
(1924) 03 MAD CK 0032
In the Madras High Court

Nagappa Pillai

APPELLANT

Vs

Arunachalam Chetty

RESPONDENT

Date of Decision : 25-03-1924

Acts Referred:

Penal Code, 1860 (IPC) — Section 294A

Citation : AIR 1925 Mad 281 : 85 Ind. Cas. 1016 : (1924) 47 MLJ 876

Hon'ble Judges : Odgers, J;Krishnan, J

Bench : Full Bench

Judgement

Krishnan, J.—This Civil Revision Petition has been referred to a Bench by Coleridge, J. as he considered that the ruling of Phillips, J., in

Sankunni v. Ikkora Kirtti (1919) MWN 570 on which the judgment of the District Munsif is based required re-consideration.

2. The suit refers to a chit fund carried on by the defendant. There were 500 subscribers each paying a rupee a month. The chit was to last for 50

months during which period two prizes were to be drawn by lot of Rs. 25 each among the subscribers every month. Any subscriber who

happened to win a prize was paid Rs. 25 at once and was thereafter to pay only a subscription of eight annas a month. If he won a second prize he

would be paid Rs. 25 more and his subscription ceased and his name would no longer be included in drawing the prizes. At the end of the 50th

month all the subscribers who had won no prizes were to be paid back the whole of the money they subscribed, namely Rs. 50 each; the single

prize winners were similarly to be repaid Rs. 25 each. These are the rules under which the chit was carried on. There were certain other rules

regarding defaulting subscribers, but it is not necessary now to refer to them.

3. It will thus be seen that while the subscribers do not lose any part of the subscriptions they pay they get a chance of winning one or two prizes.

That chance was decided by lot. But the prizes did not come out of the subscription paid as the total amount had to be repaid to the subscribers

after the 50th month. The prize money was apparently obtained from the interest that the defendant could realise by himself investing the

subscription moneys received by him for the 50 months, during that period.

4. There can be no doubt that so far as the arrangement regarding the giving of prizes is concerned it is clearly a lottery; and any suit brought, for

example, to recover the prize money will fail as being one to enforce an illegal contract. Section 294 A of the Indian Penal Code makes a lottery an

illegal transaction. The present suit however is not for such a purpose but for the refund of the subscriptions paid as the chit has been discontinued

by the defendant. The question we have to decide is whether the illegality of the prize arrangement attaches itself to the contract to repay in a lump

sum at the end of the 50 months the total subscriptions collected for those 50 months and prevents the plaintiff's present claim from being

recognised and enforced.

5. It seems to me that the main contract between the parties were to pay back the total sum of the subscriptions collected intact in a lump sum at

the end of the period. As an inducement to join the chit the prize arrangement has been added on to it as a collateral arrangement to the main

contract. It is a collateral and ancillary advantage that a fortunate subscriber may get if he wins a prize. I am inclined to think that the contract to

repay the subscriptions at the end of the period is severable from the arrangement to give prizes and the illegality of the latter does not necessarily

attach to the former. The arrangement amounts to this that in lieu of interest on his money the subscribers accept the chance of winning one or two

prizes in a lottery; for the capital has to be refunded to them intact at the end of the term. Any illegality attaching to the interest arrangement will not

necessarily affect the claim for the capital. I do not consider that it is right to hold in the circumstances of this case that any portion of the money

stated to have been paid by the plaintiff has been actually paid out as prizes; for the condition to return the money at the end of the term excludes

such an inference.

6. In the case in *Sankunni v. Ikkora Kirtti* (1919) MWN 570 the learned Judge did not have his attention drawn to the point of view above set

out, the respondent not having been represented before him. In the view I am taking it follows that the plaintiff's suit is maintainable as brought and

it is not necessary to refer to the various English and Indian cases cited before us.

7. I would therefore set aside the decree of the District Munsif and remand the case to him for disposal on the merits and direct defendant to pay

the costs of this Civil Revision Petition to the plaintiff; and direct other costs to abide and follow the result and the stamp duty for this petition to be

refunded.

Odgers, J.

