

Swami Premananda Bharathi Vs. Swami Yogananda Bharathi and anr.

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Court : Kerala

Decided On : Dec-12-1984

Reported in : AIR1985Ker83

Judge : K.K. Narendran and; K.S. Paripoornan, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11, 99 and 105(1) - Order 26, Rules 10, 11 and 12

Appeal No. : A.S. Nos. 32 and 119 of 1978

Appellant : Swami Premananda Bharathi

Respondent : Swami Yogananda Bharathi and anr.

Advocate for Def. : P. Sukumaran Nair and; K.N. Narayanan Nair, Advs.

Advocate for Pet/Ap. : C.K.S. Panicker, Adv.

Disposition : Appeals allowed

Judgement :

Paripoornan, J.

1. These are connected appeals. The 1st defendant in O. S. No. 2 of 1962. District Court. Quilon, is the appellant in A. S. No. 32 of 1978. The 1st plaintiff in O. S. No. 2 of 1962, District Court, Quilon, is the appellant in A. S. No. 119 of 1978.

Originally there were two suits, O. S. Nos. 2 and 3 of 1962. The 1st defendant in O. S. No. 2 of 1962 was the plaintiff in O. S. No. 3 of 1962. This later Suit, O. S. 3 of 1962, was withdrawn. We are now concerned only with O. S. No. 2 of 1962. The case has a chequered career. The facts involved are voluminous. In the light of our decision on a fundamental and crucial point, we are stating only the bare minimum facts to understand the background of the case. The suit was filed for removal of the first defendant from the management of the Asramam, to frame a scheme for the administration of the Trust, and for an order of injunction. The plaintiffs are Sanyasis attached to the Asramam of which the first defendant is the Mahant in office. Originally this suit was decreed by the trial court, the matter was taken up in appeal. The decision rendered in appeal by the High Court is reported in *Swamy Premananda Bharathy v. Swamy Yogananda Bharathy* 1965 Ker LT 824. The High Court held that the first defendant is a legally constituted Mahant and competent to act. The Math was founded and managed by one Sadananda Swami in 1900. He entered Samadhi on 22-1-1924. He was succeeded by his chief disciple Mahaprasad Swami. He entered Samadhi on 7-6-1954. Thereafter, the first defendant is the Mahant in office. Suits were filed for accounting and removal of the first defendant. Pending the suits, a Receiver was appointed in O. S. No. 2 of 1962. It was for accounting for the period from 7-6-1954 to 28-10-1963 on which date the Receiver was appointed. From the decision of the High Court rendered in 1965 Ker LT 824 appeals were filed before the Supreme Court as C. A. 722 of 1966 and C. A. No. 613 of 1967. The said appeals were first disposed of on 13th Sept. 1968. The Supreme Court directed the Receiver to submit a report on certain aspects. They are detailed at pages 4 and 5 of the Paper Book. Clauses 6, 10 and 11 of the Judgment of the Supreme Court are important, which read as follows :

'6. The present assets together with the annual income from the properties and a statement of the approximate expenditure required to be incurred for the purpose of the Math;

10. A List of the books of accounts maintained in the Math and the explanation of the first defendant why the account books were not maintained by him, or if they were maintained, the reasons why the books of account are not forth-coming:

11. Annual statements of income and expenditure from the properties of the Math since the first defendant started management of the properties of the Math in the lifetime of Mahaprasad Swami as his manager and later on on the death of Mahaprasad Swami as Mahant:

As ordered by the District Court on 30-11- 1968. the Auditor filed the report dated 16-1-1969. This report was relied on by the Receiver to file the report in the Supreme Court, as ordered. The important aspects are contained at pages 81 and 86 of the Paper Book. The matter relating to the Vaidyasala and Ayurvedic Pharmacy were also dealt with. Page 88 of the Paper Book contains the relevant books maintained. It is seen that on 7-11-1963 when the Receiver took charge the first defendant was bound to entrust a cash balance of Rs. 1.019.95. He handed over Rs. 1.019.35. The Supreme Court gave subsequent directions by order dated 29-7-1969 (Page 90 of the Paper Book). Finally on 16-9-1970 the appeals were disposed of. It was held that:

'It is futile to dwell on the various defects and infirmities in the accounts as also on the administration and management of the Math which has been pointed out by the District Court.'

