

**IN THE HIGH COURT OF KERALA AT ERNAKULAM  
PRESENT:  
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS**

**WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937**

**RSA.No. 1209 of 2004 ( )**  
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**AGAINST THE JUDGMENT AND DECREE IN AS 23/2003 OF  
DISTRICT COURT, KOTTAYAM DATED 20-03-2004**

**AGAINST THE JUDGMENT AND DECREE IN OS 57/1999 of MUNSIF'S COURT,  
PATHANAMTHITTA DATED 29-09-2000**

**APPELLANTS/APPELLANTS/DEFENDANTS 5 AND 6:**  
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- 1. ST.MARY'S ORTHODOX CHURCH  
VETTIPURAM, PATHANAMTHITTA, REP. BY ITS VICAR.**
- 2. TRUSTEE ST.MARY'S ORTHODOX CHURCH,  
VETTIPURAM, PATHANAMTHITTA.**

**BY ADV. SRI.V.PHILIP MATHEWS**

**RESPONDENT(S)/RESPONDENTS/PLAINTIFFS AND DEFENDANTS 1 TO 4:**  
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- 1. THANKAMANI RAJAN, W/O.RAJAN,  
VELAMPARAMBIL HOUSE, VETTIPURAM MURI  
PATHANAMTHITTA VILLAGE, KOZHENCHERY TALUK.**
- 2. SHAJAHAN, S/O. MEERA SAHIB,  
PULIMOOTTIL, VETTIPURAM MURI, PATHANAMTHITTA VILLAGE  
KOZHENCHERRY TALUK.**
- 3. KURIAKOSE V.A., S/O. K.V.ABRAHAM,  
VETTIKUNNEL, VETTIPURAM MURI, PATHANAMTHITTA VILLAGE  
KOZHENCHERY TALUK.**
- 4. ASOKAN T.R. S/O. RAGHAVAN,  
THOMACHERIL, VETTIPURAM MURI, PATHANAMTHITTA  
VILLAGE, KOZHENCHERRY TALUK.**
- 5. STATE OF KERALA, REPRESENTED BY  
THE CHIEF SECRETARY TO GOVERNMENT, SECRETARIAT  
THIRUVANANTHAPURAM.**
- 6. SECRETARY TO GOVERNMENT, LOCAL  
ADMINISTRATION DEPARTMENT, GOVT. SECRETARIAT  
THIRUVANANTHAPURAM.**
- 7. DISTRICT COLLECTOR, PATHANAMTHITTA**
- 8. PATHANAMTHITTA MUNICIPALITY  
REPRESENTED BY ITS SECRETARY, MUNICIPAL OFFICE  
PATHANAMTHITTA.**

**R1,2,4 BY ADV. SRI.S.SHYAM**

**R8 BY ADV. SRI.A.N.RAJAN BABU, STANDING COUNSEL  
ADV.SRI.V.K.SNIL**

**R5, R6 & R7 BY GOVERNMENT PLEADER SRI.P.V.ELIAS.**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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R.S.A.No. 1209 of 2004

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Dated this the 7<sup>th</sup> day of October, 2015

J U D G M E N T

This Regular Second Appeal essentially arises out of the challenge made as against the permission granted by the statutory authorities concerned for the establishment of a vault type cemetery in the appellant St.Mary's Orthodox Church, Vettipuram, Pathanamthitta district. The contesting respondents herein had filed Original Suit, O.S.No.57/1999 before the Munsiff's Court, Pathanamthitta, praying to set aside the impugned orders issued by the statutory authorities concerned in the matter of permission for construction of a vault type cemetery by the St.Mary's Orthodox Church authorities concerned (respondents 5 and 6 in the O.S.) and for consequential injunction. The trial court has decreed the suit in favour of the plaintiffs. Aggrieved by the impugned judgment and decree rendered by the Munsiff's Court, Pathanamthitta, on 29.9.2000 in O.S.No.57/1999, the church authorities had filed Appeal Suit, before the District Court concerned. The lower

appellate court, as per the impugned judgment dated 20.3.2004, dismissed A.S.No.23/2003, confirming the impugned judgment and decree of the trial court in the said suit. It is aggrieved by this, the church authorities concerned have preferred this Regular Second Appeal before this Court under Sec.100 of the Code of Civil Procedure.

2. The gist of the case projected in the plaint is as follows:-  
That the plaint schedule property is owned by the 5<sup>th</sup> respondent St.Mary's Orthodox Church, Vettipuram, Pathanamthitta district. The 5<sup>th</sup> defendant church had initially submitted an application on 29.4.1987 before the 8<sup>th</sup> respondent Pathanamthitta Municipality for permission to establish an open burial ground. By Ext.B-19 dated 14.5.1990, the Municipality informed the church that the property in question is not suitable for establishing an open type burial ground and that the District Medical Officer (DMO) has informed that if an application for permission to construct an vault type cemetery is submitted by the church, then the same could be considered and that accordingly, the Municipality informed that if the church is willing to construct a vault type cemetery, then they may submit necessary application and plan for the same. Ext.B-19 proceedings

dated 14.5.1990 was on the basis of Ext.X-1(e) proceedings dated 20.4.1990 of the DMO referred to in Ext.B-9. Thereafter, the defendant church had submitted application dated 13.6.1990 for permission to construct a vault type cemetery in their property. Based on Ext.X-1(a) proceedings dated 29.10.1990 of the DMO, the Municipal Council, by resolution dated 29.12.1990, granted necessary permission to the church for constructing the vault type cemetery. Thereafter, the Municipality by Ext.B-2(d)/B-3 order dated 13.3.1991 issued necessary permit/licence to the church for construction of the vault type cemetery. After the commencement of the construction, there were various litigations including Writ Petitions filed before this Court, which interdicted the construction. But the District Collector concerned was directed by this Court in the judgment dated 29.5.1991 in O.P.No.5540/1991 and judgment dated 18.6.1996 in O.P.No.12456/1991 to examine the grievance of the objectors against the establishment of the vault type cemetery and take a decision thereon in accordance with law. The District Collector, by Ext.B-12 dated 16.7.1996, in exercise of his statutory powers conferred under Sec. 45(2) of the Kerala Municipalities Act, 1960, ultimately found that there is no illegality or impropriety in

the impugned licence granted by the Municipality to the church and thus refused to interfere with the impugned resolution of the Municipality. Thereupon, an objector had approached the State Government to ventilate the grievances and the Government, by Ext.B-13 dated 4.5.1998, in exercise of their statutory powers conferred under Sec.45(1) of the Act found that there are no grounds to interfere with the impugned permission granted by the Municipality and accordingly, repelled the objection, but, however, directed that the plan for the construction of the vault type cemetery should be vetted by the Chief Town Planner, etc.

3. Later in pursuance of these proceedings of the Collector and the State Government, the defendant Municipality renewed the licence/permission as per Ext.B-14 dated 29.8.1998 for construction of the vault type cemetery. The four plaintiffs herein and another person had approached this Court again by filing Writ Petition as O.P.No.17816/1998 before this Court praying to quash Ext.B-12 herein (proceedings dated 16.7.1996) issued by the District Collector), Ext.B-13 herein (G.O. dated 4.5.1998 issued by the Government) and for incidental reliefs. This Court as per Ext.B-15 judgment dated 16.9.1998 dismissed O.P.No. 17816/1998

rejecting the contention of the petitioners therein that there is a prohibited distance of 25 meters in making construction of a vault type cemetery as per the Municipalities Act and also the finding therein that all legal formalities required for the impugned permission have been duly granted by the official respondents therein and accordingly, dismissed the said Original Petition, as per Ext.B-15 judgment rendered on 16.9.1998. Aggrieved by this, the petitioners in that Original Petition had filed W.A.No.2063/1998 before the Division Bench of this Court, in which, additional contesting respondents 6 to 19 (14 persons), who voiced similar objection as that of the petitioners therein, had also got themselves impleaded in that Writ Appeal to support the appellants therein. The Division Bench of this Court, as per Ext.B-17 judgment dated 9.11.1998, held that the grievances of the appellants therein could be adjudicated only in a properly instituted civil suit and accordingly, gave liberty to the five appellants therein and 14 additional contesting respondents therein to immediately file a suit before the competent civil court praying for appropriate reliefs. It is on this basis, that the four plaintiffs herein had filed the present suit praying for the aforestated reliefs.

4. According to the plaintiffs, the provisions of the Municipalities Act and the Building Rules framed therein have been violated in granting permission to the church. The minimum prohibited distance rule has not been complied with while granting the impugned permission. That the residences of the 1<sup>st</sup> to 4<sup>th</sup> and 5<sup>th</sup> plaintiffs are within 25 meters of the plaint schedule property. So also, it is further averred that the third plaintiffs' property, he has constructed a building for taking up residence is the southern boundary of the scheduled property and his building is within 25 meters of the scheduled property. Though there are only four plaintiffs, there is an averment in the plaint as if there are five plaintiffs. The inhabitants of the locality depend upon the well and a stream, for water purposes. If the cemetery is allowed to function, there is imminent danger of water pollution in the wells and in the streams endangering lives of the inhabitants of the locality. The conditions stipulated for opening the vault type cemetery are not on the basis of any scientific basis. Even if those conditions imposed for the construction are strictly adhered to, there is no assurance of safety. That it is virtually impossible to prevent seepage and consequent water pollution at the wells and the stream. The 5<sup>th</sup> and

6<sup>th</sup> defendants do not need to open a cemetery as their parent church is only 1.5 kms. away from the defendant church. The parent church concerned has a vast cemetery. That the impugned licence and permission for construction of the vault type cemetery has been granted in flagrant violation of the statutory provisions governing the field and in violation of the rights and interests of the inhabitants of the locality and that the suit was laid in the interest of the inhabitants of the locality.

5. In the written statement of the 1<sup>st</sup> and 2<sup>nd</sup> defendants (State Government authorities) it is averred that the suit is hit by Sec.544 of the Municipalities Act. They also contended that there was inordinate delay in approaching the court. That there is no impropriety or illegality in the impugned permission granted by the statutory authorities concerned and they have denied the other allegations in the plaint and also averred that the plaintiffs should be put to strict proof regarding their allegations. According to them, the order passed by the Municipality, as confirmed by the District Collector and the Government, is valid and proper and no interference is called for. The 4<sup>th</sup> respondent Pathanamthitta Municipality in their separate written statement contended that the

suit is bad in view of Sec.544 of the Municipalities Act and also that it is barred by limitation. That the Municipality had granted necessary permit as per the resolution dated 29.12.1990 and Ext.B-3 permit/licence dated 13.3.1991. That the DMO had initially found that the proposal to establish an open type burial ground as unacceptable and that the application of the church for permission to construct a vault type cemetery should be considered, etc. That thereafter, the application of the defendant church for permission to construct an vault type cemetery was duly considered and sanction was granted subject to strict conditions. The sanction so given was challenged initially before the Collector and the Government. Based on the directions issued by this Court in the aforesaid Writ Petitions, the District Collector in exercise of the statutory powers under Sec. 45(2) of the Kerala Municipalities Act, 1960, had found that there is no impropriety or illegality in the impugned licence/permit granted by the Municipality to the church. The subsequent challenge made by the objectors before the Government also did not succeed and it was thereafter that the Municipality had issued renewal of the permit/licence for the impugned construction. That at the time of grant of permission to the defendant church

authorities to construct a vault type cemetery there were no houses within 25 meters from the vault type cemetery. The construction in question was only subsequently made and that the well was subsequently dug, etc. and that the vault type cemetery is leak-proof and is hygienically very safe and there is no possibility of any seepage and there is no possibility of water in the well and streams being contaminated. The possibility of air pollution is also ruled out, etc. That the impugned permission was granted strictly in accordance with the statutory provisions and after following the necessary procedures. That the allegation regarding violation of the statutory provision is false and without any basis and accordingly, it was pleaded in the written statement that the suit is liable to be dismissed.

6. In the written statement filed by the church authorities (5<sup>th</sup> and 6<sup>th</sup> defendants) they averred that the present suit is barred by principles of resjudicata and constructive resjudicata in view of Exts.B-5 and B-8 judgments/decrees, more particularly, the judgment and decree in O.S.No.282/1991 (Exts.B-7 and B-8), which was a suit filed in a representative capacity. That the very claim adjudicated in the present suit was the subject matter of O.S.No.

282/1991 and the said issue has been decided in the said suit in favour of the church authorities. That the permission and licence granted by the Municipality was valid and proper. That the District Collector had examined the entire matter pursuant to the directions of this Court in the Writ Petitions. Thereafter, the District Collector and the DMO had inspected the site and the Collector by Ext.B-12 proceedings dated 16.7.1996 had repelled all the objections of the objectors like the plaintiffs herein. That thus the Tahsildar, DMO and the District Collector were all satisfied about the establishment of the vault type cemetery. Thereafter, the objector had again approached the Government, which led to Ext.B-13 G.O. dated 4.5.1998, repelling the said objections and finding that there is no ground to interfere in the matter, except that the Chief Town Planner should vet the plan for the impugned construction. That later, the Chief Town Planner had duly vetted and approved the plan and, based on the directions given by the Chief Town Planner, the Kerala State Pollution Control Board authorities had also granted necessary clearance in the matter. That it is based on all these proceedings that the defendant Municipality had issued Ext.B-14 permit dated 29.8.1998 renewing the earlier permit issued as per

Ext.B-3 order dated 13.3.1991. It is on the basis of such renewed permission, that the church authorities could complete substantial part of the construction, which was later interdicted by the learned Munsiff as per the interim injunction order dated 11.3.1999 ordered in the present O.S. That the construction was done strictly in accordance with the approved plan and that the apprehension expressed is without any material foundation. That there is no stipulation in the Kerala Municipality Act and the Rules framed thereunder regarding the minimum distance in the establishment of a vault type cemetery. That the defendant St.Mary's-Orthodox Church, Vettipuram, Pathanamthitta, is an independent parish church, which was carved out from St.Stephen Orthodox Church, Makkankunnam, Pathanamthitta. That the bifurcation of the defendant church as an independent parish church distinct and separate from the parish of St.Stephen's Orthodox Church was subject to the condition that the defendant church should establish their own independent cemetery. That therefore the defendant church cannot depend upon the cemetery of St.Stephen's Orthodox Church, Makkankunnam, Pathanamthitta for the burial purpose of the parish members of the defendant church. That the members of

the defendant church cannot bury dead bodies of their parish members in the cemetery of St.Stephens Orthodox Church, as a matter of right. It is further clearly averred in paragraph 15 of their written statement that the disposal of the dead is effected by the members of the Orthodox Syrian Church by burial alone and this is a practice followed by the church in its history for the last about 2000 years and the right to bury the dead bodies of the faithful is part and parcel of the religious practice of the Orthodox Syrian Church through out the world. That the members of the Orthodox Church believe in the immortality of the soul and resurrection of the body. In following their practice of burying the dead bodies, they are only exercising their fundamental right regarding practice of religion. It is further averred in paragraph 16 thereof that there is inordinate delay in instituting the suit even though this Court had pronounced Ext.B-17 judgment in W.A.No.2063/1998 as early as on 9.11.1998 directing the appellants therein to immediately set in motion the institution of the suit before the civil court, they did not care to do so and that they filed the said suit only after two and a half months on 29.1.1999. That they cannot avail the concession granted by the Division Bench of this Court in Ext.B-17 judgment,

etc. and that the church had started construction on 16.9.1998 and that the construction is nearing completion, etc. As stated herein above, both the courts below have concurrently held against the appellants.

7. Before entering into further discussion in this matter, it will be relevant to advert to the legal principles laid down by the Apex Court regarding the scope and powers of this Court in interfering with in a Second Appeal, wherein the both courts below have concurrently found against the appellants. The Apex Court in the rulings as in Jagdish Singh v. Nathu Singh, reported in AIR 1992 SC 1604; Smt.Prativa Devi v. T.K.Krishnan reported in (1996) 5 SCC 353; Satya Gupta @ Madhu Gupta v. Brijesh Kumar reported in (1998) 6 SCC 423; Ragavendra Kumar v. Firm Prem Machinery & Co. reported in AIR 2000 SC 534; Molar Mal Through Lr. v. M/s.Kay Iron Works Pvt. Ltd. reported in AIR 2000 SC 1261, Dinesh Kumar v. Yusuf Ali reported in 2010 (3) KLT SN 16 (C.No.20) (SC), etc. has consistently held that there is no prohibition to entertain a second appeal even on question of fact, provided the court is satisfied that the findings of the court below were vitiated by non-consideration of the relevant evidence or by showing erroneous

approach to the matter. Thus it was held that if the High Court comes to the conclusion that the findings of fact recorded by the court below are perverse being based on no evidence or based on irrelevant materials, the Second Appeal can be entertained and it is permissible for the court to re-appreciate the evidence, etc.

8. The Apex Court in the case Union of India v. Ibrahim Uddin, reported in 2012 (3) KLT SN 73 (C.No.79) (SC), has held in paragraphs 54 to 57 as follows:

'54. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: Jagdish Singh v. Nathu Singh, AIR 1992 SC 1604; Smt. Prativa Devi (Smt.) v. T.V. Krishnan, (1996) 5 SCC 353; Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar, (1998) 6 SCC 423; Ragavendra Kumar v. Firm Prem Machinery & Co., AIR 2000 SC 534; Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261; Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685; and Dinesh Kumar v. Yusuf Ali, (2010) 12 SCC 740).

