
(1935) 10 MAD CK 0023
In the Madras High Court

Sesha Aiyar

APPELLANT

Vs

Krishna Aiyar and Others

RESPONDENT

Date of Decision : 02-10-1935

Acts Referred:

Penal Code, 1860 (IPC) — Section 294A

Citation : (1936) ILR (Mad) 562 : (1936) 70 MLJ 36

Hon'ble Judges : Wadsworth, J;Venkataramana Rao, J;Varadachariar, J;Lakshmana Rao, J;Conish, J

Bench : Full Bench

Judgement

Conish, J.—This reference has been made upon a Civil Revision Petition in which the petitioner was third defendant in a suit brought by

plaintiffs respondents to recover money paid as subscriptions to a prize kuri. The third defendant and the other defendants promoted this kuri for

the purpose of raising funds for a temple.

2. The plaint alleges that the first plaintiff took two tickets in the kuri, and had paid Rs. 270 representing 45 monthly payments on his two tickets. It

states that the scheme was that the kuri was to be conducted for 50 months and that those subscribers who had not been so fortunate as to draw a

prize were, at the close of the kuri after the 50th drawing, to be refunded the amount of the money subscribed by them. There is the further

allegation that the kuri came to an end after payment of the 45 instalments, and that despite the plaintiff's demand for a refund of his subscriptions

no repayment has been made by defendants. The sum claimed is Rs. 270 which is the amount of 45 instalments paid by the first plaintiff on his two

tickets. The material defence to the claim, so far as this reference is concerned, is in para 3 of the written statement, where the plea is raised that

the agreement between the parties being in respect of a lottery unauthorised by Government, was for an illegal object, and was therefore unenforceable at law.

3. The lower Court held the defendants liable to refund the money. Hence the Revision Petition. The question has been referred to a Full Bench as

there are decisions of this High Court on the status of Kuris which are not always easy to reconcile.

4. The first question to be decided is whether this kuri is a lottery. A lottery has been defined as the distribution of prizes by lot or chance without

the use of any skill; See Archbold's Criminal Pleadings 27th Edn. p. 1345. In the Oxford New English Dictionary a lottery is defined as "an

arrangement for the distribution of prizes by chance among persons purchasing tickets." Tickets of course are only the tokens of the chance

purchased, and it is the purchase of this chance which is the essence of a lottery. And this is the test which has been adopted by the Courts in

England in the later cases as making a thing a lottery. Thus, in *Willis v. Young* (1907) 1 K.B. 448 it was held that a lottery involves the collective

contribution of the prize money by the competitors, though some of them may have paid nothing; and *Darling, J.*, stated that in his opinion an

absolutely free and gratuitous distribution of chances, none of which had been paid for by the competitors, would not be a lottery. In *Bartlett v.*

Parker (1907) 1 K.B. 448 too, it seems to have been accepted that the purchase of a chance of winning a prize made the thing a lottery. Taking

this then as the definition of a lottery, it has to be seen whether the kuri in question comes within the definition. The character of the kuri appears

from the printed kuri regulations. It consisted of 625 subscribers, "each subscriber agreeing to pay at the rate of Rs. 3 per month for 50 months, in

all amounting to Rs. 150 per ticket" (Clause 4):

On the 25th of every English month after 25th March 1929, one ticket will be drawn out of the 625 tickets and the winning ticket will be paid as

prize Rs. 150 without any liability to pay for future instalments. Fifty such tickets will be drawn in 50 months." (Clause 5).

5. Then Clause 7 provides that at the end of the 51st month the 575 subscribers who have not drawn prizes will be repaid without interest, the

total amount of their subscription, namely, Rs. 150. Clause 6 shows the benefit

which the temple was to derive from the arrangement: it permitted the subscription money to be deposited for interest with Banks and merchants or to be lent to subscribers, and the temple was to get the profit from these deposits and loans. So that: a subscriber to the kuri has the prospect of at least getting back the amount of his total subscription of Rs. 150 at the termination of the drawings: but his purchase of a ticket for Rs. 3 gave him a chance of a prize of Rs. 150 if his ticket was drawn at the first drawing, a chance of a prize of Rs. 150 for a payment of Rs. 6 if his ticket was successful at the second drawing, and so on down to the 49th drawing, when the winner would get Rs. 150 for an expenditure of Rs. 147 on his ticket. In my opinion this kuri was clearly within the above mentioned definition of a lottery.

6. But it has been contended that a lottery requires that the dominant motive of the persons participating in it is to gamble; and as a corollary to this proposition it is argued that a loss to some of the parties is a necessary element of a lottery. No case has been produced to show that the definition of lottery is qualified by the motives of the participants. On the contrary, in *Hall v. Me William* (1901) 85 L.T. 239 where a lottery was a competition promoted by a newspaper with the object of increasing the number of its purchasers and of its circulation, Ridley, J., said:

It may be that the owners of the newspaper have other objects in their minds as to what they will do and how they will benefit by the offering of these prizes; but as far as the purchaser is concerned I think he does buy with this newspaper the chance of obtaining the prize

7. Which goes to show that the question lottery or no lottery? - is not to be determined by the quality of the promoters' motive. The contention, too, that it is an element of a lottery that some of the competitors must stand to lose seems to be founded upon a misconception of the passage in

Halsbury Vol. 15 p. 525 which has been cited in its support. This passage reads "Though the gambling element does not appear to be wholly

absent, yet it need not be common to all the adventurers; it is enough if some of them stand to lose", It is a commentary on *Willis v. Young* (1907)

1 K.B. 448 (supra) and has to be read in that connection. It gives no warrant for the theory that a lottery is not a lottery unless it fulfils one of the

essential conditions of a wager. A lottery and a wagering contract are two distinct

things. A scheme may amount to a lottery though none of the competitors is a loser, as in *R. v. Harris* (1866) 10 Cox C.C. 352 where subscribers of a shilling were given a ticket which entitled them at all events to what was professed to be a shilling's worth of goods and also to the chance of certain bonuses of goods of greater value than the shilling. This was held to be an illegal lottery. *Taylor v. Smetten* (1866) 10 Cox C.C. 352 (the packets of tea case) is another illustration. But if it were necessary I would hold that the subscribers to this kuri whose tickets had not been drawn had suffered loss to the extent of their contributions to the Rs. 150 taken by the prize winner. And here I may observe that the head-note in *Narayana Aiyangar v. Vellachami Ambalam* I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687 (F.B.) is misleading. The Full Bench in deciding that the kuri was not a wagering contract did not decide that it was not a lottery. There was no occasion for such decision after the lower Court had returned a finding that there was no evidence of an offence against Section 294-A of the Penal Code.

8. There is another matter touching this part of the case to which I must refer: in *Shanmugha Mudali v. Kumaraswami Mudali* I.L.R.(1925) 48 Mad. 661 *Venkatasubba Rao, J.*, was of the opinion that a scheme would not be a lottery if the prize-money came out of the interest earned from the subscribers' contributions. With great respect I am unable to agree to this being a correct test. If the subscribers have purchased a chance of winning a prize it can make no difference whether the prizes are paid circuitously from the interest earned on the subscribers' contributions or are paid directly from those contributions.

9. But for the purpose of determining the legal or illegal character of this kuri it does not suffice to show that it is a lottery. A lottery is not in British India unlawful in the sense that it is prohibited by law. It is only in relation to Section 294-A of the Penal Code that a lottery becomes illegal. This section makes it an offence (1) to keep any office or place for the purpose of drawing any lottery not authorised by Government, or (2) to publish any proposal to pay any sum on an event or contingency relating to the drawing of any ticket in such lottery. The evidence distinctly proves a publishing of the kuri regulations which contained the proposals relating to the lottery. One of the defendants says that the regulations were printed

- a copy is before us - and a plaintiff's witness says that the regulations were shown to him. This constituted an offence against the second part of

Section 294-A. Regarding the question whether defendants offended against the first part of the section, I think the temple would be ""a place"", and

that it is apparent from the Regulations (Clause 9) that the defendants had a control, possibly only de facto, over the place for the purpose of

drawing the lottery there. Section 294-A does not make it an offence for the owner or occupier of the place to keep it for the unlawful purpose; it

simply makes it an offence for any person to keep the place, and this, in my opinion, would include the case of a person who, without being owner

or occupier, is permitted to keep the place for the particular object. Clause 9 of the Regulations says that the drawings will be held in the temple,

and there is the evidence of witnesses that the drawings did take place there. It is not essential to the commission of the offence of keeping a place

for an unlawful purpose that it should be solely appropriated to that purpose. Thus, in *Jenks v. Turpin* (1884) 13 Q.B.D. 505 it was held that a

house which served a double purpose, a social club for members who did not wish to pay, and a place for gaming for those who did, was a house

kept for the purpose of gaming. And in *Fielding v. Turner* (1903) 1 K.B. 867 where the defendant had installed a gaming machine in his shop, it

was held that he kept the shop for unlawful gaming. The word ""keep"", however, signifies an habitual keeping of the place for the unlawful purpose;

Martin v. Benjamin (1907) 1 K.B. 64 But when the evidence supports the conclusion, as I think it does, that 45 out of 50 projected drawings of

the lottery have been held as intended by the regulations within the temple, it seems to me that this is a sufficient ""keeping"" of the place for this

purpose. In my opinion the evidence sustains the commission of an offence by the defendants against the first part of Section 294-A.

