

(1932) 04 MAD CK 0005
In the Madras High Court

M. Kunju Nair

APPELLANT

Vs

Narayanan Nair

RESPONDENT

Date of Decision : 29-04-1932

Acts Referred:

Contract Act, 1872 — Section 74

Citation : AIR 1933 Mad 252 : 140 Ind. Cas. 838 : (1933) 37 LW 93 : (1933) 65 MLJ 29

Hon'ble Judges : Anantakrishna Aiyar, J

Bench : Division Bench

Judgement

Anantakrishna Aiyar, J.—The plaintiff in Small Cause Suit No. 1498 of 1925, on the file of the District Munsif of Palghat, is the petitioner in

this Civil Revision Petition. He started a kuri in which the defendant took one ticket. The defendant bid in auction and was paid the amount due. As

per the kuriwari, Ex. B, and the receipt. Ex. C (executed by the defendant to the plaintiff when he was paid the amount of the auction), the

defendant was bound to pay the future instalments regularly; but having made default, the plaintiff sued to recover the whole of the future

instalments at once. The defendant pleaded that the plaintiff was not entitled to claim the future subscriptions in one lump sum. The main point for

determination was whether the plaintiff was entitled to claim the amounts of the future instalments in one lump sum. There was no oral evidence in

the case, neither the plaintiff nor the defendant having gone into the box nor adduced any oral evidence. The only exhibits filed in the case were: Ex.

A, the registered notice sent by the plaintiff's vakil to the defendant prior to this suit demanding the amount; Ex. B, the kuriwari (the rules and

conditions of the kuri); and Ex. C, the receipt granted by the defendant when he

was paid the prize money when he bid at the auction. The learned

District Munsif held (1) that under the terms of the kuriwari, the plaintiff was not entitled to claim all the future instalments in a lump sum, and (2)

that "in any case the plaintiff can only claim the subscriptions which have actually become due".

2. The plaintiff's suit was decreed with reference to the amounts due for the instalments which fell due up to the date of the plaint, and the claim for

the other instalments was disallowed. The plaintiff has preferred this Revision Petition claiming the whole of the future instalments in a lump sum, the

default by the defendant having been found by the Lower Court. On a construction of the kuriwari, I have no reasonable doubt on the first point.

Para. 6 of the kuriwari - Ex. B - runs as follows:

The person who bids and receives moneys is to pay his subscription on the same date of auction to the stake-holder, and cause entries thereof to

be made in his book by the stake-holder. If default is made thereof, it is to be paid within five days at a profit of four annas in the rupee, and if

default is made even in that, the stake-holder is entitled to recover all the amounts to be paid in future together in a lump sum with interest at 2 per

cent, per mensem.

3. The provision is clear that when the defendant made default in the payment of subscriptions for two consecutive instalments according to the

finding in the present case, the plaintiff - the stake-holder - was entitled to recover the whole of the amounts due for all the future instalments.

Whether the provision is valid or not (a question to be considered presently) it is clear that there is such a provision in the kuriwari. The learned

advocate for the respondent did not seriously contest this position, and I think that the learned District Munsif was not right in his construction of

the kuriwari. I hold that the terms of the kuriwari provide that the plaintiff would be entitled to recover all the amounts due for all the future

instalments in this case.

4. The second question which was fully argued before me by the learned advocates who appeared in the case is whether such a stipulation is valid

and whether the plaintiff is entitled to enforce that provision. On that point also I am unable to agree with the decision of the Lower Court. As the

question is one that is likely to arise frequently in practice having regard to the

prevalence of kuries (chit funds) in Malabar and some other districts in the Presidency, I think it is better that I just mention the line of reasoning which has led me to arrive at my conclusion, The plaintiff is the stakeholder called kuttimoooppa in Malabar and karaswan in some other districts. The kuri is to consist of 50 tickets of the value of Rs. 6 each. There was to be an auction once in every month. The stakeholder is to collect moneys from the ticket-holders, and he is himself responsible to pay the amount bid in auction to the successful bidder. The auction bidder is to be paid the amount of the bid by the stakeholder within 15 days on furnishing sufficient security or surety to the satisfaction of the stakeholder. If sufficient security be not furnished, the stakeholder is to deposit the amount bid in auction in a particular Bank in the stakeholder's name. The future instalments are to be paid by the stakeholder from out of the said deposit and any deficiency is to be recovered by the stakeholder from the subscriber in question. If there be no subscribers who were prepared to bid in an auction, then the tickets that yet remain to be drawn were to be drawn by the casting of lots and the subscriber in whose name the ticket happened to be drawn has to be paid the amount after deducting Rs. 15 which is to be taken by the stakeholder as his remuneration "for his pains".