8. This is a Civil Revision Petition by the plaintiff in a small cause suit. He sued for the recovery of a sum of money representing his subscriptions to

a certain chit fund and interest. The District Munsif found the chit in question was a lottery and relying the ruling in *Sankunni v. Ikkora Kirtti* (1919)

MWN 570 dismissed the plaintiff's suit. The first question therefore is whether the District Munsif was right in his opinion that the chit was a

lottery. It consisted of 500 tickets of a rupee each and was to continue for 50 months. On the 5th of every Tamil month two prizes were to be

drawn of Rs. 25 each, a winner of one prize in the series paid annas eight only as monthly subscription after winning : a winner of 2 prizes paid

nothing subsequently. The prize-winners each month were determined by lot. It is contended that this chit fund falls within the scope of the ruling in

Kamakshi Achari v. Appavu Pillai (1863) 1 MHCR 448, where it was laid down that a transaction is not necessarily a lottery within Act V of

1844 because some matter is agreed to be decided by lot. In that case it was to be determined by lot which of the subscribers should be entitled to

take the whole amount of the month's subscriptions. All got their subscriptions returned, it was only the loan of the common fund which was

determined by lot. The present case goes much further than this. A lottery not authorized by Government is now illegal by virtue of Section 294-A,

Indian Penal Code, and in the present case it is clear that in the most favourable event a subscriber could draw 2 prizes or Rs. 50 at the first

drawing, i.e., on subscribing rupee one. In the least favourable event he drew no prize and got his subscription back at the end of the 50th month.

This chit fund proceeded for 26 or 27 months and the proprietor or stake-holder then stopped the chit, on hearing, it is said, of the judgment of

Phillips, J. reported in *Sankunni v. Ikkora Kirtti* (1919) MWN 570. The present suit is to recover back the instalments already paid by plaintiff as

subscriber to the chit. I have no doubt that the chit fund under consideration is a lottery or distribution of prizes by lot or chance and is therefore

illegal under the law. The appellant before us however urges that the lottery can be and ought to be separated from the contract to return the

subscriptions at the end of the 50th month and that as the plaintiff's subscriptions in the hands of the stake-holder have not yet been applied to the

illegal purpose, they can be recovered. That part of plaintiff's subscriptions has gone in paying the prize winners is clear. Further plaintiff has taken

his chance in the lottery of drawing one or two prizes every month for 26 or 27 months. His name or number has been placed in the lottery for

each one of those drawings. He has not chanced to draw a prize though he has competed for it by taking part in the lottery. I do not see therefore

how the two things can be kept distinct The plaintiff argues that the case falls within the law as to wagers, i.e., Section 30, Contract Act and

corresponding to Section 18 of the Gaming Act, 1845 (8 and 9 Vic. c. 109). There was some argument before us that Section 65, Contract Act

applied to this case. I am of opinion that it is wholly inapplicable the agreement here is not discovered to be void nor did the contract become void

it was illegal from the beginning. Under the section of the Gaming Act it has been held that the words prohibiting the recovery of money " which

shall have been deposited to abide the event upon which any wager shall have been made" do not prevent the party from repudiating the wager at

any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stake-holder. Cf.

Hampden v. Walsh 1 QBD 189 whether the authority of *Hasllow v. Jackson* 8 B & C 221 is established and *Diggle v. Higgs* 2 Ex D 422 in the

Court of Appeal. Both cases were approved by the Privy Council in *Trimble v. Hill* 5 AC 342. Therefore, when money has been paid under an

unlawful agreement but nothing else done in performance of the latter, the money may be recovered back. *Tappenden v. Rundall* (1801) 2 B&P

467 followed in *Ledu Coachman v. Hiralal Bose* ILR (1915) C 115. The exception engrafted on the section of the Gaming Act by this case is

probably confined to cases where the agreement is not actually criminal or immoral. See particularly per Chambers, J., in *Tappenden v. Rundall*