10. The lottery therefore being illegal from the manner in which it was conducted, how does this affect the plaintiffs' right to recover their

subscription money from the defendants? The general rule is that money paid or lent to a defendant to carry out an illegal purpose cannot be

recovered if the purpose has been carried out either wholly or to a substantial extent : *Mckinnell v. Robinson* *Kearley v. Thomson* (1838) 3 M. &

W. 434 : 150 E.R. 1215 This rule is embodied in Section 84 of the Indian Trusts Act. But there are exceptions. One exception is that when the

Act creating the illegality has been passed for the purpose of protecting a particular class of persons, persons belonging to that class may recover

payments made by them. The classic authority is *Browning v. Morris* (1718) 2 Cowp. 790 : 98 E.R. 1364 where Lord Mansfield said:

Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, the one,

from their situation and condition, being liable to be oppressed or imposed upon by the other, there, the parties are not in *pari delicto* ; and in

furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

11. The Lottery Acts in England make it an offence to sell or deliver a lottery ticket, to keep a lottery, to keep a place for the exercise of a lottery,

and to publish a lottery. Section 294-A makes it an offence to keep a place for drawing a lottery or to publish a lottery. Neither under the English

Acts nor under the Penal Code is it made an offence to buy a ticket in a lottery. Can it be doubted that these enactments are aimed at the class of

persons who promote lotteries, and that they are intended to protect the class of persons who are tempted to take tickets in lotteries? This was the

view of the policy of the Lottery Acts taken by Stirling, J., in *Barclay v. Pearson* (1893) 2 Ch. D. 154 and in this view the plaintiffs would be

entitled to recover their subscriptions from the defendants even if the money had been distributed. But the argument is that the plaintiffs cannot

recover because they are in *pari delicto* with the defendants. It is suggested that they have abetted the illegal acts committed by the defendants. All

that the plaintiffs are shown to have done is that they bought two tickets in the lottery. In my opinion this does not amount to aiding the defendants

in keeping a place for the drawing of a lottery:

A customer who buys an article in a shop might just as well be said to assist in conducting the business of the shop.

12. Per Hawkins, J., in *Jenks v. Turpin* (1884) L.R. 13 Q.B.D. 505. There was certainly no abetment by plaintiffs of the publication of the lottery proposals.

13. The last contention is that the defendants cannot be made personally liable. It appears from the kuri regulations that the duty of receiving the

collections of subscriptions was committed to the first defendant. But this was

only a matter of convenience in the management, as all the defendants were clothed with authority to manage the kuri, and the investment of the moneys was to be on the advice of all. It is said that the first defendant abused his trust; but of that we have no evidence. The third defendant is undoubtedly a trustee with the other defendants of the money paid in subscriptions, and is personally liable for its due appropriation in accordance with the terms of the regulations, unless, these rules give him an exemption. Clause 13, which is the only provision bearing on the matter, while declaring that the kuri property shall be liable in. case of default, does not give the defendants exemption from personal liability. It makes the kuri property security against the defendants" default.

14. For these reasons I am of opinion that defetidants were rightly held liable to refund the money claimed by the plaintiffs, and that this petition should be dismissed with costs.

Varadachariar, J.

15. In the view that I take of the application of the "pari delicto" rule to the circumstances of this case, it would have been sufficient for the disposal of the revision petition to say that the claim is in substance not for the enforcement of an illegal contract but for refund of money paid and, even assuming that the money had been paid for an illegal purpose, the plaintiff would be entitled to recover the same on the ground that he is not as guilty as the defendants (vide Section 84 of the Trusts Act). But as the case has been placed before this Bench because of the conflict between;

The Udumalpet Nidhi, Ltd., In re (1934) 57 Mad. 844 : 67 M.L.J 445 and Shanniugha Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad.

661 affirmed in Narayana Aiyangar v. Vellachami Ambalam (1927) ILR 50 Mad. 696 : 1927 52 M.L.J. 687 (F.B.). and the points arising

therefrom have been argued at great length before us, I have thought it right to express my opinion on some aspects of the wider question.

16. The arguments before us may be grouped under four heads:

(i) what are the elements necessary to make a scheme a lottery (ii) what are the conditions to be established before persons participating in a

lottery can be held guilty u/s 294-A Indian Penal Code (iii) what is the position for the purposes of the "Criminal" law of persons who subscribe to

or purchase tickets in a lottery as distinguished from that of those who organise,

promote or manage the lottery (iv) what is the position for the purpose of the Civil Law of such subscribers or ticket holders in relation to the organisers, promoters or managers.

17. Though there is no formal definition of "lottery" in the Indian Penal Code, the second clause of Section 294-A sufficiently indicates its

ingredients in the terms found in the older dictionaries. After it was pointed out that a gratuitous distribution of prizes by lot may not amount to a

lottery, the definition has been amplified in the Oxford Dictionary and in recent editions of Webster's Dictionary, so as to include the idea of a

purchase of a ticket or the passing of something in the nature of "consideration" from the subscriber or competitor. When schemes came to be so

contrived as to give the subscriber or competitor not merely the chance of getting a prize but also the certainty of getting some return in the shape

of goods or amusements or other advantage, elaborate discussions are found in reported judgments as to how much of the " consideration " paid

by the subscriber or competitor must be deemed to be paid for the return which he certainly gets and how much of it is the price paid for the

prize"" which he hopes to get. As most of the relevant authorities have been noticed in the recent Madras decisions, I do not think it necessary to

discuss the cases in detail; but it is clear that it is not possible or desirable to fix any proportion between the part of the consideration which

corresponds to the value of the advantage necessarily received and the part which must be regarded as the price paid for the chance. The result of

the authorities, seems to me to be that a scheme may fairly be regarded as a lottery if it is clear that whatever other benefit the subscriber or

competitor may get in return for his money, the chance of his getting the prize, was also part of the bargain and must have entered into his

calculation. It is the fact of the prize and not the source from which it is paid that I think is the deciding factor.

18. It may however not be easy to say with precision what constitutes a "prize" for this purpose; it will be too much to say that any and every

advantage which a person subscribing to scheme may hope to get will amount to a "prize" if his getting it will depend on the drawing of lots. The

course of decisions in this Presidency relating to the older kuri chits is opposed to such a wide interpretation of the word "prize" and the same

principle underlies the decision in the Wallingford v. Mutual Society (1880) L.R. 5 A.C. 685. The rule is correctly stated in para. 929 of the article

on " Gaming and Wagering" in Halsbury's Laws of England (Vol. 15) that "the substantial object of the whole scheme " must be looked at and

where the object is ""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

make it a lottery.

19. On behalf of the Respondent, Mr. Raghava Rao insisted that a scheme cannot amount to a lottery unless it involved the elements to be found in

a "wagering" contract and the deciding factor should be taken to be not the chance of getting a "prize" but the chance of loss in certain

contingencies. There may not be much in this antithesis but for the fact that in Shanmugha Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad.

661 the learned Judges laid stress on the fact that every subscriber at least got back the principal amount contributed by him and in Narayana

Aiyangar v. Vellachami Ambalam I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687 (F.B.) Ramesam, J., held that any payments out of the interest

derived or likely to be derived from the investment of the subscriptions must not be regarded as a "loss" sustained by the subscribers. With great

respect, I am not able to concur in some of the steps in the reasoning on which the decision in Shanmugha Mudali v. Kumaraswami Mudali I.L.R.

(1925) 48 Mad. 661 is based, nor in the statement in Narayana Aiyangar v. Vellachami Ambalam I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687

(F.B.) at p. 703 above referred to if it is meant to be taken as a rule of law. The mere fact that the subscribers to such a scheme may at some time

be able to receive a lump sum made up of their monthly payments of small sums ought not to blind us to the other features of the scheme. That a

considerable sum must result as interest as from the investment of the monthly contributions over a period of something like 50 months and a large

portion of this interest goes to the promoters and is lost to the subscribers cannot be denied. If the interest earned is divided among the c

subscribers themselves, the position may be different. It was suggested that even in cases like the present, it may be taken that the interest thus

earned was notionally taken by the subscribers and then t made a gift of to the promoters or to the temple for whose benefit the scheme was

started. I do not feel justified in importing such a "fiction" and must therefore proceed on the footing that the large body of subscribers, who after

50 months merely get back the principal amount contributed by them, lose the interest earned by the investment of their contributions. It seems to

me a legitimate inference that they were willing to incur this loss because there was the chance of their getting a prize of Rs. 150 even in the first

month or in the next few months, should they be lucky in the matter of the drawing of lots. Here again, the position may be different if their good

fortune in the matter of the draw merely meant an early re-payment, subject to their liability to continue payment of their subscriptions to the end;

but the spirit of speculation suggested a further attraction in the form of the provision that as soon as any subscriber draws the prize his liability to

pay subscriptions will cease.

20. Nor am I able to view the prize paid to the early winners as "distribution of profit". In the first few months, the probable interest will not suffice

to cover the "prizes" and the payment of the prize is not made contingent on the earning of profits. The fact that the promoters hoped to reimburse

themselves in due course from out of the interest earned will not make the payments to the subscribers who are lucky in the early drawings any the

less a "prize".

21. I cannot help feeling that in the judgments of Ramesam and Venkatasubba Rao, JJ., in Shanmuga Mudali v. Kumaraswami Mudali I.L.R.

