

(1925) 09 MAD CK 0045
In the Madras High Court

P.V. Veeranan Ambalam

APPELLANT

Vs

Ayyachi Ambalam

RESPONDENT

Date of Decision : 23-09-1925

Acts Referred:

Contract Act, 1872 — Section 65

Citation : AIR 1926 Mad 168 : 92 Ind. Cas. 968 : (1925) 22 LW 772 : (1925) 49 MLJ 791

Hon'ble Judges : Spencer, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Spencer, J.—Two questions have been argued in this Civil Revision Petition. The first is whether the chit transaction, in which the petitioner

was the promoter and the respondent was a subscriber, partook of the character of a lottery or consisted of wagering agreements between the

subscribers and the promoter. The second is whether the respondent is entitled to recover the money which he subscribed either upon the terms of

the contract between him and the petitioner, or by reason of the obligation cast by S. 65, Indian Contract Act, upon persons who have received

any advantage, of restoring it upon an agreement or contract becoming void or being discovered to be void.

2. The mere fact that the order in which members of a Mutual Benefit Society take their benefits is determined by the drawing of lots does not

constitute the transaction a lottery [vide Wallingford v. Mutual Society (1880) 5 AC 685.

3. In the particular form of chit transaction that is before us, 500 persons undertook each to subscribe two rupees at each instalment and there

were to be 50 drawings at each of which the winner was to get Rs. 100 and walk

out without any liability to subscribe for any subsequent

instalments. In other words, the promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At

the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawings had taken place and 50

subscribers had drawn the prize of Rs. 100.

4. The promoter was secure against loss as he got two rupees from each of the 500 subscribers for the first instalment and he paid out only Rs.

100 to the winner. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. The promoter

was able to pay the prizes to those who drew the winning numbers out of the subscriptions paid into his hands by the others, and he recouped

himself from loss at the end by putting the money left in his hands from each instalment of subscriptions out to usury and pocketing the interest. The

chance of getting a prize of Rs. 100 for a payment of two rupees at the first "draw-ing, four rupees at the second and six rupees at the third and so

on, free from any further liability to the winner, was the bait for attracting investors. The adventitious character of the gains also had the effect of

making the whole transaction a lottery and the agreements between the promoter and the subscribers wagering agreements within the meaning of

S. 30, Contract Act. All who took part in what the law regards as an unlawful transaction were in pari delicto, and no participator in it can invoke

the help of the law for enforcing his claims to recover any money entrusted to any person to abide the result of the drawings, even though the return

of sums subscribed by those who were not lucky enough to draw winning tickets was one of the conditions of the transaction. I agree with the

opinion of Odgers, J. in *Nagappa Pillai v. Arunachalam Chetty* (1934) 47 MLJ 876 that the agreement to repay the subscriptions in a case like this

is not severable from the prize arrangement. Neither can a subscriber invoke Section 65 of the Contract Act, for the agreement in this case did not

become void nor was it discovered to be void but it was void for illegality from its inception [see *Indian Contract and Specific Relief Acts* by

Pollock and Mulla, 4th Edition, pp. 365-368] ; and the object of the subscription, which was the formation of an association for conducting an

unlawful system of lottery has been accomplished. When money has been paid

under an illegal contract which has been partially carried into effect,
it: cannot be recovered back [vide *Kearley v. Thomson* (1890) 24 QBD 742.

5. The respondent's vakil relied upon *Shanmuga Mudali v. Kumaraswami Mudali* (1925) 21 LW 403 which, with due respect, I feel difficulty in

regarding as a decision based on sound principles. That case and the one before us possess the common feature that the prize winners in the first

50 drawings were not bound to subscribe to instalments after they had won a prize. The significance, of this feature in a chit transaction, which

makes it a gamble, has been missed by the learned Judges. In *In re Duraiswami Mudali* and another CrRC No. 305 of 1890 (1 Weir's Rulings, p.