(1801) 2 B & P 467. If this is so, the present case would appear to be outside the benefit of the exception as falling within the Criminal Law. Even

otherwise the effect of *Kearly v. Thomson* (1890) 24QBD 742 and *Taylor v. Bowers* 1 QBD 291 is that the recovery may be made before the

illegal purpose or any material part of it is carried out. Fry, L.J. at p. 747 in *Kearly v. Thomson* (1890) 24 QBD 742 says:-"" I hold therefore that

where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible though there remains something not

performed, that the money paid under that illegal contract can be recovered back."" On this case can it be said here that no material part of the

illegal purpose has been carried out ? I think not. 26 or 27 months have elapsed out of the 50 originally contemplated or more than half the term of

the lottery has run and prizes have been awarded by lot every month up to the time the lottery was brought to an end. One has little sympathy

indeed with the defendant, who has enriched himself at the expense of his subscribers but where both plaintiff and defendant are in *pari delicto*, and

there is no ground here whatever for holding that they are not *potior est conditio possidentis* and in my opinion the plaintiff is not, entitled to recover.

The Civil Revision Petition must therefore be dismissed. I should like to express my indebtedness for the assistance of the able arguments

advanced by the learned vakils in this case, Mr. Sivaramakrishna Aiyar for the appellant and Mr. Sundaram Aiyangar who, in the absence of the

respondent, kindly argued the case as *amicus curiae*.

9. This petition coming on again "" for argument "" on Thursday the 13th day of March, 1924 and having stood over for consideration this day, the

Court delivered the following.

Krishnan, J.

10. We have differed in our opinion as to the result of the revision. The question now to be decided is whether Clause 36 of the Letters Patent or

Section 98 of the CPC applies to the case.

11. Section 98 in terms applies only to appeals under the Civil Procedure Code. Section 108 makes it applicable to second appeals : but there is

no similar provision making it applicable to revision petitions u/s 115, Civil

Procedure Code, or u/s 25 of the Small Cause Courts Act, or under the Government of India Act. Section 141 cannot be relied on for applying Section 98 to such proceedings as it refers only to procedure provided for suits and not for appeals as pointed out in the case in *In re, Karri Venkanna Patrudu* (1915) 18 MLT 591. Furthermore as pointed out by their Lordships of the Privy Council in *Thakur Prasad v. Fakir Ullah* ILR (1894) A 106 : 5 MLJ 3, Section 647 corresponding to the present Section 141 refers to matters in the nature of suits such as proceedings in probates, guardianships and so forth; it does not refer to revision petitions in the High Court. When the High Court acts in revision in a small cause suit it does not do so under the CPC but u/s 25 of the Provincial Small Cause Courts Act and Section 98 cannot be applied to it in the absence of a special provision so applying it. On the other hand Section 7 of the CPC expressly excludes the applicability of Section 98 to Small Cause Courts. Section 115 is also excluded showing thereby that Section 7 is not confined in its application to Small Cause Courts in their original jurisdiction when trying suits but applies also to Courts exercising revisional powers in small cause matters. Section 7 seems to be conclusive to show that Section 98 does not apply to small cause revisions.

12. On the other hand there is no difficulty in applying Clause 36 of the Letters Patent though it speaks only of original and appellate jurisdictions. It has been consistently held that the expression "appellate jurisdiction" in this clause includes revisional jurisdiction. See *Chappan v. Moidin Kutty* ILR (1898) M 68 : 1898 8 MLJ 31 and *Srinivasa Aiyangar v. Ramaswami Chettiar* ILR (1915) M 235 : 39 MLJ 12. This view is further supported by the recent amendment of Section 15 of the Letters Patent excluding judgments in civil revision cases from the class of appealable judgments. As pointed out by Edge, C.J. in *Hussaini Begam v. The Collector of Muzaffarnagar* ILR (1889) A 176 the provision in the Letters Patent must be applied to all cases in the High Court except those to which Section 575 of the old Code, now Section 98, can properly and without straining its language be applied. In that case Clause 27 of the Allahabad Letters Patent, corresponding to Clause 36 of ours, was applied to a case where the learned Judges differed on the question whether sufficient cause for excusing delay in filing an appeal had been shown or not.