(1925) 48 Mad. 661 and that of Ramesam, J., in Narayana Aiyangar v. Vellachami Ambalam (1927) ILR 50 Mad. 696 : 1927 52 M.L.J. 687

(F.B.) a great deal too much has been read into the observations. On this point in the Wallingford Case (1880) L.R. 5 A.C. 685 Lord Blackburn

(at p. 70.5) disposed of the objection under the Lottery Acts by pointing out that "a drawing of lots on one occasion" would not make the society

illegal. Lord Watson contented himself with the remark that the appellant stated no case showing that this mutual society is a gaming or gambling

society" (p. 709). Lord Hatherley said "if this were held to be a lottery nearly every one of the societies I have referred to, namely building

societies and a great many other societies framed upon a similar footing, might be found to fall within the enactments against lotteries." These

observations afford no clue to anything like a general principle and an attempt

has therefore been made to found an argument upon the rules of the society then under consideration. Neither the terms as to distribution of profits nor those relating to the giving of loans to members (so far as one could gather them from the report) would seem to involve anything like a "prize" except the provision in Article 27 (set out on p. 687) that appropriation certificates (certifying the title of the member to receive loans from the society's funds and to participate in its-profits) "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". It must be remembered that the society being a mutual aid institution, the benefit of the premium thus levied would ultimately go to the members themselves. The only benefit left to chance therefore was that some members may get a certificate without payment of premium. One may legitimately use the decision as authority to this extent, that having regard to the objects and other incidents of membership in the society, this element of chance was not regarded as amounting to a "prize" or rendering the transaction a "gambling transaction". This only illustrates the difficulty already adverted to of exactly defining the word "prize". On analysis-it may turn out to be a question of degree, to be determined" with reference to all the circumstances of a case. It only remains to add that the remarks made on this case in the 17th Edition of Chitty on Contracts (relied on by the learned Judges in Shanmuga Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad. 661 have been omitted from the latest edition.

22. The reference in the speech of the Lord Chancellor (at p. 697) to the Lottery Acts, as applicable to persons who kept lottery offices at which "the public were invited to pay" for lottery tickets has been interpreted by Ramesam, J., as excluding from its scope cases where before the society becomes known to the public, all its members are ascertained and there is no invitation (in another place, "standing invitation") to any member of the public to join it see Shanmuga Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad. 661 at p.664 and Venkataramana v. Sanyasayya (1933) 66 M.L.J. 76. In Narayana Aiyangar v. Vellachami Ambalam I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687 (F.B.) the head note would make it appear that the decision of the Full Bench in some measure rested on

the circumstance that the "number of subscribers is determined beforehand". This is somewhat misleading. In the order calling for a finding, the only relevant observation (on p. 700) is "it is essential to know how it was organised and advertised and whether any one who liked could join by merely paying subscriptions". On the return of the finding the Court only observed that no offence has been committed "as no office or place for the purpose of drawing any lottery was kept". It is true that the expression "keeping an office or place" implies a degree of habitualness and continuity of operations but this will be satisfied as much by a repetition of drawings as amongst a fixed number of persons as by permitting an unlimited number of persons to come in as and when they please.

Further, it is disclosed by the evidence in this case and it is only natural that after the promoters had conceived the scheme they canvassed for subscribers till they reached a certain number. This stage may well be described as an "invitation" to the public. There is no reason why - and Lord Selborne does not say - this invitation should be a "standing" invitation in the sense that it is always kept open.

23. In *Narayana Aiyangar v. Vellachami Ambalam* I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687 (F.B.) at p. 704 Ramesam, J., gives it as one of his reasons for not following *Ayisa Bivi Ammal Vs. Jokara Bivi*, that the decisions there "was mainly based upon a judgment of Channell, J., in *Richards v. Starck* (1911) 1 K.B. 296 and adds, on the strength of a note in Halsbury's Laws of England, that the decision of Channell, J., is inconsistent with two earlier decisions of the Court of Appeal which were not considered by Channell, J., viz., *Fuller v. Ferryman* (1895) 11 T.L.R. 350 and *Hirst v. Williams and Ferryman* (1895) 12 T.L.R. 128 Whatever may be the nature of the arrangement in the *Fuller v. Perryman* (1895) 11 T.L.R. 350 the argument was based on the Gaming Act and the judgment proceeded on the footing (put forward in argument by Responent's counsel) that as "there was no evidence that the defendant entered into contracts that there should be no delivery of the stock and that differences only should be paid, the agreement did not relate to a gambling transaction. This line of reasoning throws no light on the question now under consideration. In *Hirst v. Williams and Perrytnan* (1895) 12 T.L.R. 128 the statement of facts makes it appear that there was no

intention or liability on the part of the plaintiff to take up the stock; but, for reasons which do not appear in the judgment and about which there is

no use speculating, the Court of Appeal said "the case raised the same point as Fuller v. Ferryman (1895) 11 T.L.R. 350 and there was no

gambling between the defendants and the plaintiff". The remarks that follow seem to treat the case as one of a contract of advance to speculators

and a guarantee for the return of the money in any event. With due respect, I am unable to read into these judgments anything necessarily

inconsistent with the observation of Channell, J., in Richards v. Starck (1911) 1 K.B. 296.

24. Proceeding next to the second of the questions argued before us, I do not think it necessary or expedient to express any definite opinion, on

the evidence in this case, as to whether or not the defendants are guilty of an offence u/s 294-A of the Indian Penal Code. Though the interest of

the moment has tempted them to plead that the case falls within Section 294-A, I am sure they would be the first to plead "not guilty" if they were

threatened with a prosecution. It is well settled that it is not sufficient for the purpose of the first part of Section 294-A that the scheme amounts to

a lottery; it is further required that the person charged should ""keep any office or place for the purpose of drawing any lottery"". It has frequently

been pointed out that the scope of this provision is very much more limited than that of the law in England relating to lotteries. (See the varieties of

offences under the English Law referred to in Martin v. Benjamin (1907) 1 K.B. 64 and Halstmyr para 934 in the Article on "gaming and

wagering" in Vol. XV). Even in India, the prohibition was wider under Act V of 1844 but when incorporating this portion of the law into the Penal

Code in 1860, the legislature has to some extent narrowed it. Under similar Acts in England much discussion has taken place as to the connotation

of the word "keep" in this context and of the words ""office or place"". It is obvious that a certain degree of habitualness or continuity of operation is

intended as also a fixed or ascertained locality for the drawing Marks v. Benjamin (1839) 5 M. & W. 565 : 151 E.R. 239 Martin v. Benjamin

(1907) 1 K.B. 64 Doggett v. Catterns (1864) 19 C.B. (N.S). 765 :144 E.R. 238 Shaw v. Morley (1868) L.R. 3 Ex. 137 Bows v. Fenwick

(1874) L.R. 9 C.P. 339 Powell v. The Kempton Park Racecourse Company, Ltd (1899) A.C. 143 see also Jenks v. Turpin (1884) 13 Q.B.D.

505 Whether, in addition, the place where the lottery is drawn should not also be a "structure" and should not be under some degree of control of

the organisers and in some matter "appropriated" to the purpose is not beyond doubt. The evidence in the present case is not very clear whether

the place where the lots are to be drawn every month is within the temple enclosure, or is merely an open space in front of the temple; nor is it

clear whether the promoters or any of them are trustees having control over the locality or are merely permitted by the temple authorities to hold

the drawing there. The District Munsif was of opinion that the evidence did not establish an offence u/s 294-A, either under the first part or under

the second part of the section. As to the second part of the section I am unable to agree with him that the "publication" contemplated is some

public advertisement in the sense of a written publication in newspapers or handbills. If a number of persons go about canvassing for subscribers

on the basis of the scheme settled beforehand by the promoters, I do not see why it should not amount to a publication of the proposal. I proceed

to consider the third and the fourth questions on the assumption that so far as the promoters are concerned an offence u/s 294-A has been proved.

25. It has been suggested before us on behalf of the petitioner that the subscribers must also be held to be guilty at least as abettors. So far as the

publication is concerned, even this is not possible. As to the keeping of the place for a lottery, it has been argued that as they enter into the scheme

with full knowledge that according to its terms a place has been fixed for the purpose of drawing, they must be deemed to aid in the "keeping". I

am not however sure that this is the correct view. Assuming that they aid in the lottery by subscribing thereto or taking tickets, it cannot necessarily

be said that they aid in the "keeping" of a place for the purpose. It would make no difference to them if the lots are drawn at one place on one

occasion, and at another place on another occasion so as to avoid the habitual user of place as required by the section.

26. It remains to deal with the relations of the parties for the purpose of the civil law. In *P.V. Veeranan Ambalam Vs. Ayyachi Ambalam*, Spencer,

J., says:

The Civil law goes further (than the Criminal law) 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

27. The meaning of this passage is not very clear. In *Narayana Aiyangar v. Vellachami Ambalam* I.L.R.(1927) 50 Mad. 696 : 1927 52 M.L.J.

687 (F.B.) Ramesam, J., understood it only to mean that such obligations will be unenforceable if the arrangement is in the nature of a "wagering contract". In some of the cases it has been attempted to assimilate a lottery to a wagering contract:

By splitting it into a number of contracts between the promoters on the one side and each individual subscriber or competitor on the other and then

pointing out that such subscriber or competitor may gain or lose according to the chance of the draw.

