

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. HARILAL

WEDNESDAY, THE 14TH DAY OF MARCH 2018 / 23RD PHALGUNA, 1939

RP.No. 450 of 2017

RSA 64/2017 of HIGH COURT OF KERALA DATED 30-01-2017

REVIEW PETITIONER/APPELLANTS IN RSA

- 1 FR. GEORGE MANJAKKAL  
AGED 78 YEARS, KIZHAKKE NATTASSERY HOLY FAMILY CATHOLIC  
CHURCH, NATTASSERY, KOTTAYAM -4, NOW RESIDING  
AT NIRMALARAM MOUNT ST. JOSEPH, BANGALORE P.O.
- 2 RT. REV. KURIAKOSE KUNNASSERY  
AGED 81 YEARS, BISHOP OF KNANAYA CATHOLIC DIOCESE,  
(KOTTAYAM DIOCESE), BISHOP'S HOUSE,  
CATHEDRAL WARD, KOTTAYAM.

BY ADVS. SRI. R. D. SHENOY (SR.)  
SRI. S. VINOD BHAT  
SRI. M. J. THOMAS  
SRI. JACOB E SIMON

RESPONDENT(S)/RESPONDENTS IN RSA:

1. BIJU UTHUP, AGED 58 YEARS,  
S/O. UTHUP, EMPLOYED AS PROJECT MANAGER,  
ADA NATIONAL AERONAUTICAL LABORATORY,  
BANGALORE, FROM ORAVANKALAYIL HOUSE,  
ERANJAL, KOTTAYAM-686004.
2. KNANAYA CATHOLIC CONGRESS  
KOTTAYAM REPRESENTED BY PRESIDENT,  
M. C. ABRAHAM, MAKKIL HOUSE,  
CHELLIYOZHUKKAM, KOTTAYAM-686 003.

R2 BY ADV. SRI. AGI JOSEPH  
R1 BY ADVS. SRI. K. C. ELDHO  
SRI. JIJO THOMAS  
SRI. MALLENNATHAN. M.  
SRI. ANEESH JAMES  
SRI. S. SREEKUMAR (SR.)

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 14-03-2018, THE COURT ON  
THE SAME DAY PASSED THE FOLLOWING:

scl.



**K.HARILAL, J.**

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R.P. No.450 of 2017  
in  
R.S.A.No.64 of 2017  
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Dated this the 14<sup>th</sup> day of March, 2018

**ORDER**

The review petitioners are the appellants in R.S.A No.64 of 2017 on the files of this Court. The aforesaid Regular Second Appeal was filed, challenging the judgment and decree, passed in A.S.No.244 of 2004 of the Second Additional District Court, Ernakulam, whereby the judgment and decree passed in O.S.No.923 of 1989 of the Additional Munsiff's Court, Kottayam were confirmed. At the time of admission of the above Regular Second Appeal, this Court denied admission on the ground that the Regular Second Appeal does not involve any question of law, as contemplated under Section 100 of the C.P.C. In the impugned judgment, this Court affirmed all the concurrent findings of the courts below as such, without any interference, and dismissed the Regular Second Appeal.

2. This review petition is filed mainly on two grounds. Firstly, according to the review petitioners, this Court has gone



beyond the scope and extent of consideration in a simple suit, for mandatory injunction and made certain observations, affecting the entire members of the Knanaya community in a suit, wherein, no publication was made under Order 1 Rule 8 of the C.P.C and the Church was not made a party. It is further contended that from paragraph 39 onwards, this Court has considered the sustainability of the existence, practice and custom of "endogamy", and the findings thereon have adversely affected the church and the faith of the parishioners, as a whole. Those adverse findings and observations, which are detrimental to their belief, are made without hearing any of the affected parties. This court, as well as the courts below, should not have gone into the question of "endogamy" in the suit, particularly when the suit was one for a mandatory injunction against vicars only and neither the church nor the parishioners were made a party to the suit.

3. Secondly, during the pendency of the first appeal before the District Court, the review petitioners have filed I.A.No.396 of 1991, along with certain documents, under

Order 41 Rule 27 of the Code of Civil Procedure, to establish the contention that the relief prayed for in the suit has become infructuous, as the marriage of the 1<sup>st</sup> respondent was solemnized in another church. But the said application was not considered or disposed of, before passing of the judgment in the said appeal, by the District Court. But, the non-consideration of the aforesaid Interlocutory Application, and the consequence thereof, was not considered in the impugned judgment passed in the appeal.