55. In Jai Singh v. Shakuntala, AIR 2002 SC 1428, this Court held that it is permissible to interfere even on question of fact but it may be only in *"very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."*

Similar view has been taken in the case of Kashmir Singh v. Harnam Singh & Anr., AIR 2008 SC 1749.

56. Declaration of relief is always discretionary. If the discretion is not exercised by the lower court *"in the spirit of the statute or fairly or honestly or according to the rules of reason and justice"*, the order passed by the lower court can be reversed by the superior court. (See: Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg &

Anr., AIR 1977 SC 747).

57. There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal'

9. While admitting this Second Appeal, this Court as per order dated 22.1.2010 had formulated the following questions of law, which read as follows:

- “(1) Was not the suit barred by the principles of res judicata & constructive res judicata in view of Exts.B5 to B8.
- (2) Did not the 8<sup>th</sup> respondent grant license/permission to construct vault type cemetery after complying with all legal formalities ?
- (3) Whether the courts below are justified in considering the alleged procedural lapses of 7<sup>th</sup> and 8<sup>th</sup> respondent in granting licence after Ext.B13 order of the government.
- (4) Is there any distance rule for construction of a vault type cemetery in a Municipality particularly in view of the findings in Ext.B15.”

10. During the course of hearing of this appeal, in the light of the submissions made, this Court had, in exercise of the powers conferred under the proviso to sub section (5) of Sec.100 of the C.P.C., also framed the following additional questions of law, as

follows:

- “1(a) Whether the suit is barred by limitation ?
- 1(b) Whether the suit is bad for want of statutory notice under Section 544 (1) of the Kerala Municipalities Act ?
- 1(c) Whether the suit to the extent it involves the cause of action for public nuisance is barred due to non compliance of the provisions contained under Section 91 of the CPC. ?”

11. Heard.

12. On consideration of the submissions made on either side, the aforestated questions are decided as hereunder:

- “1(a) Whether the suit is barred by limitation ?”

It is to be noted that Ext.B-14 renewal of the permit was granted by the defendant Municipality on 29.8.1998. It is only thereafter that the four plaintiffs herein and another person had filed a Writ Petition, as O.P.No.17816/1998 before this Court on 15.9.1998 with the prayers to quash Ext.B-12 herein (proceedings dated 16.7.1996 of the District Collector) and Ext.B-13 herein (G.O. dated 4.5.1998 issued by the State Government), and for interdicting the authorities from allowing the construction of the vault type cemetery within the radius of 100 meters from their houses and for declaration that grant of licence for construction of cemetery within prohibited distance of 50 meters from the

residential houses of the petitioners is violative of their fundamental rights guaranteed under Art.21 of the Constitution of India and incidental reliefs. It is to be noted that Ext.B-14 dated 29.8.1998, which is the renewed permit issued by the Municipality, was not challenged in the said Writ Petition. Against dismissal of that Original Petition as per Ext.B-15 judgment, the plaintiffs herein filed Writ Appeal, W.A.No.2063/1998, which led to Ext.B-17 judgment dated 9.11.1998. The Division Bench in Ext.B-17 judgment had directed that the appellants therein and all the impleaded parties therein should immediately set in motion remedy by instituting a civil suit before the competent court having jurisdiction. Although there was a specific allegation therein that the construction was being made by the church authorities contrary to the sanction granted by the authorities concerned and without being vetted by the Chief Town Planner, etc., for reasons known only to them, the appellants/writ petitioners (the plaintiffs herein), have not chosen to challenge Ext.B-14 renewed permit dated 29.8.1998 either in O.P.No.17816/1998 or in W.A.No.2063/1998 or in the present suit (O.S.No. 57/1999). The prayers in the suit are to set aside resolution No.7 dated 29.12.1990 issued by the Pathanamthitta Municipality

granting permission to construct burial ground in the plaint schedule property, Ext.B-3 proceedings dated 13.3.1991 issued by the Pathanamthitta Municipality granting permission to the church to construct vault type concrete cemetery in their property, Ext.B-12 proceedings dated 16.7.1996 of the District Collector, Pathanamthitta and Ext.B-13 Government order dated 4.5.1998 issued by the State Government and for grant of a permanent prohibitory injunction restraining defendants 1 to 4 from granting any licence to the 5<sup>th</sup> respondent church or anyone else for establishing cemetery, vault type or otherwise, in the scheduled property and restraining defendants 5 and 6 from proceeding with the construction of cemetery in the scheduled property and establishing a cemetery in any form therein, etc. Therefore, it is evidently clear that in the suit, as originally instituted on 29.1.1999, there was no prayer to set aside Ext.B-14 renewed permit dated 29.8.1998. Though the plaintiffs have not challenged Ext.B-14 renewed permit dated 29.8.1998, in the suit as originally instituted, they had subsequently moved an application for amendment so as to incorporate the amended prayer to set aside Ext.B-14 dated 29.8.1998 and the said application for amendment was allowed by

order dated 27.1.2000. It is pertinent to note that none of the defendants including the defendant church authorities had filed any objections to the said amendment application, nor had they filed their additional written statement to the amended plaint.

13. Sec.544 (3) of the Kerala Municipality Act, 1994, provides as follows:

“Sec.544. Institution of suits against municipal authorities, officers and other employees.-(1)...

xxx

xxx

xxx

(3) Every such suit shall be instituted within six months after the date on which the cause of action arose or in cases of continuing injury or damage, during such continuance or within six months after the causing thereof.”

14. The trial court in paragraphs 12 to 22 of the impugned judgment dated 29.9.2000 has proceeded on the premise as if the period of limitation is to be counted from the date of issuance of the last of the orders, which is sought to be set aside in the suit that was originally framed, viz., Ext.B-13 Government order dated 4.5.1998. On this basis, the trial court proceeded to determine whether the provision contained in Sec.544(3) of the Kerala Municipality Act is applicable in respect of a prayer to set aside an order issued by the Government and not by the Municipality. Accordingly, the trial court held that since the last of the orders that

is sought to be set aside, is an order issued by the Government and not by the Municipality, the provisions contained in Sec.544(3) of the Kerala Municipality Act would not apply, as the said provision would apply only in the case of institution of suits against the Municipal authorities, officers, other employees. The basis for this appears to be the wording in Sec.544 (1) of the Kerala Municipality Act, which is captioned as "Institution of suits against municipal authorities, officers and other employees" and sub section (1) of Sec.544 states that no suit shall be instituted against a Municipality or any other municipal authority or any officer or other employees of the Municipality or against any person acting under the order or direction of a municipal authority or any officer or employee of a Municipality in respect of any act done or purported to have been done, in pursuance of the said Act, etc. except in the manner provided therein. Therefore, the trial court had taken the view that it is only those suits, which are instituted against a municipality or any municipal authority or any officer or other employee of a municipality or against any person acting under order or direction of the Municipality or any officer of employee of the Municipality in respect of any act done or purported to have been in pursuance of

the said Act, that the bar of limitation as conceived under sub section (3) of Sec.544 would apply. On this basis, the trial court held that since what is challenged is Ext.B-13 dated 4.5.1998, is a Government order, which cannot be said to be a suit, which is instituted against a Municipality, municipal authority, officers and other employees of the Municipality, etc. as conceived in sub section (1) of Sec.544 and therefore the bar of limitation of six months mandated in sub section (3) of Sec.544 will not apply in the facts of this case. Accordingly, the trial court held that in such a case, what would apply is the residuary clause contemplated in Art.113 under Part X of the Limitation Act, 1963, which reads as follows:

“PART X – SUIT FOR WHICH THERE IS NO PRESCRIBED PERIOD

| Description of application                                                             | Period of limitation | Time from which period beings to run |
|----------------------------------------------------------------------------------------|----------------------|--------------------------------------|
| 113. Any suit for which no period of limitation is provided elsewhere in this Schedule | Three years          | When the right to sue accrues.       |

The trial court held that the three year period of limitation would expire only on 4.5.2001 (3 years from Ext.B-13 Government order dated 4.5.1998) and that since the suit was filed on 29.1.1999, the same is not barred by limitation, etc.

15. On consideration of the rival pleas in this regard this

Court is of the considered opinion that the reasonings given by the trial court in support of its conclusion that the suit is not barred by limitation, are not tenable or sustainable. Going by the amended prayer in the suit, the prayer is to set aside Ext.B-14 renewed permit dated 29.8.1998 issued by the Municipality. But more importantly it is to be noted that the impugned order passed by the Government as per Ext.B-13 was one rendered by the Government in exercise of the statutory powers conferred as per the Municipality Act. Therefore, it cannot be said that nobody has a case that the impugned order passed by the Government is one, which is totally outside and independent of the provisions of the Municipality Act and the rules framed thereunder. Therefore, since the basic impugned decision was the one rendered by the Municipality, the present suit is one which comes within the broad sweep of the suits as contemplated under Sec.544 of the Kerala Municipality Act. Hence the period of limitation of six months stipulated in Sec.544(3) of the Municipality Act would certainly apply to the facts of this case. But the trial court erred in holding the view that the period of limitation has to be counted from the date of issuance of Ext.B-13 G.O. dated 4.5.1998. As amendment of the prayer in this suit was

allowed, there was also an additional prayer to set aside Ext.B-14 renewed permit dated 29.8.1998 issued by the defendant Municipality. Therefore, the six months' period of limitation mandated in Sec.544(3) is to be counted from the date of the issuance of Ext.B-14 dated 29.8.1998. True that the said Ext.B-14 dated 29.8.1998 was not filed in the suit as originally instituted on 29.1.1999. It was only later on 27.1.2000 that the plea of amendment was allowed by the court below. Since none of defendants including the defendant church had filed any objections to the said plea for amendment and since there was no condition imposed by the court below while allowing the plea for amendment, the said amendment will relate back to the date of the original institution of the suit. Hence the amendment will relate back to the date of the original institution of the suit on 29.1.1999. The date of filing of the suit on 29.1.1999 is well within the six months' period from the date of issuance of Ext.B-14 dated 29.8.1998. Therefore, the suit is not barred by limitation. In view of this aspect, it is only to be held that though the reasonings rendered by the court below in holding that the suit is not barred by limitation are untenable, the conclusion therein cannot be faulted. Accordingly, it

is held that the present suit is not barred by limitation.

16. “1(b) Whether the suit is bad for want of statutory notice under Section 544 (1) of the Kerala Municipalities Act ?

Sec.544(1) of the Kerala Municipality Act, 1994 reads as follows:

“Sec.544. Institution of suits against municipal authorities, officers and other employees.-(1). No suit shall be instituted against a Municipality or any Municipal authority or any officer or other employee or a Municipality or against any person acting under the order or direction of a Municipal Authority or any officer or employee of a Municipality in respect of any act done or purported to have been done, in pursuance of this Act or any rule, regulation or bye-law made thereunder until the expiration of two months after notice in writing to the Municipality and, in the case of such officer, employee or person, unless notice in writing has also been delivered to him in person or at his office or place of residence, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation, claimed and the name and place of residence of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered.

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17. True that the Division Bench of this Court as per Ext.B-17 judgment dated 9.11.1998 had granted liberty to the plaintiffs herein to institute a civil suit in respect of their grievances. But this was subject to the condition that the appellants therein should institute the civil suit immediately. It is also specifically ordered therein that the appellants therein/plaintiffs herein should give advance notice of filing the suit and the interlocutory application thereto, to contesting respondents 4 and 5 therein (appellants herein/church authorities concerned). This appears to be

because, even as per the case set up by the appellants, the church authorities were proceeding with the construction and therefore this Court specifically wanted that advance notice of the filing of the suit as well as the interlocutory application therein should be served to the church authorities concerned. A Division Bench of this Court had also dispensed with notice under Sec.80(1) of the CPC to the State Government and the Pathanamthitta Municipality. It is to be noted that though Ext.B-14 dated 29.8.1998 was issued much before the date of institution of O.P.No.17816/1998 on 15.9.1998, it is against the judgment in that O.P. that the plaintiffs herein had filed W.A.No. 2063/1998. The prayers in O.P.No.17816/1998 in the matter of quashment were confined only to Ext.B-12 herein (the District Collector's proceedings dated 16.7.1996) and Ext.B-13 (Government order dated 4.5.1998) alone and there was no prayer in that O.P. to set aside Ext.B-14 herein dated 29.8.1998, though the same was issued prior to the institution of that Original Petition. Therefore, the liberty granted to the appellants therein/plaintiffs herein is only in respect of the prayers sought for in that Original Petition. It is not as if the plaintiffs are precluded from incorporating any other challenge. But the scope and width of the benefits and concessions

granted by the Division Bench of this Court as per Ext.B-17 judgment cannot be enlarged to the detriment of the defendants. It has come out in evidence that the advance notice of the filing of the suit and on the interlocutory application of the suit was not given to the defendant church authorities and that they had secured the said notice only through the due court process. Therefore, there has been non-compliance of the strict condition imposed by the Division Bench of this Court as per Ext.-17 judgment. The benefit of waiver of statutory notice to the Government and the Pathanamthitta Municipality can be only in relation to the prayers as projected in those writ proceedings viz., as against Ext.B-12 herein and Ext.B-13 herein. The benefit of waiver notice as granted in Ext.B-17 judgment cannot enure to the benefit of the plaintiffs herein as far as their amended challenge as against Ext.B-14 herein is concerned.

18. By the aforestated amendment of the plea incorporated to challenge Ext.B-14 dated 19.8.1998, the scope and width of the benefits and concessions granted by the Division Bench will otherwise be enlarged and therefore it cannot be invoked to the detriment to the defendants.

19. There is yet another perspective in the matter. Ext.B-17 judgment was rendered on 9.11.1998 directing the appellants therein to immediately set in motion the suit before the civil court concerned. The plaintiffs had chosen to file a suit only on 29.1.1999 and that too, without any advance notice of the filing of the suit and the interim application for injunction, to the defendant church authorities. The notice period contemplated in Sec.544(1) of the Act is two months. Even if the plaintiffs had issued the notice as contemplated under Sec.544(1) to the Municipality Act within two weeks from the date of the pronouncement of Ext.B-17 judgment (9.11.1998), still the plaintiffs could have easily filed such suit before the expiry of six months from the date of Ext.B-14 dated 29.8.1998, viz., 28.2.1999. Therefore, prima facie the contention of the learned counsel for the appellants herein that the plaintiffs cannot seek the benefit of waiver of statutory notice under Sec.544 (1) of the Municipality Act on the basis of Ext.B-17 judgment appears to be tenable. However, the learned counsel appearing for the respondents/plaintiffs herein would urge that this objection based on want of notice under Sec. 544(1), could have been taken only by the respondent Municipality and not, at any rate, by

the defendant church authorities. It is further pointed out by the learned counsel appearing for the plaintiffs that the Municipality has not cogently and precisely pleaded any such objection in the written statement and that what has been pleaded in paragraph 3 of the defendant Municipality's written statement dated 3.6.2000 filed in the suit is to the following effect:- *"The suit is barred by Section 544 of the Municipalities Act. The suit is to set aside resolution No.7 dated 24.12.1990, which is barred by limitation as the cause of action has arisen on 29.12.1990. So on these grounds the suit has to be dismissed in limini"*. Therefore, it was contended that there is no specific and precise objection that the suit is bad due to want of statutory notice as contemplated under Sec.544(1) of the Act and that what is objected to only the plea of limitation contained in Sec.544(3) of the Act. It is accordingly contended that since the defendant Municipality has not precisely and clearly raised any such objection regarding want of notice under Sec.544(1), it is only to be held by this Court that they have waived their objection thereto and that it is perfectly competent for a public authority like the State Government or the Municipality to waive their objection in the matter of statutory notice as contemplated under Sec.80(1) of the CPC or any other special enactment as the

one in the Kerala Municipality Act, etc.

20. On consideration of the rival plea in this regard, this Court is of the considered opinion that final opinion on the merits of the issue, as dealt with hereinabove, need not be rendered by this Court in this case, as the defendant Municipality has not properly and cogently pleaded their objection in the written statement in the matter of lack of statutory notice under Sec.544(1) of the Municipality Act. Accordingly, it is held that even if the rigour of Sec.544(1) is to be applied in the facts of this case, the defendant Municipality is treated to have waived their objection thereto. In view of this aspect, it is only to be held that the suit cannot be said to be bad on this count. The question is accordingly answered.

21. 1(c). Whether the suit to the extent it involves the cause of action for public nuisance is barred due to non compliance of the provisions contained under Section 91 of the CPC?

As rightly held by the lower appellate court in paragraph 24 of the impugned judgment dated 20.3.2004 in A.S.No.23/2003, a reading of the plaint clearly indicates that the grievance voiced by the plaintiffs are not only in respect of private nuisance but also in

respect of public nuisance. It is pointed out by the plaintiffs in the plaint averments that the wells and streams which are the drinking source of the inhabitants of the locality will all be affected by the pollution that may be caused if the cemetery allowed to function and that the seepage and leakage from the cemetery will be a threat to the well being of the peaceful life of the inhabitants of the locality, etc. It is admitted case of the plaintiffs that the construction of the cemetery has not been completed in its entirety and that thus the actual functioning of the vault type cemetery has not been commenced. The plaintiffs only apprehend that pollution and other problems would be caused if the cemetery is allowed to function. It is to be noted that the plaintiffs or any one can claim that they have actually suffered damage or injury if the actual functioning of the cemetery had commenced. But, certainly, the plaintiffs are entitled to raise their grievance if they have a justiciable cause of action of apprehended private nuisance. As the functioning of the cemetery has not been actually commenced, even the allegation regarding the public nuisance is the apprehension of the plaintiffs that public nuisance would be caused to the inhabitants of the locality as a whole. Therefore, it is to be examined as to whether the bar under

Sec.91 of the CPC would apply to the extent the suit involves allegations regarding public nuisance apprehended by the members of the locality. In this regard, it would be pertinent to note the relevant provisions contained under Sec.91 of the CPC which provides as follows:

“Sec.91:Public nuisances and other wrongful acts affecting the public.–(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted–

(a) by the Advocate–General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.”