251) there was a similar feature in a chit transaction and it was observed by Collins, C.J. and Shepherd, J. : ""This is clearly a lottery, for it depends

entirely on the drawing of lots whether or not the prize of Rs. 106 falls to any given subscriber. As the prize-winner thereafter ceases to be a

subscriber to the fund, it must necessarily follow that the rest out of; whose subscriptions the prize has been paid and who continue to be

subscribers, are the losers. "" In *Shanmuga Mudali v. Kumaraswami Mudali* (1925) 21 LW 403 Venkatasubba Rao, J. expresses an opinion that

the fact that the money for the prizes really comes out of the interest on the capital fund contributed differentiates this case from other cases of

lotteries. He says at p. 409: ""What the 449 members lose is the interest upon their money and what the first 49 members gain is a portion of the

interest thus lost by the other subscribers."" But in *Richards v. Starck* (1911) 1 KB 396 it was held that the loss of interest upon a subscriber's

subscription was a sufficient loss to make a contract resting on a future event of an uncertain nature a gaming or wagering contract. In the present

chit transaction, out of 500 subscribers there were 450 losers of interest on their money deposited with the promoter. The remaining "50 made a

gain, the amount of which varied according to an order determined by the drawing of lots, which thus depended not on skill but on pure chance.

6. It is true, as Ramesam, J. observes, that the Criminal Law by Section 294-A, Indian Penal Code, only makes punishable the keeping of an

office for holding a lottery and the publication of proposals for drawing a lottery. 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

to which admission is not to be had for the mere asking. The learned Judges were evidently much influenced in their decision by the case of

Wallingford v. Mutual Society (1880) 5 AC 685. That " was a case of legitimate business free from speculation in which there were no losers and

no one gained an unearned sum of money by the chance of drawing lots. The same may be said of the kuri chit dealt with in Vasudevan Nambudri

v. Mammod ILR (1898) M 212.

7. The Civil Revision Petition is allowed with costs and the plaintiff's suit is dismissed.

8. Plaintiff and defendant will each bear their own costs in the trial of the Small Cause Suit in the District Munsif's Court

Madhavan Nair, J.

9. I have had the advantage of reading my learned brother's judgment with which I agree. The suit which has given rise to this Civil Revision

Petition was instituted by the respondent for the recovery of a sum of Rs. 119-13-5, being the principal and interest due to him on account of the

48 instalments of subscriptions paid by him to a chit fund conducted by the petitioner. The chit fund consisted of 500 subscribers, each subscribing

Rs. 2 per mensem. At the end of each month, a chit was drawn by lot and the winner was paid Rs. 100. Thereafter his connection with the chit

fund ceased altogether and he was not under any obligation to continue his subscriptions. According to the rules of the fund, the drawings would

thus go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the remaining subscribers the total amount

subscribed by each of them. The respondent, a non prize-winner, after subscribing for 48 instalments asked the petitioner, the stakeholder, to

return to him with interest the money he had subscribed. The petitioner refusing to refund the amount contended that the chit fund was a lottery and

that a suit was not maintainable to recover the amount. The learned District Munsif holding that the chit in question is not a lottery so far as non-

prize-winners like the plaintiff are concerned, gave him a decree for the amount claimed.

10. It is argued for the petitioner that the transaction set forth above constitutes "" agreements by way of wager "" between the stakeholder and the

subscribers and, as such, is void both on principle and on the authority of the decisions of this Court and that, therefore, the decree of the Lower

Court should be set aside. In *Sunkunni v. Ikkora Kirtti* (1919) MWN 570 it was held by Phillips, J., that a "" kuri"" conducted on similar lines is a

lottery and that the plaintiff's suit to recover the money paid is not maintainable. This decision was followed by *Krishnan and Odgers, JJ.* in

Nagappa Pillai Vs. Arunachalam Chetty, , though the learned Judges differed on the question whether it was possible to hold that the agreement to

repay the subscriptions at the end of the period was severable" from the arrangement to give the prize. In *Shanmuga Mudali v. Kumaraswami*

Mudali (1925) 21 LW 403 *Ramesam and Venkatasubba Rao, JJ.*, did not follow these decisions, their opinion being mainly influenced by a

decision of the House of Lords in *Nagappa Pillai Vs. Arunachalam Chetty*, . It may be stated that the chit fund in all those cases was conducted in

the same manner as in the present case, the successful drawer of the ticket having nothing to do with the chit fund after drawing his prize.