5. The stakeholder and the subscribers have signed the kuriwari. Except that the stakeholder is allowed to take Rs. 15 out of the collections every month "for his pains", the rules of this kuriwari are substantially the same as those which find a place in the ordinary kuries, as seen for example, from the kuriwaris set out in the cases reported in *Panchena Manchu Nayar v. Padmanabhan Nayar* ILR (1896) 20 Mad. 68 : 7 M.L.J.

26 and *Vasudevan Nambudri v. Mammod* ILR (1899) 22 Mad. 212. The question is whether, in the absence of any special circumstances, the stakeholder is entitled to recover the amounts due for all the future instalments in case there was default in paying any future instalment as provided in the kuriwari. It was argued that such a stipulation is in the nature of a penalty and that the stakeholder is only entitled to a decree in respect of the amounts due for the instalments that have actually fallen due, with interest, but that he is not entitled to a decree for anything more. As the matter has come before the Courts on various occasions, I think it will be

convenient to note how the Courts have viewed similar provisions of

such *kuriwaris*. In *Periasami Thalavar v. Subramanian Asari* (1902) 14 M.L.J. 136 Benson and Bhashyam Aiyangar, JJ., had before them a case

where under the terms of a bond executed to the stake-holders of a certain chit fund the obligor bound himself to pay 27 cottas of paddy in

certain instalments, and, that on default, to pay one-sixteenth cotta per cotta per diem for interest from date of default"".

6. The Court held that ""the stipulation was not unenforceable"". The learned Judges observed as follows:

There is no allegation that the defendant did not enter into the transaction with his eyes open, or was deceived as to its terms. The bond was

entered into in accordance with the rules of the chit fund, which are not in any way illegal. There is no ground for not allowing the rule to be given

effect to.

7. No doubt the question before the Court then was not exactly the same as the one before me. But the observations are useful as throwing light on

the general nature of the bonds entered into between ticket-holders and the stake-holder in chit funds.

8. In *Vaithinatha Iyer v. Govindaswami Odayar* (1921) 42 M.L.J. 551 Oldfield and Ramesam, JJ., had more directly to consider the effect of

similar provisions in *kuriwaris*. At page 557 the learned Judges observed as follows:

Throughout the whole of the Lower Court's judgment we find no mention of the special relation in which the stake-holder of the chit is to the

subscribers, and the special necessity for provision for protection of his interest in the agreement by which those relations are regulated. That this

relation is of a special nature and justifies stringency in those conditions and in particular in the rate of interest provided for cases of default has

been clearly recognised in the decisions with which we respectfully agree. The stake-holder has necessarily to depend on punctual payments from

his subscribers and to reserve to himself powers to enforce such payments. For, the stake-holder alone is liable to each subscriber and there is no

liability between the subscribers inter se, and without punctual payments by the individual subscribers, the stake-holder could not discharge his

liabilities to the successful bidders, as they arose. Looking at the transaction as a

whole, as defined by Ex. A, we are unable to hold that any of the conditions are unreasonable or are such as the parties might not naturally recognize should regulate the exceptional relations between them.

Generally therefore we cannot treat any of them as penal.

9. *Ayya Pattar v. Attupurath Mankkal Karnavan* 1919 M.W.N. 805 *Abdur Rahim and Spencer, JJ.*, observed as follows:

Generally speaking and apart from the conduct of the parties in this case, we should say that time, in such transaction, is of the very essence of the contract.

10. In *P. Sankunni Menon Vs. The Empire of India Life Assurance Co. Ltd., Venkatasubba Rao, J.*, remarked at page 394 as follows:

What may be construed as a penalty in the case of an ordinary loan, is not necessarily a penalty in the case of a chit fund transaction. That is the

effect of the decision in *Vaithinatha Aiyar v. Govindaswami Odayar* (1921) 42 M.L.J. 551. It is there pointed out that in a case of a stake-holder

of a chit, his relation to the subscribers being of a special nature, special necessity exists justifying stringent provisions to protect his interest. The

learned Judges observe: "Without punctual payments by the individual subscribers, the stake-holder could not discharge his liabilities to the

successful bidders as they arose." Such remarks will apply with greater force to a contract of insurance.

11. One may refer also to contracts of hire purchase. In *Ellammal v. Venkataramana Rao* (1924) 79 I.C. 958 *Spencer and Devadoss, JJ.*, held

that "time was of the essence of the contract in such cases".