Therefore, going by the mandate of sub–section (1) of Sec.91 of the CPC, the plaintiffs were legally obliged to secure leave of the court as contemplated in that provision before instituting the suit to the extent it involves public nuisance or other wrongful act affecting or likely to affect the public. It is admitted case that the plaintiffs have not obtained leave of the court as mandated under Sec.91 of the CPC. It is also to be noted that sub section (2) of Sec.91 expressly declares that the said provision of Sec.91 does not limit or otherwise affect any right of suit, which may exist independently of

its provisions. It is by now well established, as held in the rulings as in Municipal Board, Mangalaur v. Mahadeoji Maharaj, reported in AIR 1965 SC 1157, etc., that any person, who has suffered special damage on account of public nuisance can bring a suit without complying with the formalities of sub section (1) of Sec.91. But in the instant case, it is the admitted case of both parties that the construction of the open vault cemetery in question has not been completed in its entirety and that in view of the interim injunction passed, the actual functioning of the vault type cemetery has not yet commenced. Therefore, even the plaintiffs do not have a case that they have actually suffered any special damages on account of the pollution or other problems caused by the actual functioning of the cemetery. Therefore, the plaintiffs cannot also avail of the benefit of sub section (2) for any alleged public nuisance, which has actually resulted in special damage suffered by them on account of such public nuisance. Therefore, it is held that the suit to the extent it alleges the cause of action of public nuisance is not maintainable as the leave of the court was not secured as contemplated under Sec.91(1) of the CPC before institution of the suit. However, it is to be held that this will not in any way preclude this Court from

adjudicating on the averments and allegations of the plaintiffs regarding the private nuisance apprehended by them on account of the proposed functioning of the vault type cemetery to the extent it detrimentally affects them.

22. (i). Was not the suit barred by the Principles of Res judicata and constructive res judicata in view of the judgments and decrees as per Exts.B-5 to B-8?

The trial court in the impugned judgment dated 29.9.2000 has held that the principles of res judicata and constructive res judicata cannot be a bar in the institution of the present suit and has held fully in favour of the plaintiffs in that issue. However, the lower appellate court has clearly held that the principles of res judicata and constructive res judicata will be a bar in the institution of the suit primarily based on Exts.B-7 and B-8 judgment and decree in O.S.No.282/1991. On a perusal of the conclusive finding of the lower appellate court in paragraphs 14 to 19 of the judgment dated 20.3.2004 and on a consideration of the rival submissions made in that behalf, this Court is in full agreement with the considered views rendered by the lower appellate court that the bar of res judicata will apply in the facts and circumstances of this case. Though there is nothing in the judgment and decree in O.S.No.282/1991 (as per

Exts.B-7 & B-8) to indicate that the suit was laid in a representative capacity and no materials were produced by the appellants herein before the trial court to show that there was any newspaper publication regarding the institution of the prior suit in O.S.No.282/1991 as envisaged under Order I Rule 8 of the CPC, the appellants herein had produced original of the newspaper publication in that regard in respect of the institution of the suit O.S.No.282/1991 before the lower appellate court. The newspaper so produced before the lower appellate court is part of the records called for by this Court. The original of the said newspaper publication dated 11.9.1991 relating to the institution of O.S.No. 282/1991 which was filed before the Munsiff Court, Pathanamthitta reads as follows:

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“(Court Publication  
Under Order I Rule 8  
Civil Procedure Code)  
Before The Vacation court  
(District Court)  
Pathanamthitta  
(To be filed before the  
Munsiff's Court  
Pathanamthitta)

OS.No.282 of 1991

Plaintiffs–St.Mary's Orthodox  
Church, Vettipprom represented  
by the Vicar Fr. James.E.Mathew  
and another.

Defendants–N.Abdul Rahiman

and Seven others.

Be it known to all that the above plaintiffs have filed the above suit against the defendants for an injunction restraining the defendants from obstructing the plaintiffs in constructing a vault type concrete cells in the 25 cents in Survey No.143/8 of the Pathanamthitta village and for recovering damages amounting to Rs.10000. The defendants are sued in representative capacity representing the General Public of the Pathanamthitta Municipal area. If any person desire to get impleaded as defendants should appear before the Munsiff's Court, Pathanamthitta on date 31-10-1991 to which the case stated posted.

By order of the Court,  
Plaintiffs Advocate  
(Sd) V.Pappy

Pathanamthitta,  
20-5-1991"

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It is clear from a mere reading of Ext.B-7 judgment in O.S.No. 282/1991 that there was clear averments in the plaint therein that the defendants herein (plaintiffs in O.S.No.282/1991) were represented in a representative capacity. As stated above, due newspaper publication was also effected in terms of the mandate contained under Order I Rule 8 of the CPC. Moreover, O.S.No. 282/1991 was filed by defendants 5 & 6 herein (St.Mary's Orthodox Church and its Trustee), who were the plaintiffs in O.S.No.

282/1991. The defendants therein were 1. N.Abdul Rahiman, Charivukalayil House, Nannuvakkadu Muri, Pathanamthitta; 2. V.V.Radhakrishnan Nambyathiri, Charivil House, Vettiprom Muri, Pathanamthitta Village; 3. Rajan, S/o.Kunjukunju, Velanparambil House, Vettiprom, Pathanamthitta Village; 4. S.M.Meera Sahib, Chavadithekkethil House, Azhoor Muri, Pathanamthitta Village; 5. Sivadasan, S/o.Sivan, Velanparampil House, Vettiprom Muri, Pathanamthitta Village; 6. Krishnankutty, -do-; 7. Sunny, S/o.Raman, Thomacheril House, Vettiprom Muri, Pathanamthitta Village and 8. Muhammed Musthafa, S/o.Muhammed Kannu, Velenparampil House, Vettiprom Muri, Pathanamthitta Village. It has been specifically averred that the defendants herein were represented in a representative capacity. The prayers in the said suit were for permanent prohibitory injunction restraining the defendants from obstructing plaintiffs from constructing vault type reinforced concrete cell in the plaint schedule property and for damages. The lower appellate court primarily relied on the ruling of this Court in the case Soman v. Appukutty reported in AIR 1988 Ker 212 = 1987 (2) KLT SN 87 = 1987 KHC 738. In paragraphs 7 to 11 thereof, this Court in the said ruling has held as follows:

'7. In this case the plaintiff sued the defendants in a representative capacity representing the Hindus of the locality having common interest so far as the temple and premises are concerned. Court granted permission for that purpose and as per orders of court public advertisement was made as provided In O.1, R.8.O.1,R.8(3) provides that any person on whose behalf, or for whose benefit, a suit is instituted, or defended, may apply to the court to be made a party to such suit. It is true that no interested person got himself impleaded as a defendant pursuant to the publication. But there is no case that the defendants were not defending the suit in a representative capacity. Sufficient safeguards are made in O.1, R.8(4) and (5) to safeguard the interest of such persons who do not join as parties in response to the publication. Sub-rule (6) of O.1, R.8 says that decree passed in such a suit shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted or defended, as the case may be. To such a suit explanation 6 to S.11 of the Civil P.C. will apply. The explanation says that where persons litigate bona fide in respect of a public right claimed in common for themselves and others, all persons interested in such right shall be deemed to claim under the persons so litigating. A decision in a representative suit after notice or publication under O.1,R.8 as in any other case, operates as re judicata against all the interested persons when it is given on the merits in so far as the rights litigated are common to the persons suing or being sued and those whom they represent. This result is statutory even if "the judgment does not specify in so many words that it is rendered against the defendants in a representative capacity unless there are indications in the judgment to show that the decision is personal against the defendants alone and not against anybody else having common interest. Otherwise the very object and purpose of the formalities observed under O.1, R.8 and the very purpose of the litigation itself will be defeated. Here nobody has any case that the suit was not prosecuted against the defendants or not defended by them in a representative capacity or that in deciding the suit the court only considered the rights of the defendants and not of other persons whom they represented. In such a situation even if the judgment does not specify in the decretal portion that the suit is decreed against the defendants in their representative capacity, the statutory effect in view of O.1, R.8(6) is that it is binding on all persons for whose benefit the suit was defended.

8. In this case the court which passed the decree has specified in so many words in the impugned order that the decree was passed in a representative capacity against the defendants and that happened in the decree is only an accidental omission. Plaintiffs also take the same stand. No person whose interest was represented by the defendants came forward to contend that the decree is not binding on them. The objection is only by the defendants who are at any rate bound by the judgment and decree. The bona fide object is evident. It

is only to see that the decree is flouted through somebody who is interested but not an eo nomine defendant in the case.

9. There cannot be any dispute regarding the fact that the court has not only the right but also the duty to amend the decree so as to bring it in conformity with the judgment. That is necessary in the interest of doing justice to the parties. It may also be true that if the decree is in conformity with the judgment it cannot be amended even in cases of clerical or arithmetical mistakes or omissions or errors/arising therein from any accidental slip or omission in the judgment unless the judgment is also corrected. At the same time in spite of the errors or omissions if the factual and statutory effect of the judgment is otherwise that effect must reflect in the decree. So far as this case is concerned there was no error or mistake in the judgment. The omission in the decretal portion of the judgment to specify that it is against the defendants in their representative capacity was against the scope of the suit and the discussions and conclusions in the body of the judgment. In spite of such an omission, in the absence of anything to the contrary in the judgment, by the operation of O.1, R.8(6) the judgment was against all persons on whose behalf the suit was defended. The decree ought to have been drafted accordingly. It is only an accidental slip or omission arising from a clerical mistake which the court was entitled to correct under S.152 of the Civil P.C.

10. The decision in Master Construction Co.(P) Ltd. v. State of Orissa, AIR 1966 SC 1047 was relied on by the counsel in this respect. That decision said:

*“An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification, namely that such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the court. The obvious instance is a slip or omission to embody in the order something which the court in fact ordered to be done. This is sometimes described as a decretal order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. The cause for such a slip or omission may be the Judge's inadvertence or the Advocate's mistake. But however wide the said expressions are construed, they cannot countenance a re-argument on merits on questions of fact or law, or permit a party to raise new arguments which he has not advanced at the first instance”*

Even though that judgment was rendered on different provisions the principles could be accepted for our purpose also. Even then it will not in any way advance the contention of the revision petitioners. As held

by the Supreme Court the obvious slip or omission made by the court in this case is the slip or omission to embody in the decree something which the court statutorily ordered to be done by the judgment. Therefore, the amendment is competent under S.152 Civil P.C and no error of jurisdiction, illegality or material irregularity is involved.

11. Then the attempt was to contend that it was illegal or at least improper on the part of the Trial Court to have amended the decree when an appeal is pending against the same. There was no stay. Even taking for granted that there was stay against execution of the decree the pendency of an appeal will not in any way disentitle the Trial Court in amending the decree to make it in conformity with the judgment. It is true that the appellate Court can also amend the lower court's decree. Till that is done or till the Trial Court decree is superseded by or merged in the appellate decree the right of the Trial Court in amending the decree is not fettered. The position may be different when the appeal is disposed of and the decree of the Trial Court was superseded by or merged in the appellate decree. Such a contingency has not arisen here.'

On the basis of the legal principles laid down by this Court in Soman's case (supra) and on the basis of the aforestated aspects, the lower appellate court held that the trial court was not justified in holding in the impugned judgment that there was no evidence to show that O.S.No.282/1991 was laid in a representative capacity and accordingly, the lower appellate court held that Exts.B-7 & B-8 judgment and decree in O.S.No.282/1991 rendered by the Munsiff Court, Pathanamthitta will bind all persons similarly situated, more so, in view of the provisions contained in Explanation VI under Sec.11 of the CPC.

23. In order to ascertain the issues that have been conclusively decided in Ext.B-7/B-8 O.S.No.282/1991 it would be

profitable to make a reference to paragraph 7 of Ext.B-7 judgment which reads as follows:

“7. Issue No.2:- Admittedly plaintiff is entitled to construct cemetery provided there is valid sanction from the Municipality. Evidence of PW1 supported by Exts.A2 to A5 would show that so as to construct a vault type cemetery in plaint schedule property there is valid sanction. Defendants case is that the proposed construction is within the prohibited distance. But only vague averment is available. Admittedly no evidence has been adduced to prove that the proposed construction is within the prohibited distance. Exts.A3 to A7 would show that the defendants and their associates have interfered with the construction in several ways and as such the issue under consideration can only be answered against the defendants. Issue answered accordingly.”

Therefore, the validity of the permit/licence granted by the municipal authorities was a matter directly and substantially in issue in the the said suit. In fact, from a perusal of the appendix to Ext.B-7 judgment, it is seen that Ext.A5 produced therein is the proceedings No.B417917/96 dated 16.7.1996 of the District Collector, Pathanamthitta which is the impugned Ext.B-12 proceedings herein. The lower appellate court was fully justified in holding that there is definite finding in Ext.B-7 judgment in O.S.No. 282/1991 that the impugned licence and permission granted to the plaintiff therein, church authorities (appellants herein) are valid and that as far as the impugned plan and licence involved in O.S.No. 282/1991 are concerned, there is a specific finding that they have been properly granted and that they are valid. Accordingly, as

correctly held by the lower appellate court, the said decision cannot be re-agitated in the present suit and therefore the claim is barred by the principles of res judicata. In this view of the matter the contention of the learned counsel appearing for the plaintiffs herein that Ext.B-7 O.S.No.282/1991 was only a suit for injunction simplicitor where the limited question is only regarding the possession and that therefore the issue regarding the validity or otherwise or the grant of impugned licence and permission given by the statutory authorities concerned was neither agitated nor decided in the said suit, etc., is only to be repelled.

24. The 3<sup>rd</sup> defendant in Ext.B-7 O.S.No.282/1991 is one Sri.Rajan, who is none other than the husband of the 1<sup>st</sup> plaintiff herein (Thankamani Rajan). Incidentally it is also to be noted that the said Sri.Rajan was also the 2<sup>nd</sup> plaintiff in Ext.B5 O.S.No. 189/1991. The 1<sup>st</sup> defendant in Ext.B-7 O.S.No.282/1991 is also the 1<sup>st</sup> plaintiff in Ext.B-5 O.S.No.189/1991. Ext.B-5 suit O.S.No. 189/1991 was filed by those parties with the prayer that the defendants therein (Church authorities herein) be permanently enjoined from constructing cemetery for burial of dead bodies in the said property. O.S.No.189/1991 was dismissed as not pressed

with costs as can be seen from Ext.B-5 judgment dated 14.12.1994. Incidentally, it is also to be noted that since O.S.No.189/1991 was dismissed as not pressed without reserving any liberty the same would certainly operate as res judicata as against those parties. Further, it is also to be noted that the 4<sup>th</sup> defendant in O.S.No. 282/1991 (S.M.Meera Sahib) is the father of the 2<sup>nd</sup> plaintiff herein (Shahjahan). The 6<sup>th</sup> defendant (Krishnankutty) in Ext.B-7 O.S.No. 282/1991 is one of the persons about whose residence, reference is made mention in various proceedings of the statutory authorities concerned produced in this case. Though the newspaper publication was taken in respect of the proceedings in Ext.B-7 O.S.No.282/1991 as stated earlier hereinabove, no persons had got themselves impleaded in the said suit. Therefore, from an overall assessment of the facts and circumstances emerging in this case it can never be said that the plaintiffs in O.S.No.282/1991 have in any way colluded with any other defendants therein so as to get a favourable judgment and decree for them. The 1<sup>st</sup> defendant (N.Abdul Rahiman), 3<sup>rd</sup> defendant (Rajan), 4<sup>th</sup> defendant (S.M.Meera Sahib) 6<sup>th</sup> defendant (Krishnan Kutty), etc., are persons who were all vitally interested in the litigative fight and at least 1<sup>st</sup> and 3<sup>rd</sup>

defendants therein were the plaintiffs in O.S.No.189/1991 and 4<sup>th</sup> defendant therein is the father of the 2<sup>nd</sup> plaintiff herein and the 3<sup>rd</sup> defendant therein is the husband of the 1<sup>st</sup> plaintiff herein. Therefore, by no stretch of imagination can it be conceived that the plaintiffs in O.S.No.282/1991 had in any way collusively instituted O.S.No.282/1991. They were litigating bona fide and even newspaper publication under Order I Rule 8 of the CPC was also effected which was not duly taken note of by the trial court.