11. In the light of these decisions and of what is meant by an ""agreement by way of wager,"" we have to determine whether the present case has been rightly decided by the learned District Munsif.

12. The Indian Contract Act does not contain any. definition of a "" wagering contract."" S. 30 states that agreements by way of wager are void. In

Thacker v. Hardy (1878) 4 QBD 685 *Cotton, L.J.* said : ""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 one way A will lose, but if it turns out

the other way B will win."" in *Subramania Pattar v. Kiradadasan alias Thirumalapad Avergal* (1912) MWN 1235 it was pointed out that in a chit

fund transaction the contracting parties are the stakeholder on the one side and each of the subscribers on the other side and there are as many

separate contracts as there are subscribers. On analysis it will be found that the contract of the stakeholder with the subscribers in the present case

partakes of the nature to a wagering contract. As pointed out in my learned brother's judgment, ""The promoter laid odds of 98 to 2 at the first

drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499

subscribers, and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs. 100." This shows that the arrangement is

really a bet between the subscribers and the stakeholder as to how a future event of an uncertain nature, i.e., the drawing of a winning ticket will

eventually turn out. If a subscriber happened to draw one of the " winning tickets " i. e., if the uncertain event turned " one way, obviously he would

gain an increased amount of money; would he lose, if the event turned out the other way?

13. Since, according to the rules, the non-prize-winners get back their subscription-amount, it is argued that the present case falls within the

principle of the decisions in *Iyyanar Kone v. Fidoomada Kone* SA No. 169 of 1857--Madras SD 1858, p. 53, *Kamakshi Achari v. Appavit Pillai*

(1863) 1 MHCR 448 and *Vasudevan Nambudri v. Mammod* ILR (1898) M 212 wherein it was held that, in chit fund transactions to which

subscribers contribute monthly subscriptions, each subscriber in his turn as determined by lot taking the entire subscription for one month, there

was no element of chance or risk, the money paid by each subscriber being eventually returned to him. In *Kamakshi Achari v. Appavu Pillai*

(1863) 1 MHCR 448 such a transaction was thus characterised by the learned Judges : " It is not the case of a few out of a number of subscribers

obtaining prizes by lot. By the arrangement all get a return of the amount of their subscriptions. It is simply a loan of the common fund to each

subscriber in turn, and neither the right of the subscribers to the return of the contributions, nor to a loan of the fund is made a matter of risk or

speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance." I do not think the same can be said of the

transaction in the present case. I have already shown how the subscribers' gain is made a matter of chance. As regards the loss, the plaintiff, no

doubt gets back the entire capital which he has subscribed. In one sense, therefore, it is true that the transaction involves no loss in any event to the

plaintiff as he is to have his money returned to him but he loses his interest. In England it has been pointed out in two cases of wagering contracts,

similar in this respect (viz. loss of interest) to the present case, that this " loss of interest " is " sufficiently a loss to bring the contract within the spirit,

though not perhaps within the actual wording of the definition " of a wagering contract. [See *Richards v. Starck* (1911) 1 K B 296. In *In re*

Duraiswami Mudali and another Cr R C No. 305 of 1890 (1 Weir's Rulings, p. 251), in which also, as in the case before us, the prizewinner after

securing the prize ceased to be a subscriber, to the fund closing after a stated period with a refund of their subscriptions to the unsuccessful

members, it was held by Collins, C.J. and" Shepherd, J. that the transaction is clearly a lottery ""for it depends entirely on the drawing of lots

whether or not the prize of Rs. 100 falls to any given subscriber. "" The learned Judges state : "" As the prize-winner thereafter cease;-; to be a

subscriber to the fund, it must necessarily follow that the rest, out of whose subscriptions the prize has been paid and who also continue to be

subscribers, are the losers. The case, therefore, is quite different from that in Kamakshi Achari v. Appavu Pillai (1863) 1 MHCR 448. "" These

decisions were not brought to the notice of the learned Judges in Shanmuga Mudali v. Kumaraswami Mudali (1925) 21 LW 403 .