28. With due respect I am unable to agree that this is a correct way of viewing the transactions. As shown by *Wills v. Young* "and *Stembridge*

(1907) 1 K.B. 448 we must look upon the subscribers or competitors as a collective body dealing with the promoters as the other party. From the

point of view of the promoters there is no "gain or loss" depending on chance. The number of some subscriber must necessarily be drawn each

month and he has to be paid the sum of Rs. 150. The uncertainty as to which of the subscribers may have the luck of the draw is no uncertainty

from the point of view of the promoters. Their profits and outgoings never depended on the chances of the draw because they are bound to pay

Rs. 150 to each subscriber and the balance of interest earned (after allowing for sundry expenses) represents their profits. I respectfully agree with

the decision in *Universal Mutual Aid and Poor Houses Association, Ltd., v. Thoppa Naidu* I.L.R.(1932) 56 Mad. 36 : 63 M.L.J. 54 that a lottery

should not be judged of by the tests applicable to a wagering contract.

29. In dealing with actions by subscribers against promoters, a distinction must be drawn between suits for recovery of the prize or the

enforcement of any of the other terms of the contract and suits for refund of moneys paid, because in the latter case there will be no question of

enforcement of the illegal contract. The suggestion of *Krishnan, J.*, in *Nagappa Pillai Vs. Arunachalam Chetty*, that some portions of the agreement

may be severed from the other portions is undoubtedly open to criticism and has rightly been disapproved of. In the view taken in many of the

Madras cases that even a claim for refund must fail seems to me with all respect equally open to question. Even here, the learned Judges were (if I may so) right in holding that the subscriber cannot in such cases claim the benefit of Section 65 of the Contract Act; but he is in my opinion entitled to rely on Section 84 of the Trusts Act. I am unable to agree with the view that both parties are in such cases in pari delicto. Assuming that the payment was made by the subscriber "for an illegal purpose", Section 84 of the Trusts Act contemplates three cases in which the payment may be claimed back. In the face of the terms of the section, I am unable to agree with the contention of Mr. Krishnaswami Aiyar on behalf of the petitioner that the statement of the rule in *Petherpermal Chetty v. Muniyandi Servai* ILR (1908) 35 Cal. 551 : 1908 L.R. 35 IndAp 98 : 1908 18 M.L.J. 277 (P.C.) is exhaustive. The second class contemplated by Section 84 comprises cases where the person making the payment or transfer is not as guilty as the transferee" and is meant to reproduce a well recognised exception known to the English law see *Reynell v. Sprye* (1852) De G.M & G. 660 : 42 E.R. 710 As early as in *Browning v. Morris* (1718) 2 Cowp 790 Lord Mansfield recognised the right of the subscriber to claim a refund from the lottery office keeper, on the principle that lottery was prohibited by statute for the sake of protecting one set of men from another set of men", and that therefore the parties are not in pari delicto. This principle which has been re-affirmed in *Kearly v. Thompson* (1890) 24 Q.B.D. 742, *Barclay v. Pearson* (1893) 2 Ch.154 and *Greenberg v. Cooperstein* (1826) Ch. 657 has not been adverted to in any of the Madras cases which disallowed the subscriber's claim for refund. It was suggested before us by Mr. Krishnaswami Aiyar that the dicta of Stirling, J., on this point in *Barclay v. Pearson* (1893) 2 Ch.154 are scarcely reconcilable with the final order in the case by which the learned Judge refused to administer the fund. I see no force in this suggestion. All that the order means is that there was no "trust" which the Court of Chancery could administer and that the plaintiff must therefore be left to his remedy at law. In a recent judgment delivered by Stone, J., on the Original Side Application No. 2720 of 1933 in O.P. No. 11 of 1931 reported in *The Universal Mutual Aid and Poor Houses Association, Ltd., In re* (1933) 4 Comp. Cas. 256 the learned Judge would appear to have restricted the operation of this rule to cases where the defendant has not disbursed the

money because, according to him, the subscriber will on such disbursement "become in part delicto, having stood by" With due respect, this view

seems to me to ignore the observation of Stirling, J., in *Barclay v. Pearson* (1893) 2 Ch.154 at page 168 that the unsuccessful competitor would

be entitled to sue "even if the fund has been distributed". The learned Judge does not notice that Section 84 of the Trusts Act states this rule as

different from the first case provided for in the section, namely, where the illegal purpose has not been carried out. I would however add that even

taking the rule in the limited form adopted by Stone, J., the plaintiff will be entitled to a decree in this case, because it has not been pleaded and in

the circumstances it cannot be pleaded that the defendants have disbursed all the moneys received from the subscribers.

30. I agree with my learned brother that the terms of the kuri chit in this case do not exclude the personal liability of the defendants and that the

Civil Revision Petition must be dismissed with costs.

Wadsworth, J.

31. The first question is whether the kuri or prize chit to which the plaintiff subscribed and which the defendants managed is a lottery. Most of the

leading cases on lottery law start from a dictionary definition of the term "lottery" usually that of Webster, who defines a lottery as a distribution of

prizes by lot or chance; and I think it has been held consistently both in England and here that this distribution must not be entirely gratuitous. An

attempt has been made to argue before us that a lottery is necessarily a type of wager and that the element of hazard and risk of loss necessarily

enters therein. In a sense it is true that whenever a man purchases a chance in a lottery he risks losing the money which he has paid for that chance.

But I do not think that it can be said that risk of loss necessarily enters into the contract of every person who joins a lottery. Otherwise it would be

obvious that a case like that covered by *Wills v. Young and Stembridge* (1907) 1 K.B. 448 could not be a lottery; for in that case, the distribution

of medals which supplied the place of tickets was gratuitous. The element of payment entered only to the extent that most of the holders (but not all

of them) purchased copies of the newspaper in order to ascertain the result. Similarly in such cases as the tea packet case *Taylor v. Smetten*

(1883) 11 Q.B. 207. or the music hall case *Morris v. Blackman* (1864) 2 H.O.C.

912 : 159 E.R. 378 or the case of the lucky newspaper Hall v.

McWilliam (1901) 85 L.T. 239 notionally there is a purchase of a chance along with the packet of tea or the music hall ticket or the newspaper as

the case may be. But in all these cases the purchaser gets his money's worth apart from the purchase of a chance so that the element of hazard is

very slight indeed.

32. Counsel for the respondent has elaborated the theory that a lottery is not a lottery unless there be a risk of loss, mainly in order to get the

advantage of the observations in Narayana Aiyangar v. Vellachami Ambalam (1927) ILR 50 Mad. 696 : 1927 52 M.L.J. 687 (F.B.) to the effect

that loss of interest is not a loss strictly so called, though it may be failure to make a profit. Now it has been explained in the Udumalpet Nidhi case

(1934) ILR 57 Mad. 844 : 67 M.L.J. 445 reported in In re: The Udumalpet Nidhi Limited I.L.R.(1934) 57 Mad. 844 : 67 M.L.J. 445 that the

actual decision in Narayana Aiyangar's case I.L.R.(1927) 50 Mad. 696 : 52 M.L.J. 687 (F.B.), referred to above was to the effect that, on a

finding of fact that there was no lottery, it could not be held that the scheme (similar to that which we are considering) amounted to a wagering

contract. In the view that I take that, though the risk of loss is usually found in any lottery scheme, it is not an essential part of the definition of a

lottery, it is strictly unnecessary to consider the correctness of the dictum in Narayana Aiyangar's case and other cases similar to it that loss of

interest is not strictly speaking a loss. I may, however observe with great respect, that the question seems to me to be one of degree. A man might

not be considered to have suffered a loss by foregoing interest on a small sum of money for a short time during which period the possibility of

earning interest would be problematic. But the matter stands on a different footing when we are dealing with a large sum of money held over a long

period. For we must consider the normal conduct of a prudent person and a prudent person normally would not allow a large sum of money to lie

idle for a long period and if the scheme entails such a consequence I would be prepared to hold that it entails a loss. Whether that view be correct

or not in the present case it seems to me clear that there was a distribution of prizes by lot and that this distribution was not gratuitous. It seems to

me therefore to follow that the scheme now under consideration is certainly a

lottery.

33. Now a lottery is not per se illegal, though if it could be shown that the lottery was in fact a series of wagering contracts as was held by

Spencer, J., in *P.V. Veeranan Ambalam Vs. Ayyachi Ambalam*, so as to fall within Section 30 of the Indian Contract Act, the contract might be

void. But it has not been contended by the petitioner before us that this lottery is in fact a wagering contract and we are only concerned with the

question of the extent to which the parties to the lottery committed offences u/s 294-A of the Indian Penal Code In dealing with this question one

has necessarily to refer to the decision of the House of Lords in *Wallingford v. Mutual Society* (1880) 5 A.C. 685 which has given rise to a great

deal of discussion. The difficulty about this case is that the consideration of the lottery question was a minor point in that case, not discussed at any

length in their Lordships' speeches, and it is not easy to be certain of the reasons which govern the decision on this point in the case. Probably the

best summary of the effect of this decision is that given in *Halsbury's Laws of England*, Vol. 15, at page 527, namely, that is "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

vitiating the scheme". From this case it has been argued that the motive of the promoters of the scheme and the subscribers thereto is the governing

factor. I doubt very much whether this is a correct view of the law. Surely a more correct statement of the effect of this decision is that if

distribution of the profits by lot is only a subsidiary item of an extensive legitimate business it ordinarily could not be said that the offence of keeping

an office for the purpose of drawing a lottery has been committed.