25. In the ruling rendered by this Court in Thankamma v. John reported in 2006 (2) KLT 221, this Court while construing the scope and ambit of Explanation VI of Sec.11 CPC, had held that it is necessary that the interest of the person concerned has really be represented by the other persons who were made parties to the suit and that the former's interest has been looked after in a bonafide manner by the other party/parties concerned. Explanation VI to Sec.11 CPC provides that where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of Sec.11 CPC, be deemed to claim under the persons so litigating. Explanation VI stipulates that the expression "between

the parties under whom they or any of them claim” occurring in Sec.11 CPC and it is stipulated therein that where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. So, if Explanation VI is attracted the bar of res judicata under Sec.11 would certainly apply. Accordingly this Court in Thankamma's case (supra) has held in paragraphs 11 to 14 as follows:

11. The question is whether the C.S.I.Church, who is the second petitioner in C.R.P.No.57 of 1994, can raise a contention that the decree is inexecutable in the facts and circumstances mentioned above. For dealing with this contention, let us assume that the Church was not a party to the suit. Explanation VI to S.11 of the Code of Civil Procedure provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of S.11, be deemed to claim under the persons so litigating. Explanation VI explains the expression “between parties under whom they or any of them claim” occurring in S.11 of the Code of Civil Procedure. If Explanation VI is attracted, the bar of res judicata under S.11 would apply. If the Church cannot put forward the contentions raised by the defendants in the present suit, in a suit instituted by or against the Church subsequently, on the ground that the bar of res judicata applies, it is a sure indication that the Church is bound by the decree and that the decree is executable against it. The contention of non-executability raised is only on the ground that the Church was not a party to the suit.

12. The other question which arises for consideration is whether Explanation VI to S.11 would be attracted if the Church as such was not made a party to the suit, but only the Vicar and Bishop were the parties to the suit, who put forward the title and possession of the Church in respect of the suit property. In *Singhai Lal Chand Jain v. Rashtriya Swayam Sewak Sangh, Panna & Ors.* (AIR 1996 SC 1211), the Supreme

Court dealt with a case where the decree passed in a suit for eviction on title filed against the Rashtriya Swayam Sewak Sangh through its Manager, President and Headmaster of a School, which is also a member of the Sangh, was contended to be a nullity and inexecutable. That contention was raised at the instance of the RSS Sangh, on the ground that the defendants in the suit were not competent to represent the Sangh, the Sangh being not a registered body, but composed of several members. The suit was not filed in a representative capacity against the defendants. The Supreme Court held thus:

*“10. Therefore, the respondents now claim under the same title in the previous suit and thereby they are bound by the decree. The doctrine of res judicata evolved the public policy to prevent trial of an issue twice over. It clearly applies to the facts of the case. Accordingly, they are precluded to raise objections on behalf of the Sangh by filing the objections.*

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*13. Thus it could be held that the Sangh having been duly represented in the previous proceedings and conducted the litigation on behalf of the Sangh bona fide and were unsuccessful in the suit, no one on behalf of the Sangh can lay any objection in the execution nor plead nullity of the decree. The doctrine of res judicata prohibited the members of the Sangh to obstruct the execution of the decree. The decree of ejectment binds every member of the Sangh and, therefore, the appellant is entitled to have the decree executed and possession taken.”*

The Supreme Court in RSS Sangh's case relied on the decision in Surayya Begum (Mst.) v. Mohd. Usman ((1991) 3 SCC 114), wherein it was held:

*“The principle of representation of the interest of a person, not impleaded by name in a judicial proceeding, through a named party is not unknown. A karta of a Joint Hindu Family has always been recognised as a representative of the other members of the Joint Hindu Family, and so has been a trustee..”*

13. In Amrit Sagar Gupta and others v. Sudesh Behari Lal & Ors. (AIR 1970 SC 5), the Supreme Court held:

*“6. It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. See Lalchand v. Sheogobind, ILR 8 Pat. 788 = (AIR 1929 Pat. 741); Ram Kishan v. Ganga Ram, ILR 12 Lah 428 = (AIR 1931 Lah. 559); Pirthipal Singh v. Rameshwar, ILR 2 Luck 288 = (AIR 1927 Oudh 27); Surendranath v. Sambhunath, ILR 55 Cal. 210 = (AIR 1927 Cal.*

870).

*7. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property, see Mulgund Co-operative Credit Society v. Shidlingappa Ishwarappa, ILR (1941) Bom. 682 = (AIR 1941 Bom. 385). See also Venkatanarayana v. Somaraju, AIR 1937 Mad. 610 (FB). It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent, the family effectively in a proceeding though he is not named as such, see Mani Sahoo v. Lokanath Mishra, AIR 1950 Ori. 140."*

14. To apply Explanation VI to S.11 of the Code of Civil Procedure, as held in RSS Sangh's case, it is necessary that the interest of the person concerned has really been represented by the other persons who were made parties to the suit and that the former's interest has been looked after in a bona fide manner by the other. If there is any conflict of interest between the persons who litigate and the persons on whose behalf they litigate or if there is fraud or collusion or if there is any malafide neglect to defend the case, the person who litigated on behalf of the other cannot be considered as a person who litigated a claim in common for himself and another. There is no case for the judgment debtors in C.R.P.No.57 of 1994 that they were not putting forward the rights of the Church. On the other hand, the stand taken by the judgment debtors would clearly indicate that they even now claim the property in question to be the property of the Church. There is no case for the second petitioner in C.R.P.No.57 of 1994, namely, the C.S.I. Church represented by Rev.Fr.Felix Mathew, that there was any collusion between the plaintiff in the suit and the Vicar and Bishop of the C.S.I. Church, who were shown as defendants 3 and 4 in the suit. There is also no case for the contesting respondents in the execution petition that the right, title and interest put forward by the defendants in the suit are different from those being put forward by the Church. There is no conflict of interests between the defendants in the suit and the Church. There is also no case that the defendants in the suit were negligent in prosecuting the suit. It is to be noted that an Appeal and Second Appeal were filed by the defendants challenging the judgment and decree of the trial court, which would clearly indicate that there was no neglect on the part of the defendants in the litigation. The irresistible conclusion is that Explanation VI to S.11 is attracted. If so, the judgment debtors or any other person representing the Church are not entitled to contend that the decree is inexecutable.'

In the said case, the Churches of India (CSI) was not as such made as a party to the suit. But, only the Vicar and Bishop were made as

parties to the suit to put forward the title and possession of the Church in respect of the suit property. This Court after referring to the decisions of the Apex Court as in Singhai Lal Chand Jain (dead) v. Rashtriya Swayam Sewak Sangh, Panna and Ors. reported in AIR 1996 SC 1211 paragraphs 10-13, Surayya Begum (Mst.) v. Hohd.Usman reported in (1991) 3 SCC 114 and Amrit Sagar Gupta and others v. Sudesh Behari Lal & Ors reported in AIR 1970 SC 5 has held that to apply Explanation VI to Sec.11 CPC, as held in RSS Sangh's case (supra), it is necessary that interest of the person concerned has really been represented by the other persons who were made parties to the suit and that the former's interest has been looked after in a bonafide manner by the other. That if there is any conflict of interest between the persons who litigate and the persons on whose behalf they litigate or if there is fraud or collusion or if there is any malafide neglect to defend the case, the person who litigated on behalf of the other cannot be considered as a person who litigated a claim in common for himself and another. Accordingly, this Court held therein that there is no case for the judgment debtors therein that they were not putting forward the rights of the Church and on the other hand, the stand taken by

them would clearly indicate that they even now claim that the property in question is that of the Church and there was no case for the revision petitioners therein that there was any collusion between the plaintiff in the suit and the contesting defendants therein and there is also no case that there is any conflict of interest between the parties in the suit and the Church, who were not made party to the suit and there is no case that the defendants in the suit were negligent in prosecuting the case. Accordingly, this Court held that the ingredients of Explanation VI to Sec.11 of the CPC is attracted and held that the judgment debtors or any other person representing the Church therein are not entitled to contend that the decree is inexecutable, etc.

26. In the case *Singhai Lal Chand Jain (dead) v. Rashtriya Swayam Sewak Sangh, Panna and Ors.*, reported in AIR 1996 SC 11 = 1996 KHC 760, the Apex Court dealt with a case where the suit was laid against the 'RSS Sangh' represented by its Manager and two others in a suit for eviction and three of them had jointly filed a written statement with defence available to them. After framing the appropriate issues, the trial court accepted the plea of the defendants and dismissed the suit. On appeal when the correctness

thereof was canvassed the respondent defended the action. Therein, the High Court on consideration of the evidence did not accept the plea of the Sangh and accordingly granted a decree, against which the Sangh preferred an appeal by way of Special Leave before the Apex Court and leave was refused by the Apex Court. On the initiation of the execution proceedings the defendants had filed objections contending that RSS Sangh was not a registered body but composed of several members and that the appellant had not followed the procedure under Order I Rule 8 of the CPC and therefore the decree was a nullity and Sec.11 of the CPC is not a bar. The Execution Court upheld the objection and dismissed the execution petition. Accordingly, in revision, the High Court confirmed the dismissal of the Execution Petition. The challenge as against the same was considered by the Apex Court in the aforesaid ruling. The Supreme Court held that on going by the facts and circumstances which led to the conduct of the proceedings in that suit as well as in the appeal and in the Special Leave thereof it cannot be held that it was a collusive suit or that there was any negligence traceable so as to treat the decree as a nullity. That the President of the Sangh and Manager of the Sangh and members

have duly represented the Sangh and defended the suit for the benefit of all the persons interested in the Sangh and accordingly the issue that arose was as to whether the decree operates as a res judicata. After taking note of the provisions contained in Explanation VI to Sec.11 of the CPC, it was held in paragraph 10 thereof that respondents therein claimed under the same title in the previous suit and thereby they are bound by the decree and the doctrine of res judicata evolved the public policy to prevent trial of an issue twice over. It was accordingly held therein that rigour of Explanation VI of Sec.11 CPC would apply in the facts of the case and accordingly held that the bar of res judicata would apply therein, etc. On a consideration of the facts and circumstances of this case, it cannot be held that the institution and conduct of the proceedings in O.S.No.282/1991 was in any way a collusive litigation between the plaintiffs therein and the defendants therein. Some of the close family relatives of the previous defendants are the plaintiffs in the present litigation. Some of the parties in the first round of litigation in O.S.No.189/1991 are also the defendants in O.S.No.282/1991. Therefore, it cannot be hold that there was any lack of vigilance on their part or that there was any collusion

between the parties. In the light of these aspects, this Court is of the considered opinion that the view rendered by the lower appellate court that the bar of res judicata would apply in the instant case is fully correct. It is to be noted that once the lower appellate court has conclusively held in paragraph 19 of the impugned judgment that the bar of res judicata would apply in favour of the defendant Church authorities in the instant case, then it was not proper on the part of that court to have gone into other issues so as to hold against defendant Church authorities so as to confirm the impugned judgment and decree of the trial court. Since the appellate court has gone into those issues and as other questions have been framed in this appeal, this Court is also examining the other questions of law framed in this case.

27. 4. Is there any distance rule for construction of a vault type cemetery in a Municipality particularly in view of the findings in Ext.B-15 judgment.

The initial application for permit to establish an open type burial ground in the property was submitted by the defendant Church authorities before the Municipality on 29.4.1987. It was later, that pursuant to the recommendation of the District Medical Officer that the Municipality as per Ext.B-19 letter dated 14.5.1990 had

informed the defendant Church authorities that their application for vault type cemetery could be considered and if Church authorities are willing for such course of action they may submit an application in that regard. It was accordingly that the defendant Church authorities had submitted application on 13.6.1990. Pursuant thereto the Municipality as per resolution dated 29.12.1990 referred to in Ext.B-1 had decided to grant permission to the Church authorities for establishing a vault type cemetery in the property. This resulted in Ext.B-3 order dated 13.3.1991 and consequently Ext.B-4 licence/permit dated 27.3.1991 being issued by the Municipality in the matter of permission to the Church authorities for construction of a vault type cemetery. All these proceedings had taken place during the subsistence of the Kerala Municipalities Act, 1960. Therefore, the issue as to whether there is any distance prohibition rule for establishment of vault type cemetery is to be examined with reference to the provisions contained in the Kerala Municipalities Act, 1960 and the Kerala Municipality Building Rules, 1984 framed thereunder. Sec.321 of the Kerala Municipalities Act, 1960 is the relevant provision in question which deals with licensing of places for disposal for the dead and it reads as follows:

“Sec.321. Licensing of places for disposal of the dead:—

(1) No new place for the disposal of the dead, whether public or private, shall be opened, formed, constructed or used unless a licence has been obtained from the council on application.

(2) Such application for a licence shall be accompanied by a plan of the place to be registered showing the locality, boundary and extent thereof, the name of the owner or person or community interested therein, the system of management and such further particulars as the council may require.

(3) The council may—

(a) grant or refuse a licence, or

(b) postpone the grant of a licence, until objections to the site have been removed or any particulars called for by it have been furnished.”

Therefore, no express provisions are incorporated in the plenary provision of law as contained in Sec.321 of the Kerala Municipalities Act, 1960 stipulating any prohibitory distance in the matter of establishment of any type of cemetery or burial ground. As a matter of fact, Sec.321 of the Kerala Municipalities Act does not even make any differentiation between open burial ground/cemetery or vault type cemetery.

28. Chapter V of the said Rules deals with *Special provisions in cases of Certain Occupancy Groups* and Rule 36(10) of Chapter V of the Kerala Buildings Rules, 1984 deals with *Crematoria, burning and burial grounds*. Sub rule (2) of Rule 36 deals with open spaces of occupancies contemplated under Sec.36 and Rule 36(2) reads as

follows:

“Rule 36. Industrial Occupancy.–(1) ....

(2) Open spaces.– Notwithstanding anything contained in the provision of sub-rule (3) of rule 15, all buildings with built up area exceeding 75 square metre or the power used exceeds 30 H.P. and/or the number of workers exceed 20 shall have open spaces not less than those prescribed below

|     | Open spaces              | Value       |
|-----|--------------------------|-------------|
| (a) | Front yard               | 7.5 metres  |
| (b) | Side yard on either side | 3.0 metres  |
| (c) | Rear yard                | 7.5 metres. |

Provided that sub rule (5) of rule 15 shall apply for all buildings exceeding 10 m. in height.

Provided further that accessory uses may be permitted within the open spaces specified above subject to the provision of sub rule (7) of rule 15 which would operate independently for all accessory uses of buildings and provided further sub rule (2) of rule 17 would operate for all buildings taken collectively.”

Therefore, from a perusal of the aforestated provisions in Sec.321 of the Act and the provisions contained in Rule 36 of the Kerala Buildings Rules, it is amply clear that there is no express provision therein which stipulates any prohibitory distance in the matter of establishment of any type of burial ground or cemetery in a Municipality. There is no explicit provision contained either in Sec.321 or in Rule 36(10) for establishment of a cemetery. However, it is to be noted that the provisions contained in the rules for establishment of crematoria, burning and burial grounds are in sub

rule (10) of Rule 36, which is part of Rule 36. Sub rule (2) of Rule 36 explicitly stipulates about open spaces, which is applicable for all types of occupancies envisaged in Rule 36. Therefore, the said prescription for open spaces in Rule 36(2) would certainly apply for Rule 36(10) as well, as otherwise to hold that there is no prescription at all for open spaces in the matter of establishment of crematoria, burning and burial ground in Rule 36(10) would result in unreasonable consequences. Therefore, it is only to be held that though Rule 36(2) may explicitly deal with occupancies like factories etc. referred to therein, the prescription for open spaces so made in sub rule (2) of Rule 36 should be held to apply in the case of all occupancies covered by Rule 36 as a whole, including the one envisaged in sub rule (10) of Rule 36.

29. This Court in Ext.B-15 judgment dated 16.9.1998 in O.P.No.17816/1998 has clearly held in paragraph 4 thereof that it is pertinent to note that there is no prescribed distance for locating the cemetery under the Municipalities Act. However, on this aspect of the matter, this Court is inclined to accept the contention raised by the learned counsel appearing for the plaintiffs that the said judgment stands merged in Ext.B-17 judgment of

the Division Bench of this Court in W.A.No.2063/1998 dated 9.11.1998 (which arose out of O.P.No.17816/1998). The Division Bench in the said Ext.B-17 judgment has clearly held that the grievance as the one voiced in the Writ Petition should be adjudicated in a properly constituted civil suit, etc. and further that on institution of such civil suit, the civil court concerned shall dispose of the suit and interlocutory applications, if any, filed, without being influenced by any of the findings rendered by this Court in these proceedings and shall dispose of the same on its own merits. Therefore, the Division Bench has clearly held that the disposal of the suit shall be totally uninfluenced or untrammelled by any of the findings rendered by this Court in those writ proceedings, which includes not only Ext.B-17 judgment, but also Ext.B-15 judgment in O.P.No.17816/1998. Therefore, the said issue has to be decided uninfluenced and untrammelled by any of the findings in those judgments. Though the prescription for the open spaces for establishment of an open type cemetery stands regulated by Rule 36 (2), there is another crucial aspect of the matter. Rule 36(10) inter alia clearly stipulates as follows:

“Rule 36(10) Crematoria, burning and burial grounds.– .....  
Further, the Authority shall prohibit certain burning or burial grounds

located in certain areas which in their opinion is dangerous or likely to be dangerous to the health and well being of the persons living in the neighbourhood or to be offensive to such persons.....”

Therefore, a statutory discretion is conferred on the municipal authority to prohibit certain burning and burial grounds located in certain areas, which in the opinion of the Municipal authorities, is dangerous or likely to be dangerous to the health and wellbeing of the persons living in the neighbourhood or to be offensive to such persons. Though the discretion is cast in wide terms, there has to be reasonableness and certainty in the exercise of such statutory discretion as otherwise subjective consideration may vary for municipalities and the perspectives may also differ from time to time. This may not be conducive to public interest, which may demand that there should be certainty in such stipulations regarding prohibitory distance.