14. In my view, the agreement in this case shows that the plaintiff gave his subscriptions to the defendant upon the terms that, in an uncertain future

event, he was to recover, if that event went one way, the sum subscribed with considerable increment; and, in the other event, he was to recover

the total amount subscribed by him but without interest. This means chat the transaction is, in substance, a wagering contract, which may be

described, in the language of Channel, L.J. in Richards v. Starck (1911) 1 KB 296, ""as a bet on terms very favourable to the plaintiff.

15. For the above reasons I am of opinion that the decisions in Iyyanar Kone v. Vidoomada Kone SA No. 169 of 1857--Madras S.D. 1858, p.

53, Kamakshi Achari v. Appavu Pillai (1863) 1 MHCR 448 and Vasudevan Nambudri v. Mammod ILR (1898) M 312 are clearly distinguishable

and that the chit fund transactions in this case is an agreement by way of wager and is, therefore, void.

16. In the decision in Shanmuga Mudali v. Kumaraswami Mudali (1925) 21 LW 403 strongly relied on by the respondent, the learned Judge,

Venkatasubba Rao, J., states: ""There is some element of chance in regard to the first 49 subscribers; but the dominant feature of the transaction is

that it enables a largo number to gradually lay by money and receive their savings in a lump sum and the scheme is, in their case, an incentive to

thrift. "" With due respect to the learned Judge, I am inclined to think that it cannot be said that the primary object of a person in taking a chit in a

fund like the present one is to lay by money for receiving it back in a lump sum. The chance of winning a prize of Rs. 100 on payment of a

subscription of Rs. 2 at the first drawing, Rs. 4 at the second drawing and so on during the fifty drawings is the attraction which tempts the

subscribers to join in such a chit fund.

17. In arriving at their conclusion the learned Judges in *Shanmuga Mudali v. Kumaraswami Mudali* (1925) 21 LW 403 were mainly influenced by

the decision of the House of Lords in *Wallingford v. Mutual Society* (1880) 5 AC 685. In that case a society called the "Mutual Society" was

registered under the Companies Act. Its declared object was to accumulate capital by means of monthly subscriptions from members, to advance

such capital to the members on rotation, to secure payment of such advances by taking over and holding real or other securities and ultimately to

divide among the members all the profits that had been made. The whole mode of operation of the Society appeared to be this: To obtain

subscriptions from members, to advance them money on interest upon "certificates of appropriation". By Article 27 it was declared that

appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those

intermediate shall be allotted to the member or members tendering the highest premium for the same respectively". All appropriations were to be

repaid by equal quarterly payments extending over twenty years from the advance. It was held that, though the benefits of the society were made

available to the members by a process of periodical drawings, the society did not come within the mischief of the Lottery Acts and that the

transaction it carried on was not a gambling transaction. The facts of the case show that amongst the subscribers there were no losers and no one

derived any undue gain by the chance of drawing lots. As pointed out in 15 Halsbury 301: "Where the scheme has for its object the carrying on of

a legitimate business, the fact that it provides for the distribution of its profits, in certain events, by lot will not vitiate the scheme." The case

resembles the decisions in *Kamakshi Achari v. Appavu Pillai* (1863) 1 MHCR 448 and *Vasudevan Nambudri v. Mammod* ILR (1898) M 212

already referred to and on principle is clearly distinguishable from the present case. It may be mentioned that Ramesam, J. deals with the case in

Shanmuga Mudali v. Kumaraswami Mudali (1925) 21 LW 403 as a suit to enforce the terms of a contract collateral to another transaction which

can be enforced, even when the main transaction is void on account of being a wagering contract, unless it amounts to an offence punishable by

law; though in the course of the judgment the learned Judge agrees with Venkatasubba Rao, J. that the main contract itself is not void.

18. The respondent argues that, if the transaction is an agreement by way of wager and is invalid on that account, he is still entitled to get a refund

of the amount claimed by him either u/s 65 of the Indian Contract Act, or on the ground that the agreement to return that amount is severable from

the arrangement to give the prize. I entirely agree with the opinion of Odgers, J. in Nagappa Pillai Vs. Arunachalam Chetty, for the reasons given

by him in that judgment that the claim of the respondent in this case cannot be substantiated on either of the Above grounds.

19. In the result I must hold that the decision of the learned District Munsif is wrong, and this Civil Revision Petition must be allowed with costs as

ordered by my learned brother.