34. In some of the cases on lotteries following *Wallingford v. Mutual Society* (1880) 5 A.C. 685 for instance *Shanmuga Mudali v. Kumara-swami*

Mudali I.L.R.(1925) 48 Mad. 661 it had been held that a person cannot be said to keep a lottery office with reference to Section 294-A, Indian

Penal Code, unless there is something in the nature of a "standing invitation to the public". Hence apparently has arisen the theory that when there is

a pre-determined number of subscribers there is no possibility of an offence u/s 294-A. With all respect for the learned Judge who have held this

view I must differ from them. The theory of a standing invitation to the public

seems to be traceable to an observation of Lord Selborne in Wallingford v. Mutual Society (1880) 5 A.C. 685 (referring to a provision of an English Act which is not in the same terms as Section 294-A, Indian Penal Code) to the effect that "The other Act relied on had reference to persons who kept lottery offices at which the public were invited to buy lottery tickets". It seems to me clear that Section 294-A has no reference to keeping an office in which the public are invited to buy lottery tickets. It has express reference to the keeping of an office or place for the purpose of drawing unauthorised lotteries and it seems to me apparent that the drawing of the lottery must necessarily follow the invitation to subscribe and that the number of subscribers must ordinarily be known when the draw takes place. So that not only is it in my opinion incorrect to say there is no keeping of an office within the mischief of the first part of Section 294-A if the number of subscribers is known, but I would go so far as to say that it is almost inevitable that the number of subscribers should be known when the drawing takes place and when the offence u/s 294-A, first part, is committed.

35. The second part of this section deals with the publication of the proposals connected with "any such lottery". It seems to me that the words such lottery" must only refer to a lottery not authorised by the Government and that publication would be complete by the circulation of printed prospectuses to members of the public or to persons known to be likely to subscribe. In the present case it is established that at least 600 persons were recruited to the scheme by means of canvassing agents, private letters and circulation of printed prospectuses. There can, I think, be no doubt as to the fact of publication and it seems to me to make no difference whatever, on the question of publication or on the question of keeping an office how and when the number of subscribers was fixed. As a matter of fact in the present case the number was fixed in the first instance at 500 and was later increased presumably as a result of popular response to 625. But the point seems to me to have no bearing on the offence u/s 294-A.

36. Having arrived at the position that the scheme in question is a lottery, that there has been publication and that neither the fixing of the number of subscribers nor the absence of any standing invitation to the public will in any

way take the scheme out of the mischief of Section 294-A, first part, it remains to be considered whether there was a keeping of an office or place for the purpose of drawing the unauthorised lottery. Now it is not seriously contended that the provision in the prospectus of the scheme that the records should be placed in the iron safe in the temple, constitutes the temple an office for the drawing of the lottery. But it is for consideration whether the provision in the prospectus, which was carried into effect in no fewer than 45 occasions, that the drawings should be held every month in connection with this lottery at the temple (which according to the evidence was understood to mean the portico in front of the temple) is not sufficient to constitute this portico a place kept for the purpose of drawing the lottery. Clearly it is a place, that is to say, it is a definite area where the persons responsible can be found. Vide *Powell v. The Kempton Park Racecourse Co. Ltd* (1899) A.C. 143. Was there a keeping? Keeping implies not occasional user, but something habitual or regular. *Martin v. Benjamin* (1907) 1 K.B. 64. It is argued that the notion of keeping also implies some dominion over the place kept. I am prepared to concede that there would not be a keeping of a place unless there was an occupation so effective as to enable the persons drawing the lottery to be regularly found in that place at stated times. But I do not consider that any exclusive dedication of the place for the purpose of drawing the lottery is necessary to bring this act within Section 294-A. The essential thing to my mind is the habitual or regular user of a place for the purpose of drawing lots, such user being sufficiently effective as to enable anyone interested in the lottery to know where the promoters can be found at the time of the draw. It is not in my opinion necessary that the members of the public should be excluded from the place or that the place should not be used for any purpose other than the drawing of the lottery. Applying these criteria it seems to me clear that the proprietors of the present scheme did keep a place for the purpose of drawing an unauthorised lottery. That is to say, the defendants as proprietors committed offences under both the parts of Section 294-A, Indian Penal Code.

37. The next question is, to what extent the plaintiff can be said to be a party to the illegality of the action of the defendants? He was a mere subscriber. There is, so far as I am aware, no evidence that he took part in the

organisation of the lottery or even that he was present at the drawing, though under the prospectus he had a right to be present if he so wished. He certainly cannot be said to have committed an offence u/s 294-A. It is suggested that he may be an abettor of such an offence. Clearly he did not abet the publication of this lottery proposal for it was published presumably before he paid over his money and it was by the publication that he was induced to join the scheme. Can he be said to have abetted the keeping of the place for the drawing of the lots? I do not think he can. Granted that the scheme under which he bought a ticket contemplated the keeping of a place for the drawing of lots, the mere purchase by the plaintiff of a ticket would not in my opinion amount to such intentional aiding or conspiracy as are contemplated u/s 107, Indian Penal Code. When the plaintiff bought his ticket, he intended to buy a chance in the lottery and an incident of that lottery was the drawing at a stated place. It was presumably within the power of the defendants as managers to alter that place. The plaintiff so far as we know had nothing to do with the draw. We do not know whether any expense was incurred in connection with the draw or that the plaintiff's money went to finance it. All that we know is that he bought a ticket which was to be drawn at a particular place. I do not consider that this amounts to an abetment of the keeping of the place at which the ticket was to be drawn.

38. If the plaintiff joined in a contract which contemplated the doing of an unlawful act by the defendants but not by himself and if it is not necessary for the plaintiff to plead his own turpitude, it seems to me that there is no reason why the plaintiff should not be allowed to recover the money which he has actually subscribed to the scheme, that money not having been paid out to anybody else under the scheme. To hold otherwise would be to permit the guilty party to misappropriate the funds of a comparatively innocent party. The case *Barclay v. Pearson* (1893) 2 Ch.154 is an authority for the position that when the parties are not in *pan delicto* the innocent or the hoodwinked party may claim the return of his money. The matter is also covered by the second clause of Section 84 of the Indian Trusts Act which prescribes that "where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of

permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of

the transferor." In the present case, the plaintiff not being guilty of any offence, the most that can be said against him is that he knew or sought to

have known that an offence would be committed in connection with the scheme to which he had subscribed. Emphatically therefore he is not in pan

delicto with the the promoters of the. scheme who have in the eye of the law, committed a crime. There is no question therefore of potior est

conditio possiden-tis nor can it be a question of ex turpi causa non oritur actio. The plaintiff can plead the contract without pleading his own

criminalty and he should therefore be allowed to recover his money.

39. It seems to me unnecessary to consider at length the plea that there is no personal liability upon the defendants for such a liability is in my

opinion imposed by the terms of the contract.

In this view therefore I agree that the petition should be dismissed with costs.

Venkataramana Rao, J.

40. The suit out of which this Civil Revision Petition arises was instituted by the plaintiff to recover a sum of Rs. 270 being the amount contributed

by him towards his share of subscriptions to a chit fund which was conducted by the defendants with interest thereon at 12 per cent per annum.

The defence was that the chit fund transaction was lottery within the meaning of Section 294-A, of the India Penal Code and any claim arising

thereunder could not be legally enforced and that the petitioners were not personally liable and at best the remedy of the plaintiff could only be

against the moneys, if any, of the fund.

41. The learned District Munsiff, Palghat was of opinion that the chit fund in question was not a lottery and that in any event an offence u/s 294-A,

was not made out and decreed the plaintiff's suit. Against the said order the present Civil Revision Petition has been filed and when it came up

before His Lordship Venkatasubba Rao, the Officiating Chief Justice, he found it difficult to reconcile Udumalpet Nidhi Ltd. In re I.L.R.(1934) 57

Mad. 844 : 67 M.L.J. 445 with the Full Bench decision in Narayana Aiyangar v. Vella-chami Ambalam I.L.R.(1927) 50 Mad. 696 : 52 M.L.J.

687 (F.B.) and Shanumuga Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad. 661 which it in terms approves and therefore had this matter

placed before this Full Bench.

42. The two main questions which fall to be decided in this case are (1) whether the chit fund in question is a lottery and (2) whether the plaintiff is

entitled to recover the amount paid by him as and for his subscriptions to the fund.

43. The nature of the transaction in this case may be described thus. The chit was started with the object of creating a fund for the

Lakshminarayana Perumal Temple. It consists of 625 subscribers, the monthly subscription being Rs. 3. The number of months for which

subscriptions have to be paid is 50. The arrangement is that a drawing takes place every month, one ticket is drawn out of 625 tickets and the

subscriber who draws the ticket is paid Rs. 150 without any liability to pay for future instalments. This process is repeated month after month till

the 50th month. After the 50th month the remaining 575 subscribers will be each paid in a particular order Rs. 150 i.e., the amount actually paid by

them and the chit fund will then be closed. On the termination of the said chit fund as aforesaid, "the entire profits accruing from the kuri shall be

utilised either in the purchase of some land at the Manager's choice or for other purposes connected with the temple" as it was agreed at the

inception that the entire profits accruing from the kuri shall belong to the temple.