30. In exercise of the powers conferred under the provisions of the Kerala Panchayats Act, 1960, the Government has framed the Kerala Panchayats (Burning and Burial Grounds) Rules, 1967, which has come into force on 12<sup>nd</sup> September, 1967 and the said Rules were in force at the relevant time as far as this case is concerned. Rule 5 of the said Panchayats Rules provides as follows:

“Rule 5.No new burial or burning ground to be located within

50 meters of a dwelling place.– No burial or burning ground which is not in existence at the commencement of these rules shall be located within a distance of fifty meters from any human habitation.

Provided that in the case of concrete vaults the distance shall be twenty five meters from any human habitation.

Explanation.– The date of application for licence shall be the crucial date and not the date of sanction for taking into account the existence of human habitation within the limit.”

It appears that the first proviso to Rule 5 was incorporated by way of an amendment to the Rule as per SRO No.706/1978 in Gazette of 18.7.1978. The first proviso stipulates that in the case of concrete vaults, the distance shall be twenty five metres from any human habitation, whereas the operative portion of Rule 5 stipulates that the said prohibitory distance in the case of all other burning or burial grounds shall be 50 meters from any human habitation.

31. Thus, unlike the Kerala Municipalities Act, the Kerala Panchayats (Burial and Burning Grounds) Rules, framed under the Kerala Panchayats Act, 1960, explicitly makes a differentiation between the vault type cemetery and other types of burial grounds and the prohibitory distance in the case of concrete type vault is 25 meters from any human habitation, whereas in the case of other types of burning and burial grounds, it shall be 50 meters. True that

the observations of this Court in the case St. Joseph's Church, Poonkunnam v. Velu, reported in ILR 1989(1) Ker. 397, p. 416, may not strictly amount to ratio decidendi of the said decision. From a reading of the said judgment it is not very clear whether the disputed cemetery therein was an open type cemetery or vault type cemetery. The entire merits of the matter are discussed and the same is concluded in para 44 thereof, on page 413 of the ILR Report. It is clear from the concluding sentence in para 44 on page 413 of the Report that the second appeal is dismissed. Thereafter, paragraph 45 thereof clearly says that those observations are made after having dealt with the main issue. The discussion from paragraphs 45 to 51 thereof appears to be in respect of certain allegations that some of the documents in the custody of the Municipality therein were manipulated or altered so as to mislead the court and as to the necessity for taking action as against the erring municipal officials concerned. Moreover, it is clearly stated in paragraph 45 that the observations thereafter are to deal with subordinate contention after having dealt with the main issue. Therein, incidentally in paragraph 50, this Court refers to the provisions contained in Rule 5(1) of the Kerala Panchayat Burning

Ground Rules, 1967, wherein a minimum distance of 25 meters from any human habitation had been mandated. But this Court is of the considered opinion that even if the said observations are not treated as ratio decidendi of the said ruling, much persuasive value should be given to those observations by this Court. Therefore, this Court can certainly take into consideration the said observations made by this Court as an aid for guidance of this Court to determine the vexed issue. Therefore, this Court is fully inclined to take the aid of the judicial wisdom flowing from those observations made by this Court therein and this Court is of the considered opinion that the statutory guidelines contained in Rule 5(1) of the said Panchayat Rules, should certainly be taken as relevant and rational guidelines for the municipal authorities concerned in exercise of their discretion in stipulating a minimum prohibitory distance as conceived. This is because, the rule as stated above, is couched in wide terms and it is really necessary in public interest that such discretion is exercised by the Municipality in a reasonable and fair manner so as to avoid unnecessary complaints of either the applicants or other objectors. In this context it would be apposite for this Court to refer to the observations of the Apex Court in the

case *Asha Sharma v. Chandigarh Administration* reported in JT 2011 (10) SC 82 = 2011 (3) KLT Suppl. 23(SC). In para 11 thereof, it was held that any action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules and even if no rules are in force to govern executive action, still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. That arbitrariness in State action, even where the rules vest discretion in any authority, has to be impermissible and the exercise of discretion, in line with principles of fairness and good governance is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature and the standard of fairness is also dependent upon certainty in State action, that is, the class of persons, subject to regulation by the Rules concerned, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Therefore, taking guidance from the spirit of the observations made by this Court in *St. Joseph Church's case supra* and by the Apex Court in *Asha Sharma's case supra*, this Court is inclined to take the considered view that statutory guidelines engrafted in Rule 5(1) of the Panchayat Rules

should be the reasonable basis for the exercise of the statutory discretion of the municipal authority in the matter of minimum prohibitory distance for establishment of burning grounds, burial grounds including vault type cemetery. Therefore, the minimum prohibitory distance in the case of establishment of a vault type cemetery in a Municipality should be 25 meters from any human habitation and in the case of other burning or burial grounds, the same shall be 50 metres as engrafted in the aforestated statutory provisions. But this is not the end of the matter, as both the courts below have committed a grave illegality in not noting the crucial provision contained in the explanation attached to Rule 5(1) of the Kerala Panchayats Rules quoted supra. The explanation engrafted under Rule 5 of the Kerala Panchayats (Burning and Burial Grounds) Rules, 1967, clearly mandates that the date of application for licence shall be the crucial date and not the date of sanction for taking into account the existence of the human habitation within the limit.

32. The Full Bench of this Court in the case Surendran v. District Collector reported in 1999 (3) KLT 22 (F.B), para 9, has, inter alia, clearly held therein that for the purpose of taking into

consideration the human habitation, the date of application is considered to be the crucial date, ie. any construction or obstruction at the site of the cemetery made after the date of the application will not be considered as genuine or bona fide. Following the legal principles laid down in the aforestated Full Bench ruling, this Court in the case Thomas Mathew v. Secretary to Government reported in 2004 (2) KLT S.N.50 (C.No.56) has clearly held that what the authority ought to have considered is not whether there was any other property in the objectionable distance, but whether there was human habitation within the objectionable distance and the crucial date is the date of application as mandated in the explanation under Rule 5 of the Kerala Panchayats (Burning and Burial Grounds) Rules. It was held therein that for the only reason that there are at present human habitations in the neighbourhood and that too, in the objectionable distance, the licence cannot be refused and the crucial question is whether there were human habitations within the objectionable limits at the time when the application was made and at the time when the inspection was conducted on the basis of the application, etc. This Court also held therein that the authority is not justified in taking a decision by merely making a passing reference

that there are wells in the neighbourhood of the cemetery, etc. A Division Bench of this Court in the case *Inter Denominational Christian Fellowship v. Narayanan* reported in 2007 (4) KLT 416, para 9, has also taken the same view and para 9 thereof reads as follows:

'9. A question would arise whether a subsequent construction within the prohibited distance would be relevant while considering the application for grant of licence under R.6. R.5(2) of the Rules reads thus:

*"Whether there is any burial and burning place or not within the specified limit from the dwelling house is to be determined by considering the circumstance on the date of application for licence."*

On the date of application, construction activity within the prohibited distance was not there. It was only after publication of the notice in Malayala Manorama daily dated 7.4.1999 that the construction activity commenced within the prohibited distance. It is to be noted that the application is dated 16.9.1998. In view of R.5(2) of the Rules, it cannot be said that the application is not liable to be granted in view of the prohibition contained in R.5. R.5(2) is in the nature of an exception to R.5(1). The state of affairs as on the date of application alone is relevant for considering the application for opening a new burial ground or burning ground. The existence or otherwise of the dwelling house is to be taken into account with reference to the date of application. A subsequent change in the state of affairs would not entail in the dismissal of the application invoking R.5(1). '

33. Therefore, it is not proper to take resort to only one portion of the rule and exclude the consideration of the crucial aspect regarding the explanation thereto, while considering the exercise of discretion in the case of the municipal authorities. In the light of the categorical legal position settled by the decisions of the Full Bench and the Division Bench of this Court, referred to above, it

is only to be held that the provisions contained in the explanation to Rule 5 supra should also be taken into account while considering the impact of the minimum prohibitory distance. Therefore, from the aforesaid discussion it emerges clearly that the minimum distance for the establishment of a vault type cemetery will be 25 meters from the human habitation and in the case of other cemeteries, the same shall be 50 metres and equally that the date of the application for the licence shall be the crucial date and not the date of sanction for taking into account the existence of the human habitation within the prohibited limit. Both the trial court and the lower appellate court have only referred to the operative portion and proviso of Rule 5 and have not even quoted the crucial provisions contained in the "Explanation" thereto, which was added as per amendment by SRO 711/88 in Gazette No.24 dated 14.6.1988. Therefore, this was a grave error committed by both the courts below while determining this crucial issue. The foregoing discussion is in relation to the provisions as contained in the Kerala Municipalities Act, 1960 and the Rules thereunder as well as the provisions contained in the Rules framed under the Kerala Panchayat Act, 1960. It may be noted that though initially in the Kerala Municipality Act, 1994 (which is effective from 30.5.1994) did not explicitly provide for any distance prohibition rule in the

establishment of burial and burning grounds covered by Sec. 485 thereof, later an amendment has been effected in the said Act with effect from 24.3.1999 by providing Sec.485A thereof, which stipulates that the prohibitory distance in that regard shall be 50 meters and 25 meters respectively in the case of burial/burning ground and concrete vault type cemetery.

34. The other two issues will be considered together as hereunder:

“(2) Did not the 8<sup>th</sup> respondent grant the licence/ permission to construct vault type cemetery after complying with all legal formalities ?  
&

(3) Whether the courts below are justified in considering the alleged procedural lapses of the 7<sup>th</sup> respondent District Collector, Pathanamthitta and the 8<sup>th</sup> respondent Municipality in granting licence after Ext.P-13 order of the government.

35. Before going into detailed discussion of these matters, it is to be stated at the outset that there are no factual averments in the plaint in the instant case that the Municipality had not referred the matter for the consideration of the District Collector, before the issuance of the impugned Ext.B-4 permit dated 27.3.1991. So also it is to be crucially noted that there is no factual averment in the plaint that the medical officer concerned had not conducted any site inspection before recommending for the grant of the application, etc. The law in the aspect of lack of pleadings is too elementary. The Apex Court while considering such an issue in the case Kalyan

Singh Chouhan v. C.P.Joshi, reported in AIR 2011 SC 1127, after placing reliance a very large corpus of earlier cases including M/s.Trojan & Co. v. RM. N.N. Nagappa Chettiar, reported in 1953 SC 235; Om Prakash Gupta v. Ranbir B.Goyal, reported in AIR 2002 SC 665; Ishwar Dutt v. L.A Collector & Anr. reported in 2005 SC 3165; State of Maharashtra v. Hindustan Construction Company Ltd., reported in (2010) 4 SCC 518 = AIR 2010 SC 1299, etc. has held that relief not founded on pleadings cannot be granted and that the decision of the case cannot be based on grounds outside the pleadings of the parties and no evidence is permissible to be taken on record in the absence of pleadings in that respect and no party can be permitted to travel beyond its pleading and that all necessary material facts should be cogently pleaded by the party in support of the case set up by it and that that where evidence was not in line of the pleadings, the said evidence cannot be looked into or relied upon. In the ruling Bachhaj Nahar v. Nilima Mandal & Ors. reported in AIR 2009 SC 1103, the Apex Court held that a case not specifically pleaded cannot be considered by the court. The legal position in this case was also so held by Apex Court in para 62 in Union of India v. Ibrahim Uddin reported in 2012 (3) KLT SN 73

(C.No.79) SC. In the case Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors. reported in AIR 1987 SC 1242 = 1987 (2) SCC 555 = 1987 KHC 965 (SC), para 6, the Apex Court has clearly held that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered and it is equally well settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. That the object and purpose of pleading is to enable the adversary party to know the case it has to meet and in order to have a fair trial, it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise.

36. Therefore, while challenging the decision making process of a public authority, as in the instant case, as to its legality, propriety or reasonableness, it is not sufficient that the averments should be in generalised terms as if the entire decision making process is vitiated by illegality or impropriety, etc. or that none of the legal formalities or official formalities has been complied with by the decision maker, etc. But the factual foundation for such challenge should be cogently and precisely pleaded in the plaint so

as to disclose a specific and concrete case as to how the decision has been vitiated by any illegality or impropriety or unreasonableness, etc. Mere pleading in generalised terms that none of the legal procedural formalities have been complied with or that the provisions of statutory formalities have been blatantly violated, etc. will not do and that the pleadings should be precise and cogent as stated above. The essence of fair play in a civil trial demands this aspect. It is only then that the opposite side can be called upon to prepare the defence properly so that they can have reasonable opportunity to frame a defence and plead the averments in their written statement of objections to the plaint accordingly in such civil proceedings. So also, the defendants could then get a reasonable opportunity to know as to the type of evidence that they are called upon to let in in order to meet the specific allegations and averment in the plaint. In the instant case, there are no specific and concrete pleadings in the plaint that the Municipality has not referred the matter to the District Collector for his approval before the Municipality had taken the impugned decision. So also, there is no pleading or averment in the plaint, in precise and concrete terms, as to the DMO had not conducted any inspection or

committed any procedural lapses before making the recommendation to the Municipality. Therefore, it is totally impermissible in law for the plaintiffs to let in any evidence on that aspect of the matter. Even if any evidence has been let in on those aspects of the matter, it is the duty of the court not to take into consideration any such evidence in view of the conclusive legal position settled as stated above. Therefore, on this ground alone, the trial court and the lower appellate court have committed a grave error in holding that the official defendants (statutory authorities concerned) have violated the statutory provisions and that they have not complied with the legal formalities, etc. on the basis of the evidence so let in in the instant trial. Therefore, the said finding of both the courts below is tainted by grave error and illegality and is liable to be reversed by this Court.

37. Apart from this crucial aspect of the matter, this Court would also endeavour to examine the merits of those aspects. The impugned application for permission to construct a vault type cemetery was made by the defendant church authorities before the municipal authority on 13.6.1990, as discernible from Ext.B-2 series files. Ext.B-2 files clearly reveal that as per column No.6 of part 3 of

the format used by the Municipality for processing the application that the Building Inspector of the Pathanamthitta Municipality had clearly given his opinion in column No.6 thereof, wherein it is categorically stated by him that he had examined the site with reference to the plan and he had recommended that permission can be granted as per the plan given along with the application submitted by the church and that there are no objections as per the rules. This crucial factual aspect of the matter that the Municipal Building Inspector had inspected the site with reference to the plan submitted by the applicant and that he had recommended permission can be granted as per the plan and that there are no objection, as per the rules (viz. Kerala Building Rules) etc., has been totally overlooked by both the courts below. Ext.X-1(a) files deal with the proceedings of the DMO concerned. Ext.X-1(c) proceedings dated 20.4.1990 of the DMO addressed to the Pathanamthitta Municipality clearly shows that he has opined therein about the existence of houses etc. near to the proposed site for the cemetery. In Ext.X-1(c) the DMO opines that the site is not fit for establishment of an open type cemetery and that it could be suitable for establishment of a vault type cemetery and that the application

of the church, if submitted for establishment of a vault type cemetery, could be considered, etc. Therefore, Ext.X-1(e) proceedings dated 20.4.1990 issued by the DMO clearly is on the basis of an inspection conducted by him. It is thereafter that the application for the establishment of the vault type cemetery was submitted by the church and by Ext.X-1(g) proceedings dated 17.9.1990, the Pathanamthitta Municipality has referred the matter to the DMO for his opinion. On the reverse of the Ext.X-1(g) it is discernible that the Clerk concerned has noted that two copies of the application and relevant documents may be submitted to the District Collector, etc. PW-6 (DMO) has deposed that the matter was not referred by him to the District Collector. As per the rules or norms there is no necessity for the DMO to make any reference to the District Collector and that his primary role is to give an opinion after assessment of the public health issue alone and that therefore at that stage it may not really be necessary for the DMO to make a reference to any other functionary. Therefore, no fault can be attributed to the DMO concerned for not referring the matter to the District Collector concerned. It is to be noted that the decision maker is the Municipality and the matter has been referred to the

DMO for his opinion and when the DMO is called upon to give his expert opinion regarding the public health aspects of the matter, it is not really relevant or necessary for him to ask the opinion of the District Collector regarding the public health issue, on which subject the expert authority is the DMO. Therefore, it cannot be said that any procedural impropriety has been committed by the DMO in not making a reference to the District Collector. Thereafter it appears from Ext.X-1(g) proceedings that the DMO had wanted an inspecting officer to conduct a verification and for that purpose, the Technical Assistant in the DMO's office was asked to make a report in that regard. Ext.X-1(g) proceedings show that the Technical Assistant of the DMO's office opined that the application of the church is to be returned to them on the ground that site plan is not authenticated by the municipal authorities and that the exact location of the property and its measurements are not demarcated in the site plan and the drinking water sources within a radius of 50 meters are not shown in the site plan, etc. This endorsement of the Technical Assistant attached to the office of the DMO was rejected by the DMO himself as can be seen from the reverse of Ext.X-1(f) proceedings. In the reverse of Ext.X-1(f) proceedings it is clearly

ordered by the DMO that the documents initially submitted by the applicant have already been attested by the Municipal Commissioner. Accordingly, the DMO, thus overruling the endorsement of the Technical Assistant, has ordered to grant the NOC. The endorsement made by the DMO on the reverse of Ext.X-1 (f) that the initial documents submitted by the applicant have already been attested by the Municipal Commissioner is fully correct, as can be seen from the plan submitted by the applicant, which is attached to the very same file. The said plan clearly shows that the Municipal Commissioner, Pathanamthitta Municipality has authenticated the said plan for the cemetery. The said plan is prepared by a licensed engineer of the Municipality as can be seen from the endorsement made therein. This crucial factual aspect regarding the endorsement made on the reverse of Ext.X-1(f) by the DMO as well as the factual correctness thereon as borne out by the original of the initial plan submitted that it is authenticated by the Municipal Commissioner has not been adverted to by both the courts below, which is a crucial omission, which has gone to the root of the matter regarding the appreciation of the evidence on this crucial aspect of the matter. In this regard it is to be noted that, as

stated above, the official Building Inspector of the Pathanamthitta Municipality had already made an endorsement that he had personally made an inspection on the site and it was found to be unobjectionable and that permission can be granted in accordance with plan. Therefore, the endorsement of objection made by the Technical Assistant attached to the DMO's office that the plan and location, etc., are not authenticated by the municipal authorities. etc, is totally factually wrong. As already stated, the DMO had already made an inspection on the previous occasion as evident from Ext.X-1(e) proceedings dated 20.4.1990. The DMO (PW-6) has also clearly deposed that he is not bound by the stand taken by the Section clerk or his subordinates and that he has granted the licence after exercise of the discretion vested with him. Therefore, the whole approach made by the trial court and by the lower appellate court that the DMO has committed a grave procedural impropriety in not ensuring a proper inspection and in not getting authenticated documents, etc., is totally against the indisputable factual materials available on record. These aspects are borne out by the files concerned as stated above, which are produced before the trial court and those crucial aspects have been totally omitted from

consideration by both the courts below. Therefore, this crucial finding made by the courts below is patently erroneous and is liable for interdiction in these appellate proceedings.

