

(1927) 03 MAD CK 0040
In the Madras High Court

Narayana Aiyangar and Others

APPELLANT

Vs

K. Vellachami Ambalam and Another

RESPONDENT

Date of Decision : 08-03-1927

Acts Referred:

Citation : AIR 1927 Mad 583 : (1927) ILR (Mad) 696 : (1927) 26 LW 796

Hon'ble Judges : Waller, J;Spencer, J;Ramesam, J;Kumaraswami Sastri, J;Beasley, J

Bench : Full Bench

Judgement

Waller, J.—Petitioners were subscribers to a chit fund. They sued to recover from the stakeholder Rs. 36, being the amount paid by them

for 18 instalments at Rs. 2 a month. The defendants set up the usual dishonest plea that the fund was a lottery and their plea was accepted by the lower Court.

2. Two questions arise:

(1) Whether the fund is a lottery;

(2) If it is, whether the subscriptions are recoverable.

3. On both of these questions there is a great conflict of authority. The cardinal feature of this fund and of all the other funds dealt with in the

decisions cited before me is this that lots are drawn for prizes monthly and that the winners get Rs. 50, the full amount of the chit without any

liability for further subscriptions. After the 50th drawing, the unsuccessful subscribers get back the full amount of their subscriptions, but without interest.

4. On the first question, Phillips, J., held in Sundaram Pillai Vs. Ramasamia Pillai and Others, that a chit fund of this description was a lottery. The

question arose again before Krishnan and Odgers, JJ. They agreed with Phillips, J., on the first question, but disagreed on the second. Krishnan, J.,

thought that the arrangement to give prizes was separable from the main contract, which was to return the subscriptions. Odgers, J., held that a

subscriber was not entitled to recover. In *Shanmuga Mudali v. Kumaraswami Mudali* A. I. R. 1925 Mad. 870 Ramesam and Venkatasubba Rao,

JJ., dissented from these two decisions on the first question and held that a fund of this kind was not a lottery at all. In *Veeranan Ambalam v.*

Ayyachi Ambalam A. I. R. 1926 Mad. 168 Spencer and Madhavan Nair, JJ. declined to follow this decision and held that such a fund was a

lottery. On the second question they disagreed with Krishnan, J., and agreed with Odgers, J. I am informed that there are several unreported

decisions on these questions. It is evident that funds of this sort are numerous. The promoters do not seem to have been proceeded against under

the Criminal Law and the public must be in a state of complete uncertainty as to the legal position. The judiciary in the mofussil are in the same

difficulty. It seems to me essential that the controversy should be set at rest as soon as possible. I therefore order that this petition be placed before

the Honourable the Chief Justice with a view to its being referred to a Full Bench.

Order.

Spencer, J.

5. This suit was brought to recover Rs. 55-15-6 alleged to be due from the first defendant who promoted a chit fund to which the plaintiffs and

others subscribed for 15 months till it was stopped.

6. The Principal District Munsil of Manamadura dismissed the suit upon the preliminary point that this chit fund constituted a lottery and that a suit

to recover money contributed to a lottery would not lie. The first defendant raised this defence among others in his written statement; but no

evidence was taken to establish whether this particular chit fund was a lottery. It is essential to know how it was organised and advertised and

whether anyone who liked could join by merely paying subscriptions. The rules of the fund as given in the printed book filed with the plaint are not

sufficient to make this clear. The learned District Munsif from his observation in para. 7 of his judgment appears to have held the opinion that the

existence of a wager was the only test whether there was or was not a lottery.

But this is not a necessary consequence. If the only defence to this suit had been that the contracts between the individual subscribers and the promoter of the chit fund amounted to wagering contracts, then other considerations would arise for determination in respect of the plaintiffs' right to recover sums paid by them upon a consideration that failed.

7. Before the dismissal of the suit upon this preliminary point can be upheld, we must call for a finding to be returned within one month of the re-

opening of this Court after the ensuing summer vacation, whether an offence as defined by Section 294-A of the Indian Penal Code was

committed when the chit transaction in suit was formed and whether all who joined in the transaction including the plaintiffs were guilty of an

offence. Either side may adduce evidence upon this point.

8. Ten days will be allowed for objections.

Ramesam, J.

9. I agree that the finding has to be called for.

Beasley, J.

10. I agree.

11. (The finding of the lower Court was in the negative. After return of the finding the following judgment was delivered.)

Opinion

Ramesam, J.