Recently the Privy Council had to consider the question whether Section 98, CPC or the Letters Patent applied to an appeal from a decree passed

on the Original Side, see *Bhaidas Shivdas v. Bai Gulab* ILR (1921) B 718 : 1921 40 MLJ 519. Their Lordships refer to Sections 4 and 98, Civil

Procedure Code, and point out that there is no specific provision in Section 98 and that there is a special form of procedure which was already

prescribed, namely, Clause 36 of the Letters Patent and therefore u/s 4, the former could not be treated as controlling the latter. It was held in *In*

re, Karri Venkanna Patrudu (1915) 18 MLT 591 already referred to that Clause 36 of the Letters Patent applied where two Judges differed in a

matter u/s 476, Criminal Procedure Code. A similar question was again decided by a Full Bench of this Court in *Bapu alias Audimulam Pillai Vs.*

Bapu alias Krishnayan, in the same way, holding that the power conferred by Section 195 of the Criminal Procedure Code was a special power

and therefore the case was governed by Clause 36 of the Letters Patent. Similarly by analogy it may be argued that as the exercise of our power

u/s 25 of the Small Cause Courts Act is the exercise of a special power it is not governed by the Civil Procedure Code. In an application u/s 107

of the Government of India Act to revise an order u/s 145 of the Criminal Procedure Code, the Calcutta High Court followed the ruling in *Bapu*

alias Audimulam Pillai Vs. Bapu alias Krishnayan, and held that Clause 36 of the Letters Patent applied. See *Mariam Bewa v. Merjan Sardae* ILR

(1919) C 438. It was also held in *Chandra, Kishore v. Basarat Ali* (1917) CRILJ 418 that in a case u/s 115, Civil Procedure Code, Clause 36

applied and the opinion of the Senior Judge prevailed.

13. Against all this authority there is an expression of opinion in a case in the Madras Reports that in a small cause revision in the High Court,

Section 575 of the old Code corresponding to the present Section 98 applies by reason of Section 647, now Section 141, and not the Letters

Patent. See *Narayanaswami Reddi v. Osuran Reddi* ILR (1901) M 548. Though that opinion was given by a Bench of three Judges I consider that

it was an obiter dictum as the Letters Patent appeal before the learned Judges was disposed of on the merits and nothing turned upon which

judgment prevailed in the revision petition. The point was not discussed by the learned Judges possibly because it was a matter of no consequence

in the appeal. I do not think we are bound by that expression of opinion or that there is any necessity to refer the matter to the Full Bench again.

The weight of that opinion is lost by reason of the subsequent rulings of this Court particularly that of the Full Bench in Bapu alias Audimulam Pillai

Vs. Bapu alias Krishnayan, . I hold therefore that Clause 36 applies to the present case and not Section 98, Civil Procedure Code, and that our

order in the Civil Revision Petition must be in the terms proposed by me.

Odgers, J.

14. This was a petition u/s 25 of the Provincial Small Cause Courts Act, which runs as follows:

The High Court for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to

law, may call for the case and pass such order with respect thereto as it thinks fit.

15. It will be remembered that the suit was brought in the Small Cause Court for the recovery of certain subscriptions to a chit fund. The lower

Court dismissed the plaintiff's claim on the ground that the chit fund was a lottery. In this Court my learned brother and myself differed in opinion.

My learned brother held that the illegal element in the lottery could be discovered from the legal part in so far as it conformed to the ordinary chit

fund transactions with which we are all familiar. I held, on the other hand, that the illegality tainted the whole transaction and that therefore the

plaintiff could not succeed and his suit should be dismissed.

16. Now the question has been raised whether my learned brother's judgment should prevail under paragraph 36 of the Letters Patent as being the

opinion of the senior. Judge or whether it is open to us to make a reference in the matter u/s 98, Sub-section 2, Civil Procedure Code.

17. It is clear that this is not an appeal, and although it is called a revision petition it is doubtful whether it is really of that nature. It is a special

procedure provided by Section 25 of the Provincial Small Cause Courts Act, by which, if so advised, the High Court can correct an erroneous

order passed by the Small Cause Court. Several authorities have been cited to us, but I do not think it necessary to refer to them all. In *In re, Karri*

Venkanna Patrudu (1915) 18 MLT 591, two learned Judges, Abdur Rahim and Ayling, JJ., had differed on a petition u/s 115, CPC to revise the

order of a District Munsif who had committed the petitioner to a Magistrate on a

charge of perjury. The learned Judges of the High Court differed.