38. The next issue is as to whether the defendant Municipality had committed any procedural impropriety in not referring the matter to the District Collector before the impugned decision of the Municipality in granting the permit dated 27.3.1991. In other words, the issue is as to whether statutory rules mandate that the application should necessarily have been referred by the municipal authority to the District Collector for his opinion. There is no provision anywhere in the aforesaid provision contained in Sec.321 of the Act that the prior approval of the District Collector should necessarily be obtained before the grant of impugned permit or that the opinion of the District Collector should have been obtained by the municipal authority for its consideration, before such grant, etc. The courts below have proceeded on the premise as if Rule 36(10) of the Kerala Building Rules framed under the Municipality Act, mandates that the approval of the District Collector is required before the grant of any permit in any individual case. Rule 36(10) of the Rules reads as follows:

“Rule 36(10) Crematoria, burning and burial grounds.– The authority with approval of Collector of District shall regulate the location and area limits of Crematoria, Burning and Burial Grounds including cemetery. Further, the Authority shall prohibit certain burning or burial grounds located in certain areas which in their opinion is dangerous or likely to be dangerous to the health and well being of the persons living in the neighbourhood or to be offensive to such persons.

Provided that an appeal shall lie against the Collector's decision to the Government who may issue such orders as is deemed fit.”

The above Rule only stipulates that the authority (viz., the Municipal authority concerned) mentioned in Sec.321 of the Act, which is the Municipal Council, with the approval of the District Collector shall regulate the location and area limits of crematoria, burning and burial grounds including cemetery, etc. It is also relevant to note that Sec.45(2) of the Act empowers the District Collector, where any immediate action is necessary as contemplated therein, to suspend the resolution, order, licence, permission, act issued by the Municipality and report to the Government, etc. Therefore, if any permit or licence as contemplated under Sec. 321(2) of the Act is issued in any individual case, the Collector is having jurisdiction to suspend the resolution taken Municipal Council in that regard or even suspend the operation of the licence, permission, etc. granted in that regard for the establishment of a burial ground in any individual case. Since that is the indisputable legal position, it

cannot be said that an individual permit issued in individual case for the establishment for burial ground or cemetery as per Sec.322(2) should require the approval or prior permission of the District Collector. If that be so, it would go against the language and spirit of Sec.45(2) of the Municipality Act, which empowers the same authority, viz.,Collector, to suspend the operation of any resolution or permit or licence issued by the Municipality, on the grounds stated therein. Moreover, the very language of Rule 36(10) indicates that what is contemplated therein is the aspect of regulation of the location and the area limits of crematoria, burning grounds and burning grounds including cemetery within the territorial limits of that Municipality. So the situation contemplated under Rule 36(10) is something akin to the zoning regulation, whereby the municipal authority with the prior approval of the District Collector can take general regulative decision as to how the zoning of the locations and area limits of its crematoria, burning and burial grounds including cemetery should generally be permitted within the territorial limits of that Municipality. Therefore, it is not that every individual application seeking permission under Sec. 322(2) should be forwarded to the District Collector for his prior approval and the

mandate of Rule 36(10) is only in the matter of a situation of exercise of power of the municipal authority for taking a general regulative decision as to the zoning the locations and area limits of crematoria, burning and burial grounds within the Municipality. It is only in such a situation, prior approval of the District Collector as mandated in Rule 36(10) is mandatory. If the prior approval of every individual application is insisted, it would amount to making the plenary provision contained in Sec.45(2) of the Act redundant and meaningless. This is because, if the prior approval of the District Collector is insisted in each case, it is only with his prior approval that the permit can be issued and the very same Collector will also be called upon to consider as to whether the said resolution of permit or permission of the Municipality should be cancelled or suspended. That apart, the very language employed in Rule 36(10) is not in the nature of covering the situation of requiring the prior approval for each and every individual applications, but only in the case of a general regulative decision in the matter of zoning of the location and the area limits of crematoria, burning grounds, etc. Therefore, this Court is of the considered opinion that, going by the provisions contained in Sec.321 of the Kerala Municipalities Act,

1960, and the provisions contained in Rule 36(10) of the Kerala Buildings Rules, 1984, framed thereunder, there is no necessity for seeking prior approval of the District Collector for the grant of permit/licence for establishment of crematoria, burning ground or burial ground in an individual case. In these aspects of the matter, both the courts below have committed a legal wrong in holding that the prior permission of the District Collector was required and that impropriety has been committed insofar as no such prior approval of the District Collector was obtained. In view of these findings on that aspect of the matter are liable to be reversed.

39. The next issue is as to whether the criterion of minimum distance of 25 meters from the human habitation has been violated in the instant case. As already held hereinabove, the crucial date for determining this aspect of the matter is as to whether such human habitations were in existence as on the date of the application for seeking permission for establishment of the cemetery in question. In the instant case the said crucial date is 27.3.1990. The impugned resolution in favour of the defendant church is taken on 29.12.1990. Ext.B-3 order is on 13.3.1991 and consequential permit/licence is issued as per Ext.B-4 dated 27.3.1991. Ext.B-12

proceedings gated 16.7.1996 of the District Collector clearly show that he had considered the matter pursuant to the directions issued by this Court in the judgments in O.P.No.5540/1991 and O.P.No. 12465/1991. It is further stated therein that he had directed the Tahsildar, Kozhenchery and the DMO, Pathanamthitta to enquire into the matter and that both of them had submitted their reports dated 9.7.1996. Therefore, it is evidently clear that subsequently there was again an inspection and report of the DMO dated 9.7.1996 referred to in Ext.B-12.

40. Ext.B-12 proceedings dated 16.7.1996 of the District Collector clearly refers to the reports dated 9.7.1996 of the Tahsildar, Kozhencherry and the DMO, Pathanamthitta. It is also stated that a site inspection was conducted by the District Collector on 12.7.1996 along with the Tahsildar. On the basis of these factual inspections, the District Collector has clearly stated therein that there is a house owned by one Abraham Kurian, which is at the distance of 18 meters from the site and that the remaining 13 houses are within the radius of 100 meters ranging from distances from 39 meters to 95 metres, etc. That the nearest well is at the distance of 70 meters and the remaining wells are at a distance

ranging from 35 meters to 100 meters. It is also clearly stated that the nearest dwelling house was constructed during the last one year (ie. in 1995), which is long after the impugned municipal resolution dated 29.12.1990. Sri. Abraham Kurian appears to be the father of the 3<sup>rd</sup> plaintiff Sri.V.A.Kuriakose. Therefore, from the reports of the statutory authorities, it is beyond the shadow of doubt that except the house of the 3<sup>rd</sup> plaintiff, all the other houses are situated much beyond the minimum distance of 25 metres from the vault type cemetery. The said reports also make it crystal clear that the said nearest dwelling house (which is that of the 3<sup>rd</sup> plaintiff) was constructed in 1995, long after the impugned resolution of the Municipality rendered on 29.12.1990.

41. Two Advocate Commissioners were appointed by the trial court for ascertaining the requisite factual details and both these commissioners were appointed at the instance of the plaintiffs. In the first commissioner's report as per Ext.C-1, the distances of the various houses near to the cemetery are clearly stated in paragraph 14 thereof. The distances therein are taken from the houses concerned upto the boundary of the plaint schedule property and not upto the vault. It is clear from the

evidence let in this case as well as the approved plan that the open space on all four sides of the vault is upto 10 meters. In para 14 of Ext.C-1 report it is stated that the houses of one Rajan, the husband of the 1<sup>st</sup> plaintiff, where the 1<sup>st</sup> plaintiff is residing, one . Kunjukunju, Thambi, Kali, Sainaba, Sherif, Krishnankutty, Sivadasan, Kurian, Eliamma, Podiyan, Sasankan, Shajahan (2<sup>nd</sup> plaintiff) and Kalyani are situated at the distances of 22.22 meters, 33.2 meters, 40 meters, 49.4 meters, 45 meters, 59 meters, 77 meters, 88.3 meters, 99.6 meters, 46 meters, 70 meters and 12.80 respectively. The house of the 3<sup>rd</sup> plaintiff Kuriakose is said to be at the distance of 6 meters from the eastern boundary of the plaint schedule property. Thus it can be seen that what is contemplated by way minimum distance as per the Rules is the distance from the human inhabitation concerned upto the vault type cemetery and not merely upto the boundary of the property concerned. Therefore, after adding the additional ten meters, which is the distance between the vault to each of its boundary points, it can be seen that except the house of the 3<sup>rd</sup> plaintiff, Kuriakose and that of one Kalyani, all other residential houses are situated much beyond the minimum distance of 25 meters. It is categorically stated in Ext.B-12 report of the

District Collector that there are no dwelling houses within the distance of 25 meters even as on the date on which the Municipality had taken its resolution in December, 1990 and that the house of the 3<sup>rd</sup> plaintiff, Sri.Kuriakose, was constructed in 1995. Smt.Kalyani is not a plaintiff in this case, as it has already been held that what could be lawfully considered in these civil proceedings is only the alleged grievance of the plaintiffs regarding the apprehension of private nuisance as far as these four plaintiffs are concerned. Therefore, the aspect regarding Smt.Kalyani's residence need not be taken into consideration in this case. Even going by Ext.X-1(e) report dated 20.4.1990 it is discernible that only two houses mentioned therein that of Sri.Rajan (husband of the 1<sup>st</sup> plaintiff) and that of Sri.Krishnankutty are in the immediate vicinity of the proposed site and that distance of those two houses are about 83 feet (25.3 mtrs.) and 104 feet (31.7 mtrs.) respectively from the property and therefore adding the distance of ten meters from the vault to the boundary, the distance of these two houses would be around 35.3 meters and 41.7 meters respectively. This also roughly tallies with the measurement noted in Exts.C-1 and C-2.

42. In Ext.C-2 report submitted by the second Advocate

Commissioner it is clearly stated that there are no houses on the western side of the plaint schedule property within about 200 meters and that there are no houses on southern side within 100 meters. It is clearly stated therein that there is a pathway/road on the northern side of the property and that adjacent to that there is a paddy field for about 300 meters. It is further stated therein that there is a pathway having two meters width on the southern direction from the municipal road on the east of the petition schedule property and further that there is a concrete building on the east of the aforesaid pathway at a distance of 5.7 meters of the eastern side and that there is a well on the north of the building at a distance of 3 meters on the east of the cemetery wall. The said building is that of the 3<sup>rd</sup> plaintiff, Sri.Kuriakose, who has clearly deposed in evidence that he had purchased the property in 1994 and that he had constructed the building only in 1995 and that even in the schedule of the sale deed pertaining to said property purchased in 1994, it is clearly shown that the western boundary of the said property purchased by him is the cemetery in question. All other houses on the eastern side of the property are much beyond 25 meters from the vault of the cemetery. Therefore, it is evidently

clear that even as on the date on which the Municipality had taken resolution on 19.12.1990 or even as on the date of Ext.B-3 dated 13.3.1991 or Ext.B-4 licence/permit dated 27.3.1991, there were no residential buildings within the prohibited distance of 25 meters from the boundary wall. The residential building of the 3<sup>rd</sup> plaintiff Kuriakose is around 16 meters from the vault, but it has clearly come out in evidence that he purchased the said property in 1994 and constructed the building in 1995, fully knowing that the said property is that of the cemetery of the church. He has not appeared in this appeal, even though notice was served on him. It has also come out in evidence that his father was working as an employee of M/s.Neema Builders, who was the contractor, who was carrying out construction activities in the cemetery. Therefore, it is only to be held that based on the indisputable materials on record and the evidence tendered by none other than the 3<sup>rd</sup> plaintiff (PW-8) that he purchased the property long after the date of submission of the application on 13.6.1990 after fully knowing that the property pertains to the cemetery of the church. He has also deposed that his father had purchased the said property from another employee of M/s.Neema Builders. Therefore, it is to be conclusively held that the

residential houses of the plaintiffs were not situated within the prohibited distance of 25 meters from the vault as on the date of the submission of the application (13.6.1990) or even as on the date of Ext.B-4 permit/licence dated 27.3.1991. Therefore, it cannot be said that any procedural impropriety or illegality or unreasonableness was committed by the defendant Municipality in the grant of Ext.B-4 permit dated 27.3.1991.

43. It is also to be noted that immediately after the issuance of the impugned Ext.B-4 permit dated 27.3.1991, due to the complaints by the objectors concerned, the Government had granted stay of the permit, on 22.4.1991. Thereafter, the District Collector had visited the site on 25.4.1991 and after consideration of the matter, the Government vacated the stay on 15.5.1991. But immediately thereafter O.P.No.5540/1991 was filed by one such objector, viz., one Smt.V.T.Valsalakumari, against the impugned Municipal resolution dated 29.12.1990 and this Court, by judgment dated 29.5.1991, had directed the District Collector to hear the parties and take a decision on the grievances of the petitioners therein and that until then, the impugned decision of the Municipality and the consequential order of the Commissioner of

the Municipality in the matter of grant of permit shall not be given effect to. By Ext.B-10 dated 25.9.1991, the District Collector rejected the petition and ordered that the church authorities could proceed with the construction based on the impugned permit. It is also relevant to note that Ext.B-6 decree in O.S.No.189/1991 was filed by some of the objectors, including the husband of the 1<sup>st</sup> plaintiff herein, seeking permanent injunction against the church in the matter of the construction and establishment of the cemetery. O.S.No. 189/1991 was dismissed as per judgment dated 14.12.1994 as not-pressed as evident from Exts.B-5 judgment and B-6 decree. Later, the aggrieved persons had again approached this Court by filing O.P.No.12456/1991 to challenge Ext.B-10 dated 25.9.1991 issued by the District Collector rejecting their objections and this Court granted interim stay in that Original Petition. By Ext.B-11 judgment dated 18.6.1996, this Court disposed of O.P.No. 12456/1991 by quashing Ext.B-10 herein and remitted the matter again to the Collector for fresh consideration of the objections. Thereupon, the Tahsildar and the District Medical Officer conducted an inspection and submitted their reports dated 9.7.1996 and the District Collector also made an inspection on 12.7.1996 as referred

to in Ext.B-12. On this basis, the District Collector after consideration of the matter in its entirety issued Ext.B-12 order dated 16.7.1996 holding that there is no reason to exercise the powers conferred on him as per Sec.45(2) of the Kerala Municipality Act for suspending the resolution. However, the District Collector granted 30 days' time to the objectors to approach the Government under Sec.45(1) of the Act and it was ordered that until then, the impugned permit will be kept in abeyance for a period of 30 days. Later, the Government again granted stay of the operation of the permit for construction. The appeal/petition was filed only by one person concerned, Sri.K.V.Abraham, (father of the 3<sup>rd</sup> plaintiff) on 5.8.1996. It is also to be noted that by Exts.B-7 judgment and B-6 decree dated 16.12.1996 the Munsiff's Court had allowed the prayers of the church authorities in the suit filed by them as O.S.No 282/1991, whereby injunction was issued restraining the defendants from obstructing the construction of the vault type cemetery, etc. Later, the Government as per Ext.B-13 dated 4.5.1998 dismissed the objection and held that there are no grounds to interfere with the impugned decision of the Municipality. However, the Government directed in Ext.B-13 that the plan

submitted by the church authorities should be vetted by the Chief Town Planner. The Chief Town Planner approved the lay out for construction as evident from Ext.B-2(h) dated 3.8.1998 with the rider that the approval of the Kerala State Pollution Control Board should be obtained. By Ext.B-2(i) dated 14.8.1998 the Kerala State Pollution Control Board issued necessary proceedings granting clearance in the matter and making it clear that, as per the norms that govern the field, there is no necessity to get their approval and that for construction of concrete vault as there is no emission or discharge of effluents and that subject to obtaining clearances/sanctions required for construction of cemetery from the authorities concerned, if any, the church authorities can proceed with the construction of the vault type cemetery in the proposed site as per the designs submitted by them along with their letter, etc. It is thereafter, that the Municipality had granted the consequential renewed permit as per Ext.B-14 dated 29.8.1998, based on which, the appellants re-commenced construction and had completed substantial part of the construction in question. It was later that the Munsiff's Court had granted interim injunction on 11.3.1999. From a narration of the aforesaid factual aspects, it can be seen that

except that immediately after the issuance of Ext.B-4 permit dated 27.3.1991, there has been stay of its operation by various authorities including courts right from 22.4.1991 till the issuance of Ext.B-13 G.O. dated 4.5.1998. In each of these proceedings the authority concerned, be it statutory or judicial forum, had consistently held in favour of the church authorities except in the instant suit. Therefore, principles of justice and equity demand that the period of duration of the stay should be excluded from the ordinary and normal validity period of Ext.B-4 permit dated 27.3.1991. The principles in that regard have been settled by the decisions of this Court and the Apex Court as in *V.V.Prakasini v. K.P.S.C. and Ors.* reported in 1993 (1) KLJ 632 (para 5 & 6) and *Grindlays Bank Ltd., v. Income-Tax Officer, Calcutta and Ors.* reported in AIR 1980 SC 656 (para 6).