44. As stated above the question for consideration is whether a kuri or chit fund of the said description is a lottery. A lottery is a species of gaming

or wagering and may be described as an agreement whereby a prize or prizes are to be awarded by drawing lots or any other chance method to

one or more of the persons who risk the payment of money or other valuable consideration for the chance of winning a prize. In Webster's

dictionary "lottery" is defined as "a scheme for the distribution of prizes by lot or chance, especially a scheme by which one or more prizes are

distributed by chance among persons who have paid or promised a consideration for a chance to win them, usually as determined by the numbers

on tickets as drawn from a lottery wheel". In Murray's dictionary the following meaning is given; "An arrangement for distribution of prizes by

chance among persons purchasing tickets". In the latest Universal Dictionary of English Language it is defined as follows: "Organised competition

for money or other prizes, the winners of which are selected by lots, the funds

being subscribed by the competitors"".

45. From a study of decisions both English and Indian the following four elements appear to be essential to constitute a lottery:

- (1) A prize or some advantage in the nature of a prize;
- (2) Distribution by chance;
- (3) Consideration paid or promised;
- (4) risk or loss.

46. I shall endeavour with reference to the decisions to show that if any one of these elements is wanting the transaction will not be lottery. Before

proceeding to do so it is necessary to advert briefly to the development of the law both in England and in India regarding lotteries and the

underlying principle on which they have been rendered illegal or in certain circumstances made punishable. In England lotteries were perfectly valid

at common law but between the years 1698 and 1846 a series of statutes were enacted in order to suppress lotteries. The original purpose of

these Acts was two-fold; to authorise only state lotteries which in fact throve from 1709 to 1803, and also to prevent any opposition to those state

lotteries either at home or from abroad. Later statutes were also intended to prevent innocent persons from being ruined. It is unnecessary to refer

to these various statutes excepting two of them in so far as they have a bearing on the Indian statute law. Two of the said statutes are the Gaming

Act of 1802, 42 Geo. 3. c. 119 and the lotteries Act of 1823, 4 Geo. 4 c. 60. The relevant provisions of the said two Acts are as follows:

(42 Geo. 3 c. 119). An Act to suppress certain Games and Lotteries not authorized by Law.

Whereas evil-disposed persons do frequently resort to public houses and other places to set up certain mischievous games or lotteries called little

goes, and to induce servants, children, and unwary persons to play at the said games; and thereby most fraudulently obtain great sums of money

from servants, children, and unwary persons to the great impoverishment and utter ruin of many families. For remedy whereof, be it enacted, that

all such games or lotteries called little goes, shall from and after the passing of this Act be deemed and are hereby declared common and public

nuisances and against law.

From and after the 1st day of July, 1802, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep

open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way,

contrivance, or device whatsoever, any game, or lottery called a little goe or any other lottery whatsoever not authorised by Parliament, or shall

knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, cards, balls, or by

numbers or figures or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place, upon

pain of forfeiting for every such offence the sum of five hundred pounds, to be recovered in the Court of Exchequer at the suit of his majesty's

Attorneygeneral, and to be to the use of his majesty, his heirs and successors".

47. The Lotteries Act 1823 provided that if any person or persons were to sell ticket or chances in any lottery not authorised by an Act of

Parliament or publish any scheme or proposal for the sale of any ticket or chance in such a lottery, for every such offence he had to forfeit and pay

a sum of fifty pounds.

48. It will be seen from the preamble of 42 Geo. 3 the underlying public policy which declared the lotteries common public nuisances was that they

promote gambling and speculation so that great sums are obtained fraudulently from servants, children, and unwary persons to the great

impoverishment and utter ruin of many families. In India, Act V of 1844 was enacted on these lines. The relevant provisions are as follows:

Whereas great mischief has been found to result from the existence of Lotteries:

(i) It is hereby enacted, that in the Territories subject to the Government of the East India Company, all lotteries not authorised by Government,

shall, from and after the 31st day of March, 1844, be deemed, and are hereby declared common and public nuisances and against law.

(ii) And it is hereby enacted, that from and after the day aforesaid, No. persons shall, in the said Territories, publicly or privately, keep any office

or place for the purpose of drawing any lottery not authorised by Government,, or shall have any such lottery drawn, or shall knowingly suffer any

such lottery or to be drawn in his or her houses, and any person so offending shall for every such offence, upon conviction before a Justice of the

Peace, or Magistrate, be punished by fine not exceeding 5,000 rupees.

49. Their Lordships Scotland, C.J. and Frere, J. in *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R. 448 in pronouncing that a certain

transaction is not a lottery within the meaning of the said Act observe as follows page 450:

There is in this, we think, nothing of that risk, speculation, and gaming which make ordinary lotteries a common and public nuisance, and which it-

was the policy and intention of the Act in question to provide against

50. A kuri is a well-known institution in Sour hern India for at least nearly a century. As held by Phillips, J, *Sankunny v. Ikkora Kirtti* (1919)

M.W.N. 570 "'a kuri as ordinarily conducted does not amount to a lottery'". It is often resorted to for promoting thrift and co-operation and for

various beneficial purposes. In the language of the learned Judges of *Saddar Adhalat Dewani* "'it is provident and a beneficial arrangement'". The

class of chit funds to which Their Lordships were referring in the above cases consisted in a number of people agreeing to contribute monthly sums

for a specified number of months and each in his turn, as determined by lot taking the whole of the money subscribed in a month. The persons who

draw sums execute a bond for the amount which will have to be subscribed less the amount already subscribed. In a scheme like this certain

persons get the use of a lump sum early and others later. If the question of interest on the amounts subscribed is taken into consideration, there is a

certain amount of inequality of benefit and consequent advantage gained at the expense of others by those who receive the sum early and thus there

is a prize gained by some which is made the matter of chance. But this loss of interest by some or gain of interest by others by itself will not

constitute the transaction a lottery as the return of their contributions is not made a matter of chance. Both in the *Saddar Dewani* decision and in

Kamakshi Achari v. Appavu Pillai (1863) 1 M.H.C.R. 448 their Lordships held such a transaction will not amount to a lottery., It is well

worthquoting the reasons on which the conclusion was arrived at:

(i) It has in it no element of chance or risk, the monies paid by each subscriber being eventually returned to him *Aiyangar Kone v. Vidoomada*

Kone (1858) *Sudder Dewani adalat* 83.

(ii) Lotteries ordinarily understood are games of chance in which the event of

either gain or loss of the absolute right to a prize or prizes by the persons concerned, is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. It is to lotteries of this description that the Act, we think, must be construed to apply when declaring "them to be common and public nuisances and against law" and as such providing for their suppression. Here no such lottery appears to have taken place... and neither the right of the subscribers to the return of their 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". *Kamakshi Achari v. Appavu Pillai*

(1863) 1 M.H.C.R. 448

51. The interpretation of lottery in Act IV of 1844 by these two decisions was accepted by the legislature and with the knowledge of that

interpretation the Indian Penal Code, was amended by Act XXVII of 1870, Section 10, by enacting Section 294-A which it may be observed is

more restricted in scope than that of Act V of 1844. Even after the introduction of that section, in *Vasudeva Nambudri v. Mammod* I.L.R.(1898)

22 Mad. 212 a kuri of the above kind was held not to be a lottery and Their Lordships observe:

The law as laid down in *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R. 448 has been followed without question for thirty-five years. The

introduction of Section 294-A into the Indian Penal Code, makes no difference

52. These decisions therefore clearly establish that where the dominant feature of the transaction was the promotion of mutual thrift and co-

operation and the object is for a beneficial purpose and not for the purpose of gaming or speculation, the fact that certain matters are determined

by lot will not constitute it a lottery and that risk of loss is a necessary element. In this connection it will be necessary to note how English Lawyers

viewed a transaction like this. In *Halsbury's Laws of England*, Vol. 15, Section 929 it is stated thus:

It seems that the substantial object of the whole scheme will be looked at in order to ascertain whether it is a lottery. 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

53. For this proposition reliance has been placed on the decision in *Wallingford v. Mutual Society* (1880) 5 A.C. 685. In that case there was a

formation of a Mutual Society the declared object of which was to accumulate capital by means of monthly subscriptions from members, to

advance such capital to the members in 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 mode of operation was 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 20 years from the advance. It was urged in that case that the constitution of the society itself was illegal, as its promised benefits were to be

given to the members by drawings, which made the society illegal under the Lottery Acts. Their Lordships had no hesitation in repelling the

contention. Referring to the Lottery Acts, Lord Selborne observed as follows:

One of those acts plainly on the face of its recitals (the enacting part not departing from those recitals,) had reference to gambling transactions only;

and in my judgment this was not a gambling transaction, within the meaning of that Act

54. Thus it will be seen in this case there was a prize obtained by some of the subscribers at the expense of the others. That prize was determined

by chance. There was consideration paid for that chance. Still it was not characterised as a lottery because the dominant feature of the scheme was

that it was not a gambling transaction. It has therefore in every case to be considered before a scheme can be pronounced to be a lottery what is

the dominant feature of the transaction. In *Shanmuga Mudaliar v. Kumarasami Mudali* I.L.R.(1925) 48 Mad. 661 their Lordships refused to

condemn a transaction of the description in this suit as a lottery. His Lordship Venkatasubba Rao, J., observed at page 669:

Though it may be said that it is the small element of chance that tempts some to

join the fund, the dominant feature of the transaction is that it enables a large 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

