3-90	Specimen form of curia " <u>Note for the marriage</u> " (recorded in Malayalam and translated to English)
B17	file on 31-3-90	Specimen form of curia " <u>Note for the Publicizing of marriage</u> " (recorded in Malayalam and translated to English)
B18	file on 31-3-90	Specimen form of curia " <u>Note for the promise of marriage</u> " (recorded in Malayalam and translated to English)
B19	file on 31-3-90	Specimen form of curia " <u>Replay to the Publicizing of marriage</u> " (recorded in Malayalam and translated to English)
B20	file on 31-3-90	Knanaya Symposium held on 29th August 1986.
B21	file on 31-3-90	Photostat Copy or Appointment Bulla as Co-adjutor.
B21(a)		English translation of Ext.B21.
B22	file on 8-3-90	Constitution of Knanaya Catholic Congress.
B23	file on 30-3-90	Petition submitted to Bishop of Kottayam by O.M. Uthup, Oravanakalam, house, Eranjal 21-4-89.
B23(a)	file on 30-3-90	Report on Ext.B23, by Parish Priest George Manjankal.
B24	file on 19-3-90	Photostat Copy for the request of Solemnising the marriage of Biju Uthup before the Bishop of Kottayam on 29 -10-89.

B24(a)	Photostat Copy of the Baptism Certificate of Biju Uthuppu issued by the Parish priest little flower Knanaya Catholic Church West Othura 26-2-89
B24(b) file on 19-3-90	Photostat Copy of the Baptism Certificate of Biju Uthup issued by the Parish Priest St. John's Vellara Church Kumarakom on 24-2-89
B24(b) file on 19-3-90	Photostat copy of marriage certificate of Uuthup with Annamma issued by Rev. Fr. Jacob Chakka-chfiri on 20-4-89.
B24(d) file on 19-3-90	Photostat Copy of the Marriage Certificate of O M. Uthup issued by Vicar Little flower Knanaya Catholic Church did. 13-8-86
B25 filed on 30-06-1990	Letter dtd: 19-3-65 submitted by T. Rosamma for admission
B26 filed on 30-06-1990	Letter -dtd. 18-3-65 by Fr. Stephen to Vicatgeneral
B27 filed on 6-7-90	Letter dtd: 22-3-65 by K. K. Abraham to Bishop of Kottayarn.
B28 filed on 2-7-90	Certificate dtd: 19-3-65 by Mathai Kathanar Stating Rosamma is a Knanya.
B29 filed on 30-6-90	Letter dtd; 25-3-65 by Mathai Kathanar stating that mother of Rosamma is a Knanayite.

Court Exhibits

Fxt. X1 dt: Nil	Baptism Register of Kumarakorn Vellara Puthen Church from 1930 to 1969.
Ext. X (2)	Marriage Register from 1956 of Little Flower Knanaya Church Othara.
X2(a)	Page No. I and Serial No. 2 of the X2 Ext.
X3	Baptism Register of Little Flower Knanaya Church Othara.
X3(a)	Page No. 1 of the Ext.X3 register.

X3 (b)

Page No. 2 of the X3Register Serial No. 21.

Plaintiff's Witness

PW1 Biju Uthuppu
PW2 Rev. Fr. Jose Cherusseril
PW3 K. C. Peter
PW4 P. V. Cyriac
PW5 Fr. Dr. Joseph Koikudy
PW6 Fr. Jose, Tharapputhottiyil
PW7 P. Rosamma
PW8 Fr. Jacob Kottarathil

Defendants Witness

DW1 Rt. Rev. Kuriakose, Kunnaehery
DW2 Fr, Joseph Puthenpurayil
DW3 T. J. Lukose
DW4 A. K. Abraham
DW5 Fr. Thomas Nedumkombil

Id:—
Addl. Munsiff

Sd:—
Addl. Munsiff

(TRUE COPY)