44. On excluding the period of stay from the normal validity period of 3 years from the permit, it can be seen that the said permit should have been revalidated as per Rule 9(2) of the Kerala Building Rules, 1984. The Kerala Municipalities Act, 1994 came into force on 30.5.1994.

45. Sec.235 of the Kerala Municipalities Act, 1960 which deals with the lapse of permission reads as follows:

“Sec.235. Lapse of permission:– If the construction or reconstruction of any building is not completed within the period specified, the permission shall lapse unless an application for extension of time is made before the expiry of the period specified; and a fresh application shall be made before the work is continued.”

Sec.394 of the Kerala Municipalities Act, 1994 dealing with lapse of permission provides as follows:

“Sec.394. Lapse of permission.– Where the construction or reconstruction of a building is not completed within the period specified in the permission, such permission shall lapse unless an application for extension of time is made before the expiry of the period specified.”

A comparison of the provisions contained in the old Act and New Act makes it clear that though Sec.235 pertaining to the old provision envisages that submission of a fresh application is necessary before the work is continued and that the legislature has consciously omitted that requirement in Sec.394 of the new Act. Therefore, by the operation of Sec.394 of the new Act dealing with lapse of permission where construction or reconstruction of a building is not completed within the period specified in the permission, such permission shall lapse unless an application for extension of time is made before the expiry of the period specified. There is no necessity to make a fresh application as per the new

provision. At the time of issuance of impugned Ext.B-13 Government Order dated 4.5.1998 and Ext.B14 permit dated 29.8.1998, the new Rules under the Kerala Municipalities Act, 1994 were not even then framed. It may be noted that Kerala Municipality Building Rules, 1999 (framed under the Kerala Municipalities Act, 1994) came into force on 1.10.1999. At the relevant time the provisions in the Kerala Building Rules, 1984 alone were in force.

Rule 9(2) of the Kerala Building Rules, 1984 provides as follows:

“R.9. Sanction, Refusal, Validity and Revocation of permit.–

(1) .....

(2) The permit once sanctioned shall remain valid up to three years. The development/redevelopment/building construction/alteration shall be commenced during the first year of such period and shall be completed not later than the valid period of the permit. If the construction is still not completed, the permit shall be revalidated on application subject to the rules then in force.”

Therefore, what was required under Sec.394 of the Kerala Municipalities Act, 1994 r/w Rule 9(2) of the Kerala Building Rules, 1984 is that an application for extension of time alone need be submitted and the permit could be revalidated on application subject to rules then in force. It is evident that the requisite application for revalidation of the permit was made by the appellants even after the issuance of Ext.B-12 proceedings dated 16.7.1996 of the District Collector. The application submitted by

the appellants for renewal or revalidation of the permit is also referred to in Ext.B-14 dated 29.8.1998. Therefore, what was required was only an application for extension of time as conceived in Sec.394 of the Kerala Municipalities Act, 1994 and the expired permit could be revalidated subject to the Rules then in force which is the Kerala Building Rules, 1984. Therefore, what was required in law is only formal renewal or revalidation of the permit or extension of time as contemplated in the aforestated statutory provisions and there was no necessity for again requiring the appellants to undergo through the entire rigour of the exercise of having to submit a fresh application to be treated in accordance with the provisions contained in the new Act and the new Rules. It is also to be noted that the new Rules were framed only as per the Kerala Municipalities Rules, 1999 with effect from 1.10.1999 and the said Rules were not even in force on the date of Ext.B14 dated 29.8.1998. Therefore, in view of the aforestated discussion, this Court is of the considered opinion that the District Collector and the State Government have not committed any legality or propriety in issuing Ext.B-12 dated 16.7.1996 and Ext.B-13 Government Order dated 4.5.1998. Consequently, it is only to be held that the defendant-Municipality

has acted perfectly in accordance with law granting a formal revalidation of expired permit in terms of Ext.B-14 dated 29.8.1998. True that the respondent Municipality had earlier taken the view that the appellants herein are legally obliged to submit a fresh application, etc. But in view of the legal position as clarified above, it is only to be held that the issuance of the impugned Ext.B-14 permit is in order.

46. The trial court and the lower appellate court has proceeded on the premise as if the appellants herein were legally obliged to undergo rigorous exercise of having to submit a fresh application and to treat the said application in accordance with the provisions contained in the new Act and the new Rules and not doing so, is illegal and the said view taken by the trial court and the lower appellate court is untenable and unsustainable in the facts and circumstances in this case. If the said view sustained in a case like this, where a party could not enjoy the benefit of the permit granted to them on account of various stay orders issued by various statutory authorities and the courts, will not be able to enjoy the benefit of that order, even if the said statutory authorities and the courts ultimately holds that the objections were untenable and

in such a situation if there is some alteration in the legal provisions at a subsequent point of time, to demand such a party to submit a fresh application and should be burdened with having to treat his application as per the provisions contained in the new law, would be nothing but grave injustice and inequity and would be paying premium to the objectors whose objections were ultimately found to be untenable and unsustainable. It may also be pertinent to note that in the new rules framed as the Kerala Municipality Building Rules, 1999 (effective from 1.10.1999), provides as per Rule 15A(1) that a development permit or a building permit issued under those rules shall be valid for three years from the date of issue and sub rule (2) thereof provides that the Secretary shall, on application, submitted within the valid period of the permit, grant extension twice, for further periods of three years each. Sub rule (9) thereof mandates that a permit issued before or after the commencement of the said 1999 Rules or under the Kerala Building Rules, 1984 including that under orders of Government or District Collector granting exemption from rules provisions, shall be extended or renewed on proper application, on like terms and for like periods as a permit issued under these rules. This makes it abundantly clear

that the subordinate legislative authority has mandated that even a permit issued under the Kerala Buildings Rules, 1984, shall be extended or renewed on like terms and for like periods as a permit issued under the 1999 Rules. Therefore, the aforestated view taken by this Court in the previous portion of this judgment regarding the renewability/revalidation of the permit as per Ext.B-14 dated 29.8.1998 is all the more justified, going by the clear intention of the subordinate Legislature authority manifested in the new Rules framed with effect from 1.10.1999.

47. Another important issue to be examined is as to whether the plaintiffs could successfully establish regarding private nuisance apprehended by them. As already held herein above in view of the bar contained under Sec.91(1) of the CPC, the allegations of public nuisance apprehended by the inhabitants of the locality as projected in the plaint cannot be entertained in this case as mandatory leave under Sec.91(1) CPC has not been obtained in this case. Still further, as the plaintiffs have no case that they have actually suffered any damage or injury out of such alleged public nuisance so far as the functioning of the cemetery has not actually commenced, they cannot project any case of public nuisance on

account of their having personally suffered any special damage and therefore cause of action of the nature prescribed in sub-section (2) of Sec.91 does not also arise in the instant case. Hence, the only matter to be examined is as to whether the threat or apprehension of the private nuisance to the extent it affects the 4 plaintiffs herein alone need be taken into consideration. Both the courts below, more particularly, the lower appellate court, has wrongly held that no proper specific evidence has been adduced in the matter by the defendants to establish that there were no problems regarding pollution or effluents, etc. It is also wrongly held by the lower appellate court that despite the condition imposed by the Government in Ext.B14 dated 29.8.1998 that the plan should be vetted by the Chief Town Planner, the same has not been done.

48. On examination of the matters stated in the previous paragraphs herein above, it is to be held that the finding by the courts below that there is violation in the condition imposed by the Government in Ext.B14 dated 29.8.1998 in the matter of vetting by the Chief Town Planner, etc., is totally without any factual basis or foundation. In Ext.B-14 dated 29.8.1998, Government repelled the objections of the objectors therein but also held that the plan and

design of the vault shall be vetted by the Chief Town Planner. By Ext.B-2(h) proceedings dated 3.8.1998, the Chief Town Planner, Thiruvananthapuram, considered the Pathanamthitta Municipality's letter dated 10.6.1998 whereby the lay out for the construction of the concrete vault in question was approved subject to the provision of the requisite minimum set back. Thereafter, based on the application dated 12.8.1998 submitted by the Church authorities and in consideration of Ext.B-2(h) proceedings dated 3.8.1998 of the Chief Town Planner, the Secretary of the Kerala State Pollution Control Board had issued Ext.B-2(i) proceedings dated 14.8.1998 wherein it has been held that based on the details furnished it is observed by that authority that no significant air or water pollution is likely from the proposed vault type cemetery and that the Kerala State Pollution Control Board's formal No Objection Certificate is not required for the construction of the concrete vault as there is no emission or effluent discharge and that subject to obtaining clearance from the authorities concerned, if any, the Church authorities can proceed with the construction of the vault in the plaint schedule property as per the design submitted by them along with their letter dated 3.8.1998. Therefore, it is evidently clear that

clearances of both the Chief Town Planner and Kerala State Pollution Control Board have been duly obtained by the appellants. It is not understandable as to on what basis the court below held that no such clearances have been obtained. May be, a formal NOC has not been issued by the Kerala State Pollution Control Board because it is clearly stated in Ext.B-2(i) that a formal NOC is not required as per the norms of the Pollution Control Board for the construction of the concrete vault as there is no emission or effluent discharge. Therefore, it is evidently clear that if only there involves emission or discharge of effluents that the formal NOC of the Kerala State Pollution Control Board is required. This is the clear cut stand of the Kerala State Pollution Control Board. The trial court proceeded to blame as if the plaintiff has violated the direction of the Chief Town Planner that the Church authority could not secure a formal NOC from the Kerala State Pollution Control Board. This approach of the trial court to say least is quite pedantic. The Kerala State Pollution Control Board could have issued a formal NOC only if their norms makes such a requirement. Otherwise, judicial forum like the High Court should have issued directions to the Pollution Control Board for issuing such NOC. Therefore, under the circumstances, it

cannot be held that the Church authorities have not secured formal clearance from the Kerala State Pollution Control Board. Hence the finding of the courts below that the Chief Town Planner and the Kerala State Pollution Control Board have not issued their clearances is clearly untenable and unsustainable. More examination of this issue is not at all required as the plaintiffs have not factually averred in the plaint that the clearances of the Chief Town Planner and the Kerala State Pollution Control Board have not been obtained by the plaintiffs in spite of the directions issued by the Government as per Ext.B-14 dated 29.8.1998 or that the condition imposed by the Chief Town Planner has been in any way violated by the Church authorities in the construction, etc. It has also been stated that prior approval of the Collector is not required before grant of permit by the Municipality under Sec.321(2) of the Kerala Municipalities Act, 1960. Therefore, in the absence of any such pleading, the parties could not have been permitted to adduce any evidence in that regard. At any rate, no further consideration of that aspect of the matter is called for in the facts and circumstances of this case. This Court has already clearly held herein above that there has been no impropriety or illegality or unreasonableness on the part of the

Pathanamthitta Municipality in the issuance of the impugned Ext.B-4 sanction letter dated 27.3.1991. Therefore, the question No.3 (supra) as to whether the courts below are justified in considering the alleged procedural lapse of the 7<sup>th</sup> respondent (District Collector) and the 8<sup>th</sup> respondent (Municipality) in granting licence, after Ext.B-13 order of the Government does not actually arise in the facts and circumstances of the case. However, it is to be noted that in view of the aforestated discussion made herein above it cannot be said that either the Collector or the DMO has committed any grave illegality or impropriety in the issuance of their respective proceedings. It is also to be noted that the Tahsildar and the DMO had again inspected the property and submitted reports dated 9.7.1996. Apart from the aforestated inspections conducted by the DMO and the Tahsildar, the District Collector, had also made a subsequent inspection on 12.7.1996 (which is referred to Ext.B-12). Therefore, these proceedings of the various authorities concerned will clearly prove that the impugned construction cannot be faulted.

49. So the view taken by the trial court in finding fault with the District Collector is untenable and wrong, in view of the aforestated reasons. Therefore, on a consideration of the totality of

the facts and circumstances , this Court is of the considered opinion that taking into account the various subsequent proceedings issued by various authorities like the DMO, Tahsildar, District Collector, etc., the courts below should not have exercised the discretionary jurisdiction in the matter of grant of injunction as prayed for in the suit.

50. It is also to be noted that the impugned decree granted by the trial court is to the effect that defendants 1 to 4 are restrained by a prohibitory injunction from granting any licence to the 5<sup>th</sup> defendant or any one else to establish cemetery in the plaint schedule property and also restraining the defendants 5 & 6 from proceeding with the construction of the cemetery in the plaint schedule property and establish the cemetery, etc. Admittedly, none of the plaintiffs have any claim over the plaint schedule property as it is property fully owned and possessed by the defendant Church authorities. Even if the plaintiffs had made out a case at best the trial court could have only granted a decree to the effect that the statutory authorities are enjoined from granting any licence in violation of the Act and Rules and consequently enjoining the defendant Church authorities from making any construction of

the cemetery on the basis of any licence or permit which are issued in violation of the provisions of the Act and Rules. That alone was competent for the civil courts. So the impugned decree granted in such extreme wide terms is illegal and improper.

51. The further view rendered by the lower appellate court that the defendant Church should be blamed for not having cited the private engineer, who supervised the construction, as a witness in this case is not tenable. Both the Advocate Commissioners were appointed at the instance of the plaintiffs. The trial court had ordered that the second Advocate Commissioner should be assisted by an expert engineer, who happened to be a retired Executive Engineer from the State Government, who was later reemployed in the ICDP Project of the Government of India. The said Executive Engineer was not cited as a witness by the plaintiffs. Therefore, the defendant Church authorities cited the said Executive Engineer as DW4 and he had adduced detailed evidence regarding technical and scientific aspects of the matter. The Engineer who supervised the construction in question was a private Engineer, who was engaged at the behest of the Church and therefore in any view of the matter he could certainly be branded as a interested witness. Therefore,

non-examination of the private Engineer of the defendant Church does not in any way whittle down or dilute the defence of the defendants in this case. The further finding made by the lower appellate court finding fault with the impugned construction in so far as PW7 (Municipal Engineer) had deposed that the Municipal authorities had not supervised the construction, etc., is also not tenable. Firstly, there is no averment anywhere in the plaint that the Municipal authorities concerned had never supervised the construction in question. If such allegations were actually correct, then it was known to the plaintiffs as the construction had happened only prior to the institution of the suit. In the absence of such averment, there is no necessity to take into consideration any such evidence that has been adduced in that regard. That apart, plaintiffs would not point out any provision under the Municipalities Act and Rules which mandate that the construction done after the issuance of the permit should necessarily be supervised by the Municipal authorities concerned, except at the time of issuance of completion certificate. It is pointed out by the learned counsel appearing for the appellants that such requirement is there only after the completion of the construction for the purpose of issuance

of the completion certificate as contemplated under the Building Rules. Therefore the matter of alleged non-supervision of the construction by the Municipal authorities is not a matter of much relevance in the facts of this case.

52. The trial court in paragraph 5 of the impugned judgment has held that the defendant Church authorities are to be blamed for using Reinforced Cement Concrete (RCC) construction instead of Plain Cement Concrete (PCC) as permitted by the Municipal authorities and that therefore the construction done by the defendant Church authorities is not in accordance with the approved plan. It is a matter which is well known to even layman that the method of Reinforced Cement Concrete (RCC) construction is much more safer, durable and stronger compared to Plain Cement Concrete (PCC) type construction. Therefore, the action of the defendants in taking recourse to RCC type construction would also strengthen the construction. It is also to be noted that the court below have totally failed to take into consideration the crucial piece of evidence as discernible from Ext.B-2 series files on the reverse of page 5 thereon in paragraph No.2 wherein the Municipal Engineer/ Assistant Engineer of the Municipality has ordered on 21.10.1998

based on the endorsement of the building inspector that Church authorities should use RCC in the bottom portion of the vault also instead of PCC. It is on the basis of the specific direction given by the Municipal authorities that the defendant Church authorities would have used RCC type construction in question.