The Supreme Court took the view that it is, not necessary or expedient to direct the removal of the first defendant as Mahant. The District Court was directed to appoint a Commissioner for taking up accounts from the first defendant from the date he assumed charge of the office of Mahant and after a report is submitted by the Commissioner to make appropriate direction after hearing the parties in the matter of reimbursement of such amounts as may remain unaccounted for. In pursuance thereto, a Commissioner was appointed by the trial Court. The Commissioner filed a detailed report which is available at pages 104 to 106 of the Paper Book. It is seen that the Commissioner prepared the statement with the help of an experienced Audit Assistant of a Chartered Accountant Firm. According to the Commissioner, the entries in the accounts were made properly and he has no reason to doubt the correctness of the entries as they are drawn up regularly and systematically. He opined that the books of account have been written up regularly and he had no reason to doubt the bona fides of the accounts. The Commissioner,

Shri A. E. Thrivikrama Kurup, Advocate, was examined on 15-1-1972. His report is Ext. C5. Objections seem to have been filed against the said report of the Commissioner (Ext. c5). But, without considering the objections, another Commissioner was appointed who filed

Exts. C5 and C 10 reports. The second Commissioner was appointed without setting aside Ext. C 5 Commissioner's report. The order of appointment of the Commissioner is available at page 152 of the Paper Book. That order is dated 21-12-1974. It states :--

'This is a statement to appoint a Commissioner for assessing the additional details enumerated in the statement. This is opposed by 1st defendant's counsel on the ground that many items covered by petitioner are covered by prior findings and hence need not be reassessed. The Commissioner is directed to file a report regarding the points now sought. If any portion in the report is covered by prior findings, that portion in the report will be finally eschewed while accepting or rejecting the additional report. As agreed to at bar by both sides Sri. R. Sadasivan Nair. M. Com. LL.B. well-versed in accounting is appointed Commissioner. It is conceded by both sides that since the Commissioner is a competent hand, appointment of a professional auditor is 'unnecessary. The Commissioner will file his report before 15-1-1975. His remuneration will be fixed later. All the necessary accounts and statements or other records in the Court will be furnished to the receiver on his receipt. Parties are also directed to furnish any record with them, if the Commissioner makes a demand or submit any explanations by way of clarifications.'

The first defendant took up the matter in revision, C.R.P. No. 41 of 1975. By order dated 19-2-1975 this court passed on order to the following effect:

'The plaintiff filed a statement and requested the court to dispute a Commissioner for making a report on those statements. The court below was careful enough to direct that if any portion of the report to be filed by the new Commissioner is covered by prior findings, that portion in the report will be finally eschewed while accepting or rejecting the additional report. That apparently is for avoiding any duplication.'

The order of the trial Court dated 21-12-1974 was not interfered with. Thereafter, the court proceeded further with the case and delivered judgment in the suit on 29-11-1977. The court below set aside Ext. C5 and based its decision on the reports of the second Commissioner (Exts. C6 and C10). It is from the aforesaid judgment of the trial Court, the first defendant as well as the first plaintiff have filed the above appeals.

(2) The main point involved in these appeals is relating to the accounts and the liability of the first defendant. The Supreme Court directed the appointment of a Commissioner and had given specific directions relating to that matter. Counsel for the first defendant, Mr. C. K. Sivasankara Panicker, very vehemently attached the approach and the basis of the decision of the lower court. The court below discarded Ext. C5 report (1st Commissioner's report) altogether and placed reliance on the second Commissioner's reports (Exts. C6 and C10). Counsel attacked the approach made in this regard as unjustified and unsustainable. Counsel for the first plaintiff, Mr. P. Sukumaran Nair, was not able to successfully substantiate the approach and basis adopted by the lower court in eschewing Ext C5 totally, and also in setting aside Ext. C5 (first Commissioner's report), after obtaining the second report (Exts. C6 and C10). However, counsel submitted in the alternative, that in view of prior proceedings, the court below could place reliance on Exts. C6 and C10 (second Commissioner's reports) to the extent they do not militate against the findings contained or dealt with in Ext. C5. On this aspect, counsel stressed the terms of the order of the trial court dated 21-12-1974 as affirmed in C.R.P. No. 41 of 1975.