4. Heard Shri.R.D. Shenoy, the learned Senior Counsel appearing for the review petitioners and Shri.S.Sreekumar, the learned Senior Counsel appearing for the 1<sup>st</sup> respondent and Shri.Aji Joseph, the learned counsel appearing for the 2<sup>nd</sup> respondent.

5. The learned Senior Counsel appearing for the review petitioners advanced arguments in support of the aforesaid contention raised in the memorandum of the review petition. In order to substantiate the second ground, referred to above, the learned counsel invited my attention to the decision,

reported in **Ammalu v. Kothambari Vellachi [AIR 1974 Kerala 116]**.

6. On the other hand, the learned Senior Counsel appearing for the 1<sup>st</sup> respondent advanced arguments, contending that there is no sufficient ground, to review the impugned judgment, whereby, the Regular Second Appeal stands dismissed. The learned Senior Counsel invited my attention to the memorandum of Regular Second Appeal and contended that neither any ground nor any question of law was raised, pertaining to the non-consideration of I.A.No.396 of 1991, by the first appellate court.

7. In view of the arguments at the bar, the question to be considered is, whether there is any ground, to review the impugned judgment, in view of the statutory mandate, under Order 47 Rule 1 C.P.C.

8. It is trite law that the scope and extent of review are strictly confined to Order 47 Rule 1 C.P.C. Bearing the aforesaid legal preposition in mind, I have meticulously gone through the grounds raised in the memorandum of review



petition and the arguments raised at the bar. The review petitioners have no case falling under the 1<sup>st</sup> ground, the discovery of any new or important matter or evidence. It is the case of the review petitioners that there is an error apparent on the face of the impugned judgment.

9. According to the learned Senior Counsel for the review petitioners, this Court, as well as the courts below, have exceeded their jurisdiction, by rendering the adverse findings on the sustainability of the century old custom of "endogamy", prevailing in a Knanaya community, without framing an issue and without affording an opportunity of being heard, to the church or any member of that community, and it amounts to an error, apparent on the face of the judgment. When there was a finding that the 1<sup>st</sup> respondent and his predecessors are members of the Knanaya Community, attached to Holy Family Parish Church, Nattassery and they are entitled to get vivahakuri, there was no need to make any further enquiry on the legality and sustainability of the endogamy, under Canon law, to grant the relief as prayed for,



by the 1<sup>st</sup> respondent, the learned Senior Counsel contends.

10. It is not disputed that the original suit was one for mandatory injunction only against the review petitioners. The relief sought for in the original suit was to issue necessary directions to the review petitioners, to issue 'Vivahakuri' for the conduct of the marriage of the 1<sup>st</sup> respondent. The original suit was filed on the ground that the 1<sup>st</sup> respondent, his parents and other members of the family are the members of the Knanaya Catholic Community, attached to the Holy Family Parish Church, Nattassery. But the review petitioners refused to issue 'Vivahakuri' without sufficient reasons.

11. Going by the impugned judgment, this Court, after elaborate discussions in paragraph 16 to 38, found that the 1<sup>st</sup> respondent and his family members are the members of the Knanaya Catholic Community and parishioners of Holy Family Parish Church, coming under Kottayam Diocese and there was a breach of obligation, warranting issuance of mandatory injunction, invoking jurisdiction and power under Section 39 of the Specific Relief Act. Further, it was found that the suit was



maintainable against review petitioners only, as no relief was sought against the church and the church was not a necessary party in view of the relief sought for. The issue of non-joinder of the party, was also found in favour of the 1<sup>st</sup> respondent. In other words, this Court has treated the suit, as one in which no question, affecting the church or parishioners of the Church, was involved.

12. But, going by paragraph 39 onwards of the impugned judgment, it is seen that after arriving at a finding that the courts below are justified in finding that the 1<sup>st</sup> respondent and his family members are members of Knanaya community and Holly Family Parish Church and thereby the review petitioners are estopped from denying 1<sup>st</sup> respondent's membership, in the Knanaya community and his entitlement of 'Vivahakuri' under the membership, this Court proceeded to consider the question of "endogamy" around which the entire grounds are set up in this review petition.