12. This case has been referred to a Full Bench on account of a conflict between the earlier decisions of this Court. The question is whether the

terms of a chit fund transaction cannot be enforced in a Court of law. There are only two conceivable grounds on which Courts can refuse to

enforce the terms of a chit fund: (1) that it is an unlawful transaction as it involves the commission of an offence u/s 294-A of the Indian Penal Code

(vide Sections 23 and 24 of the Contract Act); (2) that it amounts to a wagering contract and is, therefore, void u/s 30 of the Contract Act. In the

present case we called for a finding as to whether an offence has been committed and the finding is that none has been committed as no office or

place for the purpose of drawing any lottery was kept. The only other ground is whether it amounts to a wagering contract and I think this is all

what Spencer, J., meant in *Veeranani Ambalam v. Ayyachi Ambalam* A. I. R. 1926

Mad. 168 where he says:

The civil law, however, goes further and prevents obligations arising out of lotteries being enforced in a Court of law whether the lottery is held in

an office to which the public have access or in a private place.

though he uses the word "lottery" and not the words "a wagering contract."

In my judgment in *Shanmuga Mudali v. Kumaraswami Mudali* A. I. R.

1925 Mad. 870 also I concluded by saying that the chit fund before us was not a lottery and I did not use the words "wagering contract." It would

be convenient to use the latter term as that is the phrase used in the Contract Act. In *Hampden v. Walsh* [1876] 1 Q. B. D. 189 a "wager" was

described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not

happening. In *Thacker v. Hardy* [1878] 4 Q. B. D. 685 Cotton, L. J., says:

The essence of gaming and wagering is that one party is to win. and the other to lose upon a future event which at the time of the contract is of an

uncertain nature--that is to say, if the event turns out one way A will lose; but if it turns out the other way he will win.

13. In *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. D. 484 Hawkins, J., defines a wager thus:

A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree

that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or

other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no

other real consideration for the making of such contract by either of the parties.....If either of the parties may win but cannot lose, or may lose but

cannot win, it is not a wagering contract.

14. In my opinion almost all the varieties of chit funds that have come up before the Courts in this Presidency including the present chit fund do not

satisfy the above definitions and are not wagering contracts. It is said that there is an element of uncertainty in all of them and there is an inequality

between the position of the parties. Some draw money early and are in a position to make larger gain by interest, others draw late and lose

interest. In my opinion, loss of interest is not loss strictly so called. It may be

failure to make a profit. If a person makes a hand loan to a friend and gets back his money after some time without any interest, he does not lose any part of his money but only fails to make a profit, namely, interest.

There are so many varieties of interest ranging from zero to very high rates of interest. It cannot be said that any one is bound to earn a particular rate and that not earning a particular rate is loss. It is clear that in most chit fund transactions, no subscriber loses the money he has contributed; and so long as getting back the actual amount of subscription is always assured, the interval of time, however, long it may be, is immaterial and it cannot be said any subscriber loses. But even otherwise the definitions as given by the English Judges are not satisfied by these chit funds. I, therefore, adhere to the opinion expressed by me in *Shanmuga Mudali v. Kumaraswami Mudali* A. I. R. 1925 Mad. 870 that these are all perfectly lawful transactions covered by the decision in *Wallingford v. Mutual Society* [1880] 5 A. C. 685 and they are enforceable in Courts.

The opposite conclusion of *Spencer and Madhavan Nair, JJ.*, in *Veeranan Ambalam v. Ayyachi Ambalam* A. I. R. 1926 Mad. 168 was mainly based upon a judgment of *Channell, J.*, in *Richards v. Starch* [1911] 1 K. B. 296 That case never went up to the Court of appeal and, as pointed out in *Halsbury's Laws of England*, Vol. 15, p. 269, it is inconsistent with two earlier decisions of the Court of appeal which were not considered by *Channell, J.*, viz., *Fuller v. Perryman* [1895] 11 T. L. R. 350 and *Hirst v. Williams and Perryman* [1895] 12 T. L. R. 128 decided by *Esher, M. R. Smith and Rigby, L. JJ.* These cases were not considered by *Channell, J.*, and are clearly inconsistent with his judgment. Following these decisions and *Wallingford v. Mutual Society* [1880] 5 A. C. 685 and the definitions of wagering contract already cited I am of opinion that the suit chit fund is not a wagering contract and there is no objection to enforce its terms in a Court of law.

15. In this view it is unnecessary to consider the further contention of the petitioner that, even if the transaction itself is void as a wagering contract, the moneys paid can be refunded. Vide *Barclay v. Pearson* [1893] 2 Ch. 154 and *Hampden v. Walsh* [1876] 1 Q. B. D. 189 already cited.

16. In conclusion I may say that if it is considered that chit fund transactions require to be regulated in the interests of the public to avoid the

perpetration of the fraud on poor and innocent persons legislation on the lines of the Provident Fund Act is the proper course and not to declare

them illegal by the straining of the law relating to wagering contracts. The decision of the Court below is reversed and the suit remanded for

disposal according to law. The petitioner will get costs of his petition. The costs of the Lower Court will abide and follow the result.

Kumaraswami Sastri, J.

17. I agree.

Beasley, J.

18. I agree.