Mr. Justice Abdur Rahim was for setting aside the order u/s 476, Criminal Procedure Code. Mr. Justice Ayling saw no reason to interfere. The

Court held that Clause 36 of the Letters Patent applied to the case and that Section 141, Civil Procedure Code, did not make Section 98

applicable to matters of this kind. That case was, of course, strictly a case of revision and the Privy Council had held in *Bhaidas Shivdas v. Bhai*

Gulab ILR (1921) B 718 : 40 MLJ 519 that the two provisions, Clause 36 of the Letters Patent and Section 98, Sub-section (2), Civil Procedure

Code, do not affect each other. The case before their Lordships was a difference of opinion on an original side appeal to which Chapter VII of

CPC has, of course, no application. But it is quite obvious from their Lordships judgment that there is no ground for contending that Section 98,

Civil Procedure Code, has obviated the provisions of Clause 36 of the Letters Patent. The case in *Bapu alias Audimulam Pillai Vs. Bapu alias*

Krishnayen, was a difference of opinion in a sanction matter and the Full Bench held that an application to the High Court u/s 195, Criminal

Procedure Code, was neither an appeal nor a revision but a matter of special procedure and that therefore Clause 36 of the Letters Patent would

apply on a difference of opinion. This seems to me to be a strong authority, for holding that Clause 36 of the Letters Patent would apply to the

case before us, because as pointed out Section 25 of the Small Cause Courts Act is a special procedure and in my opinion is not a revision. The

difficulty in adopting this view is caused by a case reported in *Narayanaswami Reddi v. Osuran Reddi* ILR (1901) M 548. It is not a Full Bench

case though it was heard by a Bench of three Judges, and it is prima facie a case on all fours with the present. There an unsuccessful defendant in a

Small Cause Court filed a Civil Revision Petition to this Court. One learned Judge was of the opinion that the case should be remanded for

disposal while the other held that the case was not one in which the High Court should interfere. The defendant preferred an appeal under Clause

15 of the Letters Patent, and an objection was taken that there was no judgment in the strict sense of the term from which an appeal could be

taken. The Court held that there was a judgment and further that the case was governed by Section 575 (corresponding to Section 98), Civil

Procedure Code. The learned Judges distinguished the case cited to them for the appellant Hussain Begam v. The Collector of Muzaffarnagar ILR

(1889) A 176 which held Clause 36 of the Letters Patent applicable on the ground that there had been no hearing of the appeal within Section 575

(equivalent to Section 98), Civil Procedure Code, and that in the case before them there was a hearing of the petition by the two Judges who

differed as to the way the petition should be disposed of. The point was very summarily dismissed, if one may say so with respect, by the Bench

in Narayanaswami Reddi v. Osuran Reddi ILR (1901) M 548 but even so, I was at first inclined to think that it might be entitled to weight with me

in the present case. Even though, for the reasons I have given I am doubtful if Narayanaswami Reddi v. Osuran Reddi ILR (1901) M 548 can now

be considered good law in face of the decision in In re, Venkanna Patrudu (1915) 18 MLT 591 the Privy Council decision in Bhaidas Shivdas v.

Bai Gulab ILR (1921) B 718 : 40 MLJ 519 and more especially the inference to be drawn from the Full Bench decision of this Court in Bapu v.

Bapu ILR (1912) M 750 : 1912 23 MLJ 419. Under these circumstances I was inclined to the view that the only satisfactory way to clear up this

difficulty which, it is obvious, may recur at any moment, was to have an authoritative decision by a Full Bench on the point. On further

consideration however I have come to the conclusion that this is unnecessary; the opinion expressed in Narayanaswami Reddi v. Osuran Reddi

ILR (1901)M 548 is in almost a single line, the point is not discussed and further the Judges there held they were entitled to go into the merits

which they did and reversed the opinion of Subramania Aiyar, J., whose judgment it was contended prevailed under the Letters Patent. As pointed

out this is not a Full Bench case and is therefore not technically binding on us. I have already given reasons for thinking its opinion unsound. I

therefore agree that Clause 36 of the Letters Patent governs this case, and the judgment of my learned brother as senior Judge must prevail.