55. To a similar effect Ramesam, J., says at page 664. A reference to the case of Sykes v. Beadon (1879) 11 Ch. D. 170 will be necessary in this connection because that case has been relied on in two later Madras cases The Universal Mutual Aid and Poor Houses Association, Ltd. Vs. A.D. Thoppa Naidu and Others, and In re, The Udumalpet Nidhi Ltd I.L.R.(1934) 57 Mad. 844 : 1934 67 M.L.J. 445 for the conclusion they arrive at in describing a transaction like this as a lottery. Jessel M.R in that case characterised an association similar to the one in Wallingford case as an illegal association. The main question in that case was whether the association was formed for the acquisition of gain and therefore ought to have been registered under the Companies Act of 1862. The learned Judge was of opinion that it was such an association and not having been registered is illegal and he ventured to remark that it would also offend the Lottery Act. The decision in Wallingford case (1880) 5 A.C. 685 was given on the 8th June, 1880. The question identical with that which arose in Sykes v. Beadon (1879) 11 Ch. D. 170 came up in the Court of Appeal for decision on the 16th July, 1880 in Smith V. Anderson (1880) 15 Ch. D. 247. In that case shares in a number of submarine telegraph companies of the aggregate nominal amount of ₹400,000 were purchased by subscription and vested in trustees. Each subscriber received for every ₹90 subscribed a certificate for the nominal amount of ₹100 and a deferred coupon for one 4200th part of the funds, the number of certificates being 4200 and the profits therefrom were to be divided in a certain manner stated therein. There was provision for redemption of certificates by purchase. There was also provision for redemption in a certain event by a drawing of the certificates which entitled the recipient of that certificate to particular benefits i.e., gain of ₹30 per share. It was contended in that case that the object of the association being for the acquisition of gain and that the drawing of the certificates for purchase by lot was a lottery. Chitty Q.C. who appeared for the association in that case met the argument relating to lottery by saying "All argument that this case is within the Lottery Acts is precluded by the decision of the House

of Lords in Wallingford v. Mutual Society (1880) 5 A.C. 685". Their Lordships in the Court of appeal reversed the judgment of Sir George Jessel

M.R. holding that the association was not for the purpose of gain within the meaning of the Companies Act, that:

If there is any business at all it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees - persons who have no

mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something

which is to be divided between them

56. The learned Judges did not deem it necessary to deal with the question of lottery apparently owing to the decision of the House of Lords. The

transaction could have been condemned as a lottery if the dictum of Sir George Jessel M.R. in Sykes v. Beadon (1879) 11 Ch. D. 170 was

applied. It would appear from Chitty on Contracts, 16th Edn. that the authority in Sykes v. Beadon (1880) 15 Ch. D. 247 is not of much weight

having regard to the decision of the House of Lords (p. 748). In the latest Edition in the body of the book the result of the decision in Wallingford

Case (1879) 11 Ch. D. 170 is stated and no reference is made to Sykes v. Beadon (1879) 11 Ch. D. 170 except in the foot-notes.

57. Coming to the suit transaction its dominant feature is to raise a fund for the purpose of the temple and not gaming or speculation. The object is

stated in Rule 3.

58. (3) The terms and the object of the Kuri. - The object of the kuri is:

to create a special fund for the temple and as the expenses of the fund are increasing year by year, and as there is no fund from which these

expenses could be met to create a fund for the purpose so that such expenses may be met in future without any default

59. No one will deny that it was a legitimate object and such schemes are now generally being resorted to for such purposes. If the chit funds of

the nature described in Kamakshi Achari v. Appavu Pillai (1863) 1 M.H.C.R. 448 and V asudevan Nambudri v. Mammod I.L.R.(1898) 22 Mad.

212 are legitimate transactions on the ground that their object was to promote thrift, prudence and co-operation it is not possible to see why this

transaction should be viewed differently. Here also everybody gets a lump sum of Rs. 150 just as in those chit funds everybody got the amount

which he subscribed. The fact that some of them got more and that could probably have been an inducement for people to subscribe does not

detract from the legitimate object of the transaction, namely, to provide for a charitable object and to get a lump sum at the end of a prescribed

number of months.

60. Taking the various elements which go to constitute a lottery the mere obtaining of a prize by chance will not do. There must be consideration

paid or promised, because it has been held in *Willis v. Young and Stembridge* (1907) 1 K.B. 448 that an absolutely free and gratuitous distribution

of chances, none of which has been paid for, would not be a lottery. It will thus be seen that the combination of a prize, chance and gain would not

be enough. That which is essential therefore is consideration paid or promised because it is only then that the fourth element of risk or loss comes

in. If there is no consideration there can be no question of gain or loss. Every one of the English cases on which reliance is placed tends

undoubtedly to establish this. As rightly observed in *Halsbury*, Vol. 15, p. 525 footnote (f):

In spite of the fact that the Courts have adopted as a definition the description of a lottery given above, in which the gambling element is not

mentioned, (a lottery has been described as a scheme for distributing prize by lot or chance), there is no reported case in which the element has

been wholly absent. Indeed, the Courts have gone out of their way to discover its presence

61. In *Taylor v. Smetten* (1883) 11 Q.B. 207 a packet containing a pound of tea was sold at 2 Section 6d. a packet. In each packet was a

coupon entitling the purchaser to a prize. Hawkins, J., who delivered the leading judgment in that case having stated the definition given in

Webster's dictionary of lottery to be a distribution of prizes by lot or chance proceeded to consider what the nature of the transaction was upon

which he was asked to pronounce an opinion. If he had merely decided on Webster's definition according to which only two elements are

required, a prize and a chance, there was no need to do so as he had done. It was conceded in that case that the tea was good and worth the

money. But he refused to accept that concession and proceeded to observe:

Although it was admitted by the respondent that the tea was good and worth all

the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes. Nor can it be doubted that in buying a package, the purchaser treated and considered it as a purchase of the tea and the coupon, whatever its value might turn out to be

62. Therefore in so far as he lost the prize he has lost so much of the consideration that went in for it.

63. In *Hall v. McWilliam* (1901) 85 L.T. 239 in an issue of an evening newspaper, worth a half-penny, a prize was offered to every purchaser of

it. Bigham, J., observed as follows:

It is said that in some way or another no chance is sold because the one half-penny that is given for the newspaper is said to be exhausted by the

receipt of the newspaper by the person who pays the half-penny. That is not accurate. What the person who buys this newspaper gets for his half-

penny is not the mere newspaper, but the chance as well. The iivo things--the newspaper and the chance - are sold together

64. In *Kerslake v. Knight* (1925) 133 L.T.R. 606 this aspect is much more neatly put by the Chief Justice Lord Hewart. It is also a case of a sale

of newspaper with a prize. He observes:

I think that the purchaser brought for one undivided price an article and a chance. The ticket was just as much bought as if it had been priced

separately

65. In *Willis v. Young and Stemberge* (1907) 1 K.B. 448 medals were distributed by the proprietor of the *Weekly Telegraph*. Darling, J.,

observed:

All chances are paid for in the mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance

66. In *Bartlett v. Parket* (1912) 2 k.B. 497 tickets bearing four different numbers were sold for 6d. each upon the terms that the purchaser of the

ticket bearing a number to be subsequently drawn by an independent person would be entitled to a bicyle as a prize. The bicyle in this case was

presented as a gift by a firm of cycle manufacturers for the purpose of advertisement. The ground on which this transaction was held to be a lottery

is thus stated by Ridley, J.:

I am unable to see how the fact that no part of the money which was paid for tickets went for the purchase of the prize, which was presented by

the Cycle Company, makes any difference. I think a lottery is held whenever there is a sale of tickets which gives the holders of them the chance of

winning a prize. It is selling a chance where one ticket, by chance, entitles the holder to a prize

67. This again emphasises the necessity of a consideration. It is unnecessary to multiply cases because every one of the cases when examined

established the necessity of a loss as an element in determining whether the transaction is a lottery or not.

68. Coming to Indian Cases I have already shown that in the two cases decided under Act V of 1844, "risk" was considered an element of lottery

and the same interpretation must be placed on the said word in Act XXVII of 1870 and it was accordingly done in cases since the Act was

enacted. In *In re, Doraisami Mudaly and Anr.* (1890) 1 Weir 251 a transaction similar to the one in suit was held to be a lottery on the ground that

all those who did not get prize would get back the prize without any interest. The learned Judges observe:

As the prize winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest out of whose subscription the prize has

been paid and also continue to be subscribers, are the losers

69. They can only be losers by reason of their failure to get interest because everybody gets his subscription back. This case shows that the loss is

an element which is insisted on. See also *Sankunni v. Ikkorakirtti* (1919) M.W.N. 570. In *P.V. Veeranan Ambalam Vs. Ayyachi Ambalam*, this

aspect of the loss is well brought out.

Spencer, J., observes:

In (he present chit transaction, out of 500 subscribers there were 450 losers of interest on their money deposited with the promoters.

Madhavan Nair, J.. observes on page 797:

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.

70. Leaving aside the question which I shall presently consider how far loss of interest is a hazard of loss for the purpose of lottery. It is absolutely clear that every decision, English and Indian, regards the risk of loss a necessary element of lottery. It may be that in some cases it is difficult to estimate the loss, as in tea or sweatmeat packet cases or newspaper cases or the musical entertainment cases where you cannot allocate how much was paid for chance and how much for the purchase of tea or newspaper or the entertainment, still the Courts are at pains to discover a loss, call such a loss what you will, notional or hypothetical. It is a fallacy to consider the case from the point of view of gain only. Where there is gain to one there is necessary loss to another. The gain cannot be "separated from the corresponding loss.

71. Venkatasubba Rao, J, if I may say so with respect, approaches the question from the correct stand point when in Shanmugha Mudali v.