53. A Division Bench (consisting of M.S.Menon, C.J., & M.Madhavan Nair, J.) in the case *Rev.Fr..Antony v. Health Inspector & Ors.* reported in 1964 KLT 15, has held that burial of the dead by itself does not constitute a nuisance and burials to constitute a nuisance must come within the definition of the expression as given in Sec.2(27) and Sec.39 of the Travancore–Cochin Public Health Act, 1955. It would be relevant to note the observations in paragraphs 13 to 15 thereof, which read as follows:

'13. Burial of the dead by itself does not constitute a nuisance. "*Earth*", says Currie and Mearns, in their *Manual of Public Health Hygiene*, "*is the time honoured method for the disposal of the dead in Britain. Sentiment clings to the country churchyards which have at least inspired one distinguished poem, and proof that they have been damaging to health is on the whole wanting*" (3rd Edition, Page 434). Burials to constitute a nuisance must come within the definition of that expression as given in S. 2 (27) and S. 39 of the Act.

14. S. 2 (27) says:

*'Nuisance' includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing or disturbance to rest or sleep or which is or may be dangerous to life or injurious to the health or property of the public or the people in general who dwell or occupy property in the vicinity or persons who may have occasion to use any public right";*

and S. 39:

*“Without prejudice to the generality of the definition of the expression ‘nuisance’ contained in clause (27) of S. 2 the following shall be deemed specially to be nuisances for the purposes of this Chapter:-*

*(1) any premises in such a state as to be prejudicial to health or a nuisance;*

*(2) any pond, pool, ditch, gutter, water-course, water-trough, latrine, cesspool, drain or ash-pit, which is so foul or in such a state as to be prejudicial to health or a nuisance;*

*(3) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;*

*(4) any accumulation or deposit of refuse or other matter which is prejudicial to health or a nuisance;*

*(5) any factory (not being a factory governed by the provisions of the Factories Act, 1948) workshop or work-place which is not provided with sufficient means of ventilation, or in which sufficient ventilation is not maintained, or which is not kept clean or not kept free from noxious effluvia or which is so overcrowded while work is carried on as to be prejudicial to the health of those employed therein;*

*(6) any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dye-house, brewery, bake-house, or gas-work or in any manufacturing or trade process whatsoever;*

*(7) any chimney sending forth smoke in such quantities as to be a nuisance; and*

*(8) any noise, vibration, dust, clinders, irritating smell or offensive odour produced by a factory, workshop or workplace which is a nuisance to the neighbourhood”.*

15. Can a cemetery come under the first item in S. 39, “any premises in such a state as to be prejudicial to health or a nuisance”? S. 39 corresponds to S. 91 of the (English) Public Health Act, 1875. Item (1) of that section was: “any premises in such a state as to be a nuisance or injurious to health.” These words came up for consideration in *The Queen v. Parlby* (1889–22 Q.B.D. 520). The Court said:

*“It is clear that the expression ‘premises in such a state as to be a nuisance’ has not the wide application claimed for it by the respondents, who say that it is answered by any premises on which a nuisance exists”;*

*“We think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as for instance, where houses have been inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb”; and*

*“The very magnitude of the authority conferred upon justices by the sections under consideration affords a powerful argument that they are intended for the ordinary and comparatively simple cases comprised under the 91st section as we have interpreted it”.*

54. It is by now well established that mere apprehension of future mischief from something which in itself is lawful and capable of being done without creating a nuisance is no ground for an injunction. So in a case like this, the plaintiffs will have to establish that if no actual damage or injury is proved, then there should necessarily be proof of imminent danger, and there must also be proof that the apprehended danger will, if it comes, be very substantial. Therefore, it is the burden of the plaintiffs to cogently and precisely plead as well as prove by convincing and sufficient evidence that there is imminent danger by the proposed functioning of the vault type cemetery and that such apprehended danger is not only imminent but also substantial. On a consideration of the evidence and materials on record in this case, this Court is of the considered opinion that the plaintiffs have not let in any sufficient evidence including scientific or expert evidence to prove this crucial

aspect that the proposed functioning of the vault type cemetery poses not only imminent apprehended danger but also that such danger is very substantial. So also, the plaintiffs have not let in any cogent evidence to convincingly establish that their apprehension that if the proposed functioning of the vault type cemetery is actually commenced, then it is highly likely to be in such a state as to be prejudicial to health or a nuisance, so as to fulfill the parameters in that regard laid down in the Division Bench ruling of this Court in Rev.Fr.Antony's case supra reported in 1964 KLT 15. Only after the plaintiffs have discharged their onus in this regard, should the defendants be obliged to let in contra evidence on that aspect.

55. The view rendered by the lower appellate court that the appellants herein/defendants concerned have not let in any scientific evidence in the matter is also clearly wrong. As stated above the Executive Engineer concerned, who was appointed as expert to assist the second Advocate Commissioner was cited as DW4 by the defendant Church authorities. DW4 was formerly an Executive Engineer of the Public Works Department of Government of Kerala and he was later reemployed in the ICDP Project of the

Government of India. He passed Civil Engineering degree in 1967 and he had inspected the site along with the second Advocate Commissioner on three occasions. DW4 has deposed as follows:

“(A) Pressure level will become zero after 10 metres seepage through earth. The ratio of Hydraulic gradient is 4:1. If water is lying at a height of 4 metres after water passes through seepage for 4 metres distance there will be decrease of pressure head by 1 meter. Pressure head will decrease in that ratio. There will be no pressure in the concrete vault if water rises in the paddy field. Concrete vault is constructed by levelling sloppy earth? Q Yes. (A). There the slope of the land is to the north from the south. There will not be any pressure of water from south. Rain water will only flow as it is a slope. Water will flow in the same manner from the east and west. There will not be any pressure. There will be 50–60 centimetre water pressure beneath the earth according to water table. That will be 200 kgm/M<sup>2</sup>. Such pressure will occur only if water table increases can the concrete vault resist pressure if there is 10 fold increase in pressure level? Q. Yes (A). I have not noticed any defect in the construction of the concrete vault during my inspection. Is there any possibility of air pollution or water pollution from the concrete vault? Q. There will not be any pollution after construction as the vault is airtight and watertight.”

Thus it can be seen that DW4 has given an expert opinion on the basis of scientific details that he could not notice any defect in the construction of the concrete vault during his inspection and that there will not be any pollution after construction as the vault is airtight and watertight. He has further deposed that there is a paddy field on the north and that he was directed to ascertain as to whether there is any water in the tank of the concrete vault and as to whether based on the difference in the water level in the paddy field and the wells, whether there is any difference in the water level

in the tank. That he has stated that there was no water in the tank at the time of inspection and to a question that the matter sought to be ascertained could not be noted, he has clearly stated that it is possible as there is water in the paddy field and that water did not enter the tank of the vault as it is water tight. Further he has deposed that water could be seen in the paddy fields. To a question, whether pressure will be '0' after 10 metres seepage even in places where natural spring occurs during rainy season, he answered that there will be drop in water pressure at 4:1 ratio and that becoming '0' depends upon the pressure load at the starting point and that if the pressure load is very high during starting point, then the distance of seepage will be increased. The distance of seepage will depends on the quantity of water in the paddy field, etc. That he found on inspection that the land was levelled properly, etc. To a further question he has clearly answered that overall quality of the construction is of good quality and that otherwise the structure would have been collapsed earlier if there is any structural defect, etc. Therefore, going by the evidence tendered by an independent expert witness like DW4, who has assisted the Advocate Commissioner as per orders of the court below, it could

be seen that there is sufficient expert evidence tendered in this case about actual quality of the construction. The Advocate Commissioner in para 9 of his Ext.C-2(a) report has clearly stated that his inspection with the assistance of the expert engineer has disclosed that water from the paddy field is not entering into the tank of the concrete vault of the cemetery since there is no water in the tank even though there is water in the paddy field about 1.2 metres higher from the lower level of the tank. Further it is categorically reported therein that water from the well does not enter the tank even though there is water in the well at a pressure of 0.75 meters. It is also clear from the said report that if there was any possibility of water flowing outside the tank or entering into the tank, then water lying at a height of 1.2 meters would have entered the tank due to its pressure and that there is no evidence of water entering the tank based on the difference in the water level in the paddy field. Further, it is stated in para 11 of the said report that after the inspection on 30.5.2000 he had authorized two other persons to pour water into the tank to ascertain later whether there is any possibility of leakage of water from the tank and after doing this, he had returned to the site on the next day (viz. 31.5.2000).

On 31.5.2000, the Commissioner inspected the site in the presence of the plaintiffs, defendants and the witnesses to the mahazer and noted that the water is at a height of 1.65 meters and he instructed both sides that he will again inspect the site on 1.6.2000 at 10 a.m. to ascertain whether there is difference in water level and that he covered the tank with tarpaulin to prevent rain water from entering the tank. Mahazers in that regard in the presence of witnesses were prepared on 30.5.2000 and 31.5.2000. Thereafter, he again inspected the site on 1.6.2000 at 10 a.m. in the presence of the parties and the witnesses and inspected the water level in the tank with the expert engineer and found that the water is at a height of 1.6 meters in the tank as on the previous day and thus concluded that there is no leakage from the tank. This crucial evidence given by the expert engineer and the Commissioner appointed by the court and that too, at the behest of the plaintiffs, have been totally disregarded by both the courts below. The Advocate Commissioner who prepared Ext.C-2(a) report has been examined as PW-5 and the expert engineer was examined by the defence as DW-4. The trial court takes the extreme stand of disregarding this crucial technical evidence that there is no possibility of leakage of any water from

the tank, on the specious stand that the Advocate Commissioner had not ensured that the concrete vault's tank to be under his supervision until the last of his inspection on 1.6.2000 and therefore he may not be knowing whether water was again filled in the tank by any person before he came to the spot on the last day. The plaintiffs have not made any such objections and they have not even made any remote suggestion while examining these witnesses about any such possibility and this is unilaterally taken by the trial court without any proper appreciation of the evidence in that regard. This approach of the court below, to say the least, is unreasonable and improper. Therefore, all the aforestated aspects, which have come out in evidence, clearly prove that the defendants could establish that the construction of the vault type cemetery is of sound and good quality and that the apprehension of leakage of any seepage or discharge from the concrete vault is not established.

56. The view taken by the trial court, more particularly, in para 51 of its judgment, brushing aside the crucial expert evidence let in by DW-4, is based on irrelevant considerations. The trial court takes note of the fact that DW-4 (former PWD Executive Engineer) has deposed that the pressure head of the water will be 2.4 meters

at the time of flood. This is not properly impeached by the plaintiffs. However, the trial court comments that the assumption of the expert is only on the belief that at the time of flood, water level will only be doubled from the level which was present at the time of his inspection and that this is not a reasonable approach, etc. As to what is the material basis for impeaching the evidence of the expert is not stated by the trial court. It is after making a local inspection of the area that DW-4, who was directed to assist the Advocate Commissioner, has tendered his considered opinion. The trial court has also noted that after seepage to a distance of 10 meters pressure head will be '0' if calculated in the ratio 4:1 (ie., for 4 meters seepage, pressure head will be reduced by 1) and that thus even during flood, the pressure head will be '0' in the concrete vault if there is 10 meters clearance from the water sources and that according to DW-4, the concrete vault has capacity to resist the pressure caused during flood also and that hence no seepage of water pollution will occur. The trial court proceeds to discredit this expert opinion by saying that DW-4 has admitted that if the concrete vault structure is not designed properly, then it will be collapsed, etc. This admission was only to a specific question put to

him in that regard. However, the trial court has not noted the evidence given by the expert that in the instant case the concrete vault structure would have collapsed much earlier if there were any structural defects and that the construction effected in this case is done properly, etc. So it is only by merely speculating the most extreme situations that the trial court has not relied on the expert evidence. The trial court even goes to the extent of finding fault with the impugned construction by noting that the same was done by R.C.C. (reinforced cement concrete) and not by P.C.C. (plain cement concrete) as specified by the permit and that therefore the construction is not in accordance with the approved plan. This is totally wrong as R.C.C. Method was insisted by the Municipal authorities as discernible from page 5 of Ext.B-2 series Municipality files about which detailed reference has already been made in para 52 of this judgment. So the approach made by the trial court in overruling the expert evidence is clearly erroneous and wrong. The materials on record available in this case clearly establish that all reasonable and proper care has been taken in the construction of the concrete vault.

57 But both the courts below have erroneously proceeded as

if the onus is exclusively on the defendants to establish the aforestated aspect. It is interesting to note that while the lower appellate court proceeded on the premise as if the defendants have not let in scientific or expert evidence in this case, the trial court on the other hand took the view that the reliance made by the defendants on scientific or expert evidence is no safe guarantee that pollution and such other related aspects will not arise, etc. On a consideration of the totality of the facts and circumstances, this Court is of the considered opinion that the trial court has gone wrong in taking such a view. In a situation like this, the permit holder or the Municipality or the statutory authority concerned can at best only adduce scientific or expert evidence to show that construction has been done properly and without any substantial defect. Therefore, in the light of the aforestated scientific or expert evidence it cannot be held that there has been proof in the instant case of any imminent danger or apprehended danger will be very substantial, etc. It is also relevant in this context to note the observations of the Supreme Court in the case *G.Sunderrajan v. Union of India and ors.* reported in (2013) 6 SCC 620 p.737, para 242 that '*..... the proportionality of risk may not be "zero" regard being had to the nature's unpredictability. All efforts are to be made to avoid any man-made disaster*'. The evidence on

record clearly shows that reasonable and proper steps have been taken to ensure the safe construction in this case.

58. In this context, the observations of this Court (M.P.Menon, J.) in the case *Komalavally Amma v. President, Kerala Bhrahmana Sabha*, reported in 1987 (2) KLT SN.50 (C.No.72), that provisions of Secs.320, 321 & 323 of the Kerala Municipalities Act, 1960, are designed to serve some purpose and not to create impossible situations for a section of the people living within its limits.

59. It is also relevant in this context to note the decision of this Court in *Vareed Porinchukutty v. State of Kerala & Ors.* reported in 1971 KLT 204, in which it has been held that the right to bury dead bodies with certain rites and ceremonies is an integral part of the Christian faith and that in burying dead bodies in consecrated places, they only exercise their fundamental right regarding practice of religion. Paragraph 22 of the said decision reads as follows:

"22. Practices which are regarded by the community as part of its religion are also matters of religion. Among most of the Hindus disposal of the dead is effected by cremation but among Muslims, Jews and Christians it is done by burial. Right to bury dead bodies in a particular manner with particular rites and ceremonies in consecrated places is part and parcel of the practice of certain religions. Among Christians while rites at the time of burial consist

in services expressed in words ceremonies consist in gestures or acts preceding, accompanying or following those words. Catholics, it is admitted that members of the A Party are Catholics, believe in the immortality of the soul and resurrection of the body. The practice of burying dead bodies with certain rites and ceremonies is an integral part of the Catholic faith. In burying dead bodies in consecrated places they only exercise their fundamental right regarding practice of religion."

60. In the light of the aforesaid aspects, the impugned judgments and decrees of both the courts below are set aside. Consequently, the Appeal Suit, A.S.No.23/2003 on the file of the District Court, Kottayam, stands allowed. Accordingly, it is ordered that the impugned judgment and decree dated 29.9.2000 of the Munsiff's Court, Pathanamthitta, in O.S.No.57/1999 stands set aside. Resultantly, the Original Suit, O.S.No.57/1999 on the file of the Munsiff's Court, Pathanamthitta, stands dismissed.

61. Before parting with this case, this Court would observe that notwithstanding the dismissal of the suit, after the commencement of the operation of the vault type cemetery in the plaint scheduled property, if any of the aggrieved parties can establish that there actually occurs pollution or such other nuisances, it will certainly be open to them to ventilate their grievances by approaching the competent civil court for appropriate reliefs in such matters relating to private nuisance, public nuisance

or such other civil wrongs, in accordance with law. In such an eventuality, it would also be open to such aggrieved persons concerned to approach the competent municipal authorities in terms of Sec.440 of the Kerala Municipality Act, 1994, which deals with measures for abatement of nuisance, and also to approach the competent authorities as envisaged in provisions in Sec.133 of the Cr.P.C., provided jurisdictional facts in that regard are completely satisfied or any other appropriate remedies in accordance with law.

62. Consequently, it is also clarified that the appellants herein will be at liberty to proceed with the construction, after getting necessary formal revalidation of Ext.B-14 permit from the 8<sup>th</sup> respondent Pathanamthitta Municipality. The fact that ever since 11.3.1999, the date of interim injunction, upto now, the appellants could not proceed with the construction in view of the injunction granted by the court below, has to be duly taken note of by the 8<sup>th</sup> respondent Pathanamthitta Municipality, while considering the revalidation of the permit. Therefore, it is consequentially ordered that the Secretary of the Pathanamthitta Municipality will issue necessary extension or renewal of Ext.B-14 permit in terms of Rule 15A(9) of the Kerala Municipality Building Rules, 1999, within two

weeks from the date of receipt of a certified copy of this judgment. The appellants herein will be at liberty to produce a certified copy of this judgment before the Secretary of the Municipality for facilitating further necessary action in that regard.

With these observations and directions, the Regular Second Appeal stands allowed. However, there will be no order as to costs.

sdk+ Sd/-  
ALEXANDER THOMAS, JUDGE

The order dated 15.12.2015, passed on R.S.A.No.1209/2004 modifying the directions in paragraph 62 of the judgment dated 07.10.2015 in R.S.A.No.1209/2004 is appended.

Sd/-  
Registrar (Judicial)

///True copy///

P.S. To Judge.