12. It is true, as held by *Ramesam, J.*, in *Muthukumaraswami Pillai v. Subramania Chettiar* (1926) 102 I.C. 14, that it could not be said that the

doctrine of penalty would not apply at all under any circumstances to provisions in a kuriwari. In the words of the learned Judge, "the terms of a

chit fund contract may be penal". But I do not understand the learned Judge to say that a stipulation to pay the whole of the future instalments in a

lump sum in case of default in payment of an instalment as provided in the kuriwari should be considered as a penalty and should always be

relieved against. I have gone through the judgment of the learned Judge, and I do not think that the learned Judge meant to decide that question.

This is what the learned Judge says:

The second point argued before me is that the conditions of the bond are penal. Under this point he (the defendant) raises two questions. The first is that the rate of interest payable in default is penal, and secondly, the stipulation relating to payment of all the future instalments on two defaults is also penal. Mr. Patanjali Sastri appearing for the respondents argues that the second point was really not raised either in the written statement or in the issues. It was raised very vaguely in the written statement. It is true it is not raised in the issues. Defendant 4's conduct in depositing the amount of instalments 6 to 21 with interest at 12 per cent, from the date of the 6th call up to 17th August, 1920, namely, Rs. 1,746, seems to suggest that he intended to raise no question about the advancing for the payment of instalments 6 to 21. The suit was filed on the 8th September, 1920. By that date, instalments 6 to 13 had fallen overdue, and 14 to 21 had not. Even assuming that the stipulation about the payment of all the instalments on defaults is penal, there is nothing to prevent defendants from paying and the plaintiff from accepting the amount of instalments 14 to 21 before their time. The only question is whether the amount of interest which he has paid for these instalments, namely, Rs. 546, was too much, if it is regarded as the amount of interest only on instalments 6 to 13. One thing is clear, that he was quite content to get rid of the obligation to pay instalments 6 to 21 by paying an interest of Rs. 546 for them, whichever way the figure may be arrived at.

13. The learned Judge's decision was really only on the question of the amount of interest that the plaintiff was entitled to in the peculiar circumstances of that case. There was a Letters Patent Appeal (L.P.A. No. 199 of 1927) preferred against the learned Judge's judgment by the plaintiff. The learned Judge's decision on the question of interest was confirmed in the circumstances but the plaintiff was given a decree in respect of the future instalments also. The District Munsif had passed a decree in respect of all the other instalments, in regard to which the defendant had preferred an appeal. Accordingly, by the decision in the Letters Patent Appeal the amount fixed in the decree in S.A. No. 563 of 1925 was added to the amount due under the District Munsif's decree.

14. I have thought it necessary to quote the relevant passages from the judgment of the learned Judge, as it was strongly passed upon me by the

learned advocate for the respondent that the question before me was decided by the learned Judge in Muthukumaraswami Filial v. Subramania

Chettiar (1926) 102 I.C. 14 in favour of the respondent's contention. But from what I have said above, it seems to me that the learned Judge's

judgment in this case is no authority in favour of the contention that a provision in a kuriwari to pay all the future instalments in case of default of

payment of one instalment should always be treated as penal and relieved against. In fact that learned Judge sitting with Oldfield, J., had decided

the contrary in the case reported in Vaithinatha Aiyar v. Govindaswami Odayar (1921) 42 M.L.J. 551 and there is no reason to think that the

learned Judge was inclined to withdraw from the position taken up in that case, as was contended before me by the learned advocate for the

respondent.

15. The learned advocate for the respondent strongly relied on two decisions of V.V. Srinivasa Aiyangar, J., reported in Ramalinga Adaviar v.

Meenakshisundaram Pillai (1924) 47 M.L.J. 883 and Subbiah Pillai v. Shanmugam Pillai 1927 M.W.N. 527. As those decisions have been

recently considered at length by Curgenvin, J., in S.A. No. 921 of 1926, I do not propose to go into them in detail. The learned Judge -

Curgenvin, J. - after discussing the questions whether such a case would fall under Illus. (f) or Illus. (g) to Section 74, Contract Act, came to the

following conclusion:

I can see no reason therefore for not following the decision in Vaithinatha Aiyar v. Govindaswami Odayar (1921) 42 M.L.J. 551, which sitting

singly, I should feel bound either to follow, or to refer this case to a Bench. I conclude that the claim to the principal should be allowed in full.

16. The case before the learned Judge was also a case of a chit fund, and it was held that a stipulation for payment of the entire amount of the

future instalments on default in payment of one, was not a stipulation by way of penalty. As already mentioned, particular stipulations in a kuriwari

may be of the nature of a penalty, as observed by Ramesam, J., in Muthukumaraswami Pillai v. Subramania Chettiar (1926) 102 I.C. 14. See also

the decision of the Full Bench in Muthukrishna Iyer v. Sankaralingam Pillai ILR (1912) 36 Mad. 229 : 24 M.L.J. 135. But the provision to pay all

the future instalments in a lump sum in case of default by a prize-winner in

payment of any instalment provided for by the kuriwari has been held in a number of cases in this Court to be by itself not a penalty.