13. It is not disputed that no publication was made under Order 1 Rule 8 of the C.P.C. The question pertaining to



the existence of practice and custom of "endogamy" is a matter, which may affect the church and innumerable parishioners, as a whole, who have not been given an opportunity of being heard. But, this Court, in paragraph 39 onwards, made observations, affirming the adverse findings of the courts below, on the sustainability of "endogamy" also, in a suit, wherein, neither the church nor any of the parishioners of the church was made a party. Neither the trial court nor the appellate court had framed an issue or raised a point, on the sustainability of "endogamy". But, the findings on the "endogamy" are made collateral only, to support the findings on the issues, which were specifically framed and determined.

14. *Audi alteram partem* is a Sacrosanct Principle, to be observed, before making a judgment binding to anybody other than parties to the suit. In the instant case, the observations on "endogamy" are made, without observing the said principle. Therefore, those observations cannot be made binding on anybody, other than the parties to the suit.

15. In the above view, this Court ought to have made a

clarification in the impugned judgment, to the effect that, since the church was not made a party and no publication was effected under Order 1 Rule 8, the observations, on the sustainability of "endogamy", is binding on the parties to the suit only. It is an omission and the consequence thereof would affect the church and its innumerable parishioners, to whom an opportunity of being heard was not granted. Further, the said omission is an error, apparent on the face of the judgment dated 30.01.2017, and this Court inclined to correct the said error by way of review. Thus, the first ground is accepted.

16. Secondly, it is contended that during the pendency of the appeal before the first appellate court, the review petitioners have filed I.A.No.396 of 1991, along with certain documents, under Order 41 Rule 27 C.P.C., to substantiate the contentions that the relief, sought for in the original suit, has become infructuous, by the marriage of the 1<sup>st</sup> respondent, which was held in another church. It is vehemently contended that the non-consideration of the aforesaid I.A was not considered in the impugned judgment.

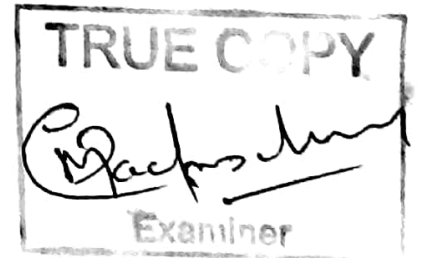
17. Going by the memorandum of regular second appeal, as rightly pointed out by the learned counsel for the 1<sup>st</sup> respondent, the non-consideration of I.A. No.396 of 1991 was not raised, either in the grounds or as a question of law. It is needless to say that the scope and extent of consideration of a Regular Second Appeal, under Section 100 of the C.P.C., is confined to the existence of a question of law only. That apart, the non-consideration of I.A.No.396 of 1991 was not raised during the course of arguments also at the time of admission. It follows that this ground is seen raised afresh in the review petition only. Indisputably the non consideration of I.A.No.396 of 1991 was not a new matter and it was a matter, which was within the knowledge of the review petitioners, at the time of filing the memorandum of Regular Second Appeal. If that be so, this Court is of the view that the impugned judgment cannot be reviewed on the ground that I.A.No.396 of 1991 was not considered by the first appellate court, either before or along with the judgment. In the above view, the said contentions will stand rejected.



Therefore, this review petition is allowed, to the above extent, for making a clarification as to the nature of the binding force of the observations on "endogamy". The impugned judgment dated 30.1.2017 passed in the Regular Second Appeal is recalled, re-opened and R.S.A. will be re-heard at once. The Registry is directed to issue the judgment dated 14.3.2018 in R.S.A.No.64 of 2017.

Sd/14.03.2018

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**K.HARILAL**  
**JUDGE**





**HIGH COURT OF KERALA  
AT ERNAKULAM**

**Year and Number of Suit or** : RP 450/2017 IN RSA 64/2017  
**other Proceedings**

**Name of Applicant/Advocate** : SRI.K.C.ELDHO

**Application Number** : B 4582/2018

**Application Date** : 15-03-2018

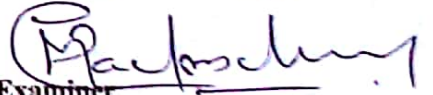
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Examiner