(3) For a proper and effective decision in this case, the accounts have to be properly examined on the basis of the report of a Commissioner appointed by Court. It was keeping in mind the aforesaid order of the Supreme Court, the trial court appointed a Commissioner, Shri A. E. Thrivikrama Kurup. Advocate, who filed the report on 15-1-1972. He was examined on 15-1-1972. The Commissioner, Shri A. E. Thrivikrama Kurup availed the assistance of an Assistant of a Chartered Accountant firm. The short question that falls for consideration is, having obtained the report of a Commissioner and having examined such Commissioner, was the trial court competent and justified in law in appointing another or a second

Commissioner and in obtaining another report without setting aside the prior report, Ext C5, for valid reasons stated? The subsequent reports are Exts. C6 and C10. Is it a condition precedent, before appointing another or a second Commissioner, that the report of the first Commissioner should be set aside or annulled for reasons stated? If the court was not competent or acted unauthorisedly in appointing the second Commissioner, the reports so obtained cannot be looked into. Moreover, the further question that arises for consideration is, was the trial court justified after the filing of the reports of the second Commissioner, in setting aside the first Commissioner's report (Ext. C5) mechanically and without considering the objections on the merits?

(4) The Court below has disposed of the matter in paragraph 4 of its Judgment in the following manner :

'4. Commissioners have been appointed by my learned predecessor for the purpose of auditing the accounts. The first report of the Commissioner is marked as Ext. C5 and it is dated 15-1-1972. Serious objections had been filed against it and my learned predecessor directed the appointment of another Commissioner who has filed two reports which are marked as Ext. C6 and C10 respectively. Ext. C6 is his original report and Ext. C10 is a supplementary report by way of certain clarifications. It appears that my learned predecessor has not expressly set aside Ext. C5.

But as the Kerala High Court has repeatedly held that reports of different Commissioners cannot co-exist, it should be taken that Ext. C5 has been superseded by Exts. C6 and C10. For this reason I hereby set aside Ext. C5 and reliance for the purpose of deciding the issue will be placed only on the latter reports prepared by the same Commissioner and marked as Exts. C6 and C10.'

We may at once state that the trial Court committed a serious error in setting aside Ext. C5 (first Commissioner's report) for the reasons stated by it or the manner in which it was set aside. Ext. C5 has been set aside without giving proper and valid reasons and without adverting to the matter on the merits at all. We have no hesitation to hold that the court below acted illegally and totally in excess of jurisdiction in mechanically setting aside the first Commissioner's report (Ext. C5)

for the sole reason that a second Commissioner's report was ordered and obtained by the court and in view of that, the earlier report was superseded.

(5) Now on the main question as to whether the Court below was justified in appointing the second Commissioner and in placing reliance on such subsequent reports (Exts. C6 and C10), very elaborate arguments were addressed before us by the counsel appearing for the parties. It is useful to quote Order XXVI, Rules 11 and 12, C.P.C.:

' 11. Commissioner to examine or adjust accounts -- (1) In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. Court to give Commissioner necessary instructions -- (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings and report to be evidence -- Courts may direct further inquiry. The proceedings and report (if any) of the Commissioner shall be evidence in the suit but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit'

Similar provisions are contained in Order XXVI, Rule 10, C.P.C.