17. The decision of Odgers and Curgenvin, JJ., in *Venna Tatayya Vs. Kakarla Gangayya*, was also referred to. But that was not a case of a chit

fund, but of a decree incorporating a razinama between the parties, and the Court held that the provision that in default of payment of any one of

the instalments, the plaintiff could recover, irrespective of the future instalments, the entire amount of principal and interest that remained

outstanding by that date was not in the nature of a penalty u/s 74, Contract Act.

18. As the question has been discussed in the cases already quoted by me, I propose only to give reference to the decision of the House of Lords

in *Wallingford v. Directors, etc. of the Mutual Society* (1880) 5 A.C. 685, of the Court of Appeal in England in *Protector Loan Co. v. Grice*

(1880) 5 Q.B.D. 592 and of the Irish Court in *In the matter of O.B. - An arranging debtor* (1917) 2 Ir. Rep. 354 In Halsbury's Laws of England,

Vol. 13, p. 152, para. 179, there are the following observations which seem to be relevant to the present case:

Where money is actually payable, or to become payable, a provision may validly be made for diminishing the amount, or making it payable by

instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complies with the terms he is entitled to the benefit

of the provisions. But he must purchase the benefit by strict compliance with the terms; and, if he is in default, the full debt is payable and he cannot

claim relief as against a penalty. Upon this principle, when a higher rate of interest has been stipulated for in a mortgage, interest at a lower rate

may be substituted on condition of punctual payment; and where a debt is made payable by instalments, a stipulation that on non-payment of any

instalment the entire debt shall become due is not in the nature of a penalty.

19. See also para. 1325 at p. 555 of *Story on Equity*, 3rd Edn., by A.E. Rendall.

20. In essence, the transaction before me is a loan of a common fund to one member. The member to whom the loan is to be advanced is selected

either by casting of lots or by other means. The person who offers the highest discount is, in some cases, selected as the person entitled to the loan

of the common fund. But the amount advanced to such member is a loan, and the common fund is lent to each subscriber in turn. As observed by

Scotland, C.J., and Frere, J., in *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R. 448, "It is simply a loan of the common fund to each

subscriber in turn." These remarks were made in 1863. It is really a debt in praesenti but to be paid by particular instalments if certain conditions

be duly observed, but otherwise to be paid up at once irrespective of the benefit of time and instalments. It has been so viewed in this Presidency

for a long time. English Courts have held that in such cases no question of penalty arises. See the observations of Lord Selborne at p. 696 in

Wallingford v. Directors, etc. of the Mutual Society (1880) 5 A.C. 685, of Lord Blackburn at p. 705 and of Lord Watson at p. 710.

21. With reference to the general nature of such kuri transaction, I may quote the following observations of Benson and Sundara Aiyar, JJ., in

Appeal No. 218 of 1911. The learned Judges say:

The kuri is a well-known institution in Malabar and is resorted to to help thrifty persons for the purpose of investing their savings with good

chances of profit.

22. As kuri transactions are common in the States of Travancore and Cochin also, I just wanted to see how the Courts in those States have dealt

with such a matter. Such transactions are in Travancore called Chitty-transactions and I find that the Travancore High Court has held that "a

stipulation of the kind in a chitty bond is not penal". See *Venkitasubramania Ayyar v. Velayudhami* 15 T.L.R. 182 and *Krishnan Raman v. Raman*

Aiyappan 21 T.L.R. 52 (which latter case refers at p. 55 to a Full Bench decision of that Court to the same effect) and 44 T.L.R. 461.

23. The Chief Court of Cochin has also taken the same view. See 7 Cochin Law Reports 309 where it is remarked as follows:

When regard is had to the nature of a kuri, it is impossible to regard such a provision as a penalty.

24. I do not feel called upon in the circumstances to refer this question to a Bench.

25. I may note that no question has been argued before me whether the provision in this kuriwari relating to interest is penal or not, and so it is not

necessary for me to give any opinion on that point in this case.

26. For the above reasons, I think that the learned District Munsif was in error in this case in holding that the plaintiff - the stake-holder - was not

entitled to the amounts due for all the instalments together, and his decree will be modified by giving the plaintiff a decree for the whole of the

amount sued for, together with interest at 6 per cent, from date of plaint till date of payment, with costs in this and in the Lower Court.