(6) Appellant's counsel Mr. C. K. Sivasankara Panickar emphatically argued that the proceedings and report of the Commissioner shall be evidence in the suit. In this case, the Commissioner has also been examined. It is only in a case where the court has reason to be dissatisfied with them, the

Court may direct such further inquiry, as it shall think fit. According to counsel, for reasons stated, the Court below should have set aside Ext. C5 report, before appointing the second Commissioner. In the absence of a proper and legal order setting aside Ext. C5, the appointment of the second Commissioner itself is illegal

and without jurisdiction, and a fortiori, the reports so obtained, Exts. C6 and C10, should be totally ignored in this case. In the alternative, counsel contended that in view of the facts of this case, to the extent Exts. C6 and C10 militate against Ext. C5, they should have been ignored, in view of orders passed by the trial Court on 21-12-1974 as affirmed in C.R.P. No. 41 of 1975. It is common ground that the matters investigated and reported by the Commissioner a second time and the reports submitted by him, Exts. C6 and C10, traversed substantial matters contained in the first report Ext. C5. It was agreed that there was overlapping. We see considerable force in the submission made by the appellant's counsel. We have noticed the provisions of Order XXVI, Rule 12, C.P.C. As stated, there are similar provisions in Order XXVI, Rule 10, C.P.C. as well. Under Order XXVI, Rule 10, where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. In Order XXVI, Rule 12, if the Court has reason to be dissatisfied with the proceedings

and report of the Commissioner, it may direct such further inquiry as it shall think fit. The minor difference in the phraseology in Order XXVI, Rule 10(3), C.P.C. and Order XXVI, Rule 12, C.P.C., does not affect the principle discernible from them. They are substantially of the same import. As early as 1874, more than 110 years ago, in *Nowab Syud Arim Ali Khan Bahadoor v. Surussutty Debia*(1875)23 Suth WR 93 at page 95 the Court said :

'It seems to us that when an enquiry has been made by a Commissioner under the provisions of the Civil P.C., the Court to which that enquiry is reported ought not, unless it absolutely quashes and annuls the proceedings of the first enquiry, order another enquiry on the same matter unless the subject-matter of enquiry by the second Ameen can be distinguished from the subject-matter of the first enquiry, in which case, of course, if there has been an omission and if the same Ameen cannot be deputed again, another officer might be employed. We think it is contrary to principle that the report and minutes of enquiry of the first investigation should remain upon the record as part of the record, and then there should be a second enquiry perhaps discrepant with the first.'

In Lakshmi alias Kochukunji v. Auseph Mariyam (1926) 42 Trav Co LR 429 : 16 Trav Co LJ 288a Division Bench of the Travancore High Court observed at page 434 :

'When a Commissioner appointed for a local investigation makes a report it is not competent for a Court unless it annuls the proceedings of the first enquiry to depute a second Commissioner for the same purpose.

This principle appears to have been recognised by the British Indian Courts even under the old Code which did not contain an express provision on the lines of Clause (3) of Rule 10 in Order XXVI of the New Code.'

In Visvanadhan v. Mengamma, AIR 1930 Mad 236 at page 238, Anantakrishna Ayyar, J. held :

'The Court should first have considered whether the first Commissioner's report should be superseded and must have recorded its reasons in writing when it came to the conclusion that it should be superseded. Then and then alone, it had jurisdiction to appoint a second Commissioner to do the same work allotted to the first'.

In K. S. Ramachar v. K. S. Krishnachar, AIR 1949 Mad 612, Subba Rao, J. held :

'The learned District Munsif without considering the merits of the application and without giving any reasons why the previous Commissioner's report should be ignored, appointed a fresh Commissioner as he thought it was necessary in the interests of justice. This procedure is not only contrary to the express provisions of Order 26, Rule 10(3), Civil P.C., but has been condemned more than once by this High Court.'

In an unreported decision of this Court in C.R.P.Nos.73 and 75 of 1973 dated 11-6-1974 : 1974 Ker LT (SN) page 22, (Case No. 60) Viswanatha Iyer, J. observed :

'So long as there is a Commissioner's report and a plan in respect of the matters directed to be investigated, unless that report and plan are found to be incorrect and set aside, a second commission cannot be issued.'

One of us (Narendran, J.) in *Ummer v. Kunbammed*, 1983 Ker LT 258 : (AIR 1984 NOC 197), in construing Order XXVI, Rule 10(3) held as follows:

'The Court can issue a second commission only under Order XXVI, Rule 10(3) of the Code. As per the above provision, the Court should, for any reason, be dissatisfied with the proceedings of the Commissioner already deputed. The dissatisfaction can be before the submission of the report or after that. No question of setting aside the report arises if the Court was dissatisfied about the work of the commissioner and issued a second commission before he submitted the report. But if a second commission is to be issued after the Commissioner already deputed submitted his report can it be done without setting aside the report? Proceedings of the Commissioner cannot but include the report of the Commissioner if a report has been submitted. If the Court is dissatisfied about what the commissioner did, can the report be salvaged simply because the report is not specifically made mention of in Rule 10(3). Not only that, the court gets jurisdiction to issue a second commission only if the Court for any reason is dissatisfied with the work of the first commissioner. In this case, not only that the Court did not express any dissatisfaction about the work of the first commissioner it was also held that no grounds are made out to set aside his report. The Court has not even postponed its decision on the question of setting aside the commission report. When the second commission report is also submitted, the Court will have to accept one report and disregard the other. Going by the scheme of the relevant provisions of the Code, this is not something which is contemplated. Simply because Rule 10(3) does not provide for the setting aside of the first commission report, it cannot be said that a second commission can be issued without setting aside the first commission report. If, for example, the Court feels some more details are to be gathered, the Court can depute the same commissioner for the same purpose and in that case, no setting aside of the report already submitted is necessary. At any rate, the Court has no jurisdiction to issue a second commission when it has not only not expressed any dissatisfaction about the work of the first commissioner but has refused to get aside his report.'

The decisions of the Madras, Andhra Pradesh and Karnataka High Courts and earlier decisions of this Court were referred to, in the said decision.

7. The short question that falls for consideration is whether the court below acted illegally or in excess of or without jurisdiction in appointing the second commissioner without setting aside the proceedings and report of the first commissioner (Ext. C5)? Counsel for the first plaintiff, Mr. P. Sukumaran Nair, submitted that the appointment of the second commissioner without setting aside the proceedings and report of the first commissioner is only an irregularity which can be cured. Reliance was placed on Section 99 of the C.P.C. and also a decision of Velu Pillai, J. reported in *Narayana Guntan v. Madhava Menon*, 1964 Ker LT 453 : (AIR 1965 Ker 95). If the appointment of the second commissioner, without setting aside the first commissioner's report and the proceedings, is illegal or otherwise beset with a jurisdictional error, then Section 99 of C.P.C. can be of no avail. In this context, we should remember that the word 'jurisdiction' has acquired a wide meaning in recent times. The decision of the House of Lords in *Anisminic's case* (1969 1 All ER 208 has analysed the entire matter from a wide perspective. This decision has been referred to with approval in the decisions of the Supreme Court reported in *M. L. Sethi v. R. P. Kapur*, AIR 1972 SC 2379 at P. 2385; *Hariprasad Mulshankar Trivedi v. V.B. Raju*. AIR 1973 SC 2602 and *Union of India v. Tarachand Gupta & Brothers*, AIR 1971 SC 1558. These decisions indicate that the word 'jurisdiction' is a 'verbal cast of many colours', and the dividing line between lack of jurisdiction or power and erroneous exercise of it, is very thin, but none the less the distinction between the two has not been completely wiped out and in the final analysis, the concept of jurisdiction for the purpose of judicial review, has been one of public policy. It appears that, if the error of law, committed by the court or tribunal is 'vital' or 'a flagrant one', it is considered to be a jurisdictional error. Mathew, J. speaking for the court in *H. P. M. Trivedi's case*. AIR 1973 SC 2602 at page 2608 said :

'We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word 'jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context. (See per Diplock, J. (1967-3 WLR 382) at p. 394 in the *Anisminic case*). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal

structure of law may lose something of its logical symmetry. 'At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic.'

8. We shall consider as to whether the appointment of a second commissioner without setting aside the report and proceedings of the first commissioner is a jurisdictional error. In this connection we may refer usefully the decisions of the Madras and Travancore High Courts. In the decision reported in Thottamma v. C. S. Subramaniam, AIR 1922 Mad 219, the Court deprecated or condemned the practice of appointing successive Commissioners. The aforesaid decision was followed and the principle again reiterated in Ambi v. Kunhikavamma, AIR 1929 Mad 661 and Kunhi Kutti Ali v. Mohammed Haji, AIR 1931 Mad 71. The courts have held that a specific order superseding the first order is imperative and a choice of one of the commissioner's report from successive reports, is wrong (vide 2 TLT(lviii) -- S.A. No. 114 of 1102) and AIR 1931 Mad 73. We are aware of a different note on this aspect of the matter struck by the Division Bench of the Patna High Court in the decision reported in Shib Charan Sahu v. Sarda Prasad, AIR 1937 Pat 670, and the decision reported in Chhotu Mauju v. Gurbhajan Singh, AIR 1972 Punj & Har 265. The Patna decision was referred to with approval by Velu Pillai, J. in 1964 Ker LT 453 : (AIR 1965 Ker 95). We respectfully concur with the decisions of the Madras High Court and Travancore High Court and the decisions of the Kerala High Court reported in 1974 Ker LT (SN) 22 and 1983 Ker LT 258 : (AIR 1984 NOC 197), referred to hereinabove and also in Para 6 supra and do not find our way to agree with the decisions to the contrary as laying down the law on the point correctly. Time and again, the Courts have condemned or deprecated the tendency of the subordinate courts in the appointment of a second commissioner before superseding the first commissioner's report and proceedings. That the first commissioner's report and proceedings should be set aside for reasons to be recorded and then only the court can proceed to appoint another commissioner to do the work is a wholesome rule of law based on public policy,. The proceedings in the court below could be expedited, without waste of time and money. We are of the view, that only if the court has reason to be dissatisfied with the proceedings and report of the first commissioner for reasons stated, it can appoint a second commissioner for further inquiry. This is a condition precedent.

The provision contained in Order XXVI, Rule 12. C.P.C. is 'vital'. Strict adherence alone will facilitate speedier, effective and cheaper administration of justice. The rule is enacted on ground of public policy. It will be useful to remember the law laid down by the Judicial Committee of the Privy Council regarding the principle to be adopted in dealing with commissioner's report. In *Chandan Mull v. Chiman Lal*, AIR 1940 PC 3, the Judicial Committee observed :--

'Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.' For the above reasons, we hold that the appointment of the second commissioner and the reports filed by him, (Exts. C6 and C10) without setting aside Ext. C5 (first commissioner's report), is wholly illegal and without jurisdiction. Reliance placed on Exts. C6 and C10 by the Court below is unauthorised and without jurisdiction in the circumstances.

9. It is settled law that the decision of a court on a question relating to jurisdiction, cannot be deemed to have been finally determined by an erroneous decision of the court and such decision cannot operate as *res judicata* in subsequent proceedings *Mathura Prasad v. Dossibai*, AIR 1971 SC 2355. Since the appointment of the second commissioner in this case is without jurisdiction, the order of the trial court dated 21-12-1974 as affirmed by this court in C.R.P. 41 of 1975 dated 19-2-1975 cannot be a bar in ignoring or eschewing or discarding Exts. C6 and C10. The interlocutory order passed by the trial court dated 21-12-1974 as also the order passed in revision, C.R.P.No. 41 of 1975, cannot be a deter in considering the matter afresh when it comes up before a Bench of this court in the appeal filed from the final decree in the suit. In this context, we may bear in mind Section 105(1) C.P.C. :

'105. Other orders-- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from, any error, defect or irregularity in

any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.'

The decision of Madras High Court in T.S. Pichu Ayyangar v. Ramanuja, AIR 1940 Mad 756; takes the view that the order passed by the lower Court in this case dated 21-12-1974 (as upheld in C.R.P. No. 41/1975) is open to attack, in the appeal filed from the final decree. since the order impugned affects the decision of the case. The said decision has been followed in Subha Reddiar v. Seetharaman, AIR 1972 Mad 421. Counsel for the 1st plaintiff, Sri P. Sukumaran Nair, contended that the decision of the Madras High Court in Pichu Ayyangar's case, AIR 1940 Mad 756 considered the matter only From the stand point of Section 105(1) C.P.C., but the order impugned will constitute 'res judicata' and so the matter cannot be agitated again. Counsel relied on the decisions reported in Balkishna Dass v. Parmeshri Dass, AIR 1963 Punj 187; Shyamacharan v. Sheojee Bhai, AIR 1964 Madh Pra 288 and Ramsarup v. Pyare Das. AIR 1974 Pat 153. It does not appear that the decision of the Madras High Court in AIR 1940 Mad 756 was brought to the notice of the Punjab and Patna High Courts when the decisions in AIR 1963 Punj 187 and AIR 1974 Pat 153 were rendered. But the Madras decision AIR 1940 Mad 756 was referred to in express terms and dissented from by the Madhya Pradesh High Court while rendering the decision reported in AIR 1964 Madh Pra 288. The decisions of Punjab. Patna and Madhya Pradesh High Courts took the view that the matter cannot be subject to a fresh attack in the High Court, on the principle of res judicata. But, the principle of res judicata is totally inapplicable in this case; we have held that the court committed a jurisdictional error in appointing a second commissioner, without expressly setting aside the report and proceedings of the first commissioner. Whatever decision is rendered by the Court militating against the said position in law, cannot be deemed to have been finally determined, by the erroneous decision rendered by the court and such erroneous decision cannot operate as res judicata. In this connection, the principle laid down by the Supreme Court in Mathura Prasad's case, AIR 1971 SC 2355 has already been referred to and we need not repeat the same. See also. Sushil Kumar Ghosh v. Revenue Officer. AIR 1976 Cal 1 Soni Vrajilal v. Jadavji, AIR 1972 Guj 148. Since we have held that the court committed a 'jurisdictional error', in the matter, Section 99 of CPC which was called in aid by the 1st plaintiff's counsel Sri

P. Sukumaran Nair, cannot help him. The appointment of the second commissioner in this case, is an illegality and a jurisdictional error and not a mere irregularity. None of the above salient features or aspects were adverted to by the Court below; the court below has, mechanically, without applying its mind to the crucial issue involved and ignoring the mandate of Order XXVI, Rule 12, C.P.C., simply set aside Ext. C5 report. This is totally illegal and without jurisdiction.

10. For the reasons stated above, we are of the view, that on the facts of this case, the court below acted illegally and totally in excess of or without jurisdiction in appointing a second commissioner and in placing reliance on Exts. C6 and C10 reports. The judgment of the trial court shows that the entire reasoning and conclusion is based on Exts. C6 and C10. The judgment of the trial court cannot stand. In view of our conclusion that Ext. C5 will hold good, till it is set a side, for reasons stated, Exts. C6 and C10 should be eschewed from consideration. The trial court will consider Ext, C5 report and the evidence of the commissioner recorded on 15-1-1972. If the court finds for valid and sufficient grounds, that Ext. C5 report is not acceptable or otherwise infirm, then and then alone, it will appoint another commissioner and proceed further in accordance with law. In case the court finds that Ext. C5 report is proper and acceptable, it will proceed to decide the suit in the light of that report and evidence recorded in the case.

11. For the reasons stated above, the judgment and decree of the court below are set aside. The appeals are allowed. The matter is remitted back to the court below for fresh consideration in accordance with law and in the light of the observations contained herein. The matter will be posted in the court below for appearance of parties on 7-1-1985.