Kumaraswami Mudali I.L.R.(1925) 48 Mad. 661 on page 664 he observes:

The element, therefore that is generally present in a lottery or wagering transaction, viz., that loss is occasioned to one or more does not exist in this transaction

72. It is necessary now to consider whether loss of interest to some of the subscribers can be considered a hazard of loss to constitute the

transaction a lottery. The view taken in Shanmugha Mudali v. Kumaraswami Mudali I.L.R.(1925) 48 Mad. 661 was that it was not but in P.V.

Veeranan Ambalam Vs. Ayyachi Ambalam, Spencer, J. and Madhavan Nair, J., held it was. In so holding they relied upon the judgment of

Richards v. Starck (1911) 1 K.B. 296. The scheme therein is thus described by Channel, J.:

A person who desires to participate in the scheme deposits a sum of money, whether ₹5 or ₹10 or some multiple thereof, with the defendant,

who is to be at liberty to speculate with it on the Stock Exchange in certain stocks, and if at the end of three months from the date of the deposit

the price of those stocks is higher than the price at the date when the deposit is made the defendant undertakes to pay to the depositor the amount

of his deposit and also the amount of the rise in the price of the stocks less 10 per cent, upon this latter amount."..."And in the event of the

particular stock not having risen in price he will have the deposit in any event

73. The learned Judge observes:

In one sense the transaction involves no loss in any event to the plaintiff, as he was to have his money returned to him, though without interest. But

the plaintiff has lost the interest upon his deposit, and that is, to my mind, sufficiently a loss to bring the contract within the spirit though not perhaps

within the actual wording of the definition

74. In view of the conflict between *Shamnugha Mudali v. Kumaraswami Mudali* I.L.R.(1925) 48 Mad. 661 and *Veeranan Ambalam v. Ayyachi*

Ambalam (1928) 49 M.L.J. 791 the question came up before the Full Bench in *Narayana Aiyangar v. Vellachami Ambalam* I.L.R.(1927) 50

Mad. 696 : 52 M.L.J. 687 (F.B.). Ramesam, J., who delivered the leading judgment observes as follows:

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

75. He refused to follow *Richards v. Starcks* as on a similar set of facts the Court of Appeal in *Hirst v. Williams and Perryman* (1895) 12 T.L.R.

125 took a different view. There the office of a certain newspaper issued a circular headed ""Unique opportunity for Speculation"" with reference to

contemplated rise in ""Brighton Stock"". The scheme propounded was that those who were willing to participate in it should subscribe ₹½25 or

₹½50 and that the sum subscribed would be returned with profit if there is any rise in price and if there is loss the return of the money is

guaranteed. Lord Esher M.R observed:

There was no gambling between the defendants and the plaintiff. The defendants in effect said to the plaintiff, we (the defendants) are going to

speculate on the Stock Exchange, and if you will advance us money we

guarantee its return in the event of our speculations resulting in a loss

76. (Vide also 15 Halsbury p. 474 foot-note). The decision of the Full Bench is thus a distinct authority that loss of interest is not an element which

would go to constitute a lottery. So far as the suit chit transaction is concerned, no question of loss of interest arises as all the subscribers have

made a gift of such interest as may be earned to the temple. It is competent for a subscriber to forego interest and there is nothing illegal in it and

there is thus no loss hazarded and the return of the subscription is not made a matter of risk or speculation. Pollock and Mulla in their Commentary

on Contract Act (6th Edn.) approving Narayana Aiyangar v. Vellachami Ambalam I.L.R.(1927) 50 Mad. 696 : 1927 52 M.L.J. 687 (F.B.),

observe:

A "Chit Fund" plan under which all subscribers are repaid their capital by a fixed date, though some determined by lot get more and sooner is not

a lottery (page 250).

77. I am therefore distinctly of opinion that the Chit Fund in question is not a lottery and with due respect do not agree with the opinion of my

learned brothers on this point. It is paramount public policy not to condemn a transaction like this which in the social consciousness of the people is

not considered illegal, considerations founded on the possible scope for swindling by unscrupulous persons ought not to make one pronounce a

transaction unlawful is otherwise lawful. As Ramesam, J., rightly observes in Narayana Aiyangar v. Vellachami Ambalam I.L.R.(1927) 50 Mad.

696 : 52 M.L.J. 687 (F.B.).

If it is considered that chit fund transactions require to be regulated in the interests of the public to avoid the perpetration of 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

78. Assuming however the transaction to be a lottery the next question is, has an offence u/s 294-A been committed? To constitute an offence

under that section there must be keeping an office or place for the purpose of drawing any lottery. The word, "keep" implies control de facto or de

jure. The cases cited at the bar do not throw such light on the meaning of the word "keep" except showing that mere incidental or casual use is not

enough Marks v. Benjamin (1839) 5 M. & W. 565 : 151 E.R. 239 and that the use must be habitual Martin v. Benjamins and the place must have

been appropriated for the purpose. The juxtaposition of the "office" with the "place" connotes that "keep" implies control. In this case the place of

drawing is the portico of the temple and it has not been shown that the defendants had any control over it. In fact the finding is that the defendants

did not keep a place within the meaning of the section. Even assuming that the defendants are guilty of an offence under the first part of the section,

the subscribers can in no event be guilty of it or an abetment of it. They were in no sense keeping a place for the purpose of drawing. Subscribing

moneys for the maintenance of a lottery is not the same as keeping a place for the drawing of a lottery.

79. Again though the promoters may be guilty of a publication under the second clause of the section 294-A, subscribers can in no sense be guilty.

80. The next question is whether the plaintiff is entitled to recover the subscriptions paid by him. It is contended by Mr. T.M. Krishnaswami Aiyar

that the plaintiff having been a party to an illegal contract and the illegal purposes having been substantially carried out is disentitled from getting any

relief. Strong reliance is placed on the decision in Petherpermal Chetty v. Muniandy Servai I.L.R.(1908) 35 Cal. 551 : L.R. 35 IndAp 98 : 18

M.L.J. 277 (P.C.). There is no doubt that the general rule is that no person can claim any right or remedy on the basis or ground that he has been a

party to an illegal contract and as the illegal contract is an essential constituent of the cause of action, he cannot succeed. In English law there are

well-recognised exceptions to this rule and one of them is where the contracting parties are not in pari delicto:

the offence of one of them so far exceeds that of the other as to make it just and reasonable that the other should be entitled not indeed to enforce

the contract but to obtain in some measure or form restitutio in integrum in respect of acts of performance done by him in favour of the more guilty

party

81. It is in virtue of this principle that relief has been given in cases where contracts or transactions are prohibited by positive statutes for the sake

of protecting one set of men from another set of men. Under this protected class come the subscribers to a lottery declared illegal under the

Lottery Acts of England. (Vide Preamble to 42 Geo. III already referred to.) The Indian Enactments, Act V of 1844 and Section 294-A of the

Indian Penal Code are based on the same policy. The relief has been given though the transaction has been finished and completed. See *Browning*

v. Morris (1718) 2 Cooper 790 : 28 E.R. 1363 and *Barclay v. Pearson* (1893) 2 Ch. D. 154 and *Chitty on Contracts* 18th Ed. p. 786. This

principle has been embodied in Section 84 of the Trusts Act which mentions three classes of cases, namely (1) where the illegal purpose is not

carried into execution (2) where the transferor is not as guilty as the transferee (3) where the effect of permitting the transferee to retain the

property might be to defeat the provisions of any law. *Petherpermal Chetty v. Muniyandi Servai* I.L.R.(1908) 35 IndAp 98 : ILR 35 Cal. 551: 18

M.L.J. 277 (P.C.) would come within the first class of cases. The suit transaction would come within the second class of cases. There is also

another recognised exception in English Law to the rule of *turpis causa* in cases where there exists between the parties the relation of trustee and

beneficiary and a trustee holds on behalf of his beneficiary all the moneys he receives in his capacity as trustee. The law will not permit him to keep

them for himself on the plea of illegality in the transaction, in which they were received:

In such cases public policy requires that the rule of *turpis causa* shall be executed in favour of the more important and imperative rule that agents

and trustees must faithfully perform the duties of their office

82. I am inclined to think that the third class of cases mentioned in Section 84 would cover cases like this and the suit transaction might also fall

under it. In *P.V. Veeranan Ambalam Vs. Ayyachi Ambalam*, and in the judgment of Odgers, J., in *Nagappa Pillai v. Arunachalam Chetty* (1925)

47 M.L.J. 876 Section 84 of the Trusts Act is not adverted to, nor the well-recognised exceptions in English Law considered. I am therefore of

opinion that the plaintiff is clearly entitled to get back the subscription paid by him.

83. The last argument of Mr. T.M. Krishnaswami Aiyar is that in any event his client cannot be made personally liable. He based his argument on

Clause 13 of the regulations of the Kuri. From a reading of the regulations of the Kuri there is nothing to exclude the personal liability of the

defendants and Clause 13 only confers an additional security on the moneys of the Kuri.

84. In the result the petition fails and I concur with my learned brothers in dismissing the revision petition with costs.

Lakshmana Rao, J.

85. I agree that the petition should be dismissed with costs, and in my opinion the crucial test is whether or not the chance of winning a prize by lot

enters into the bargain. If it does the subscribers would necessarily be risking something, and it is not essential that the fund out of which the prizes

are provided should consist only or at all, of sums contributed by them. That every one of them would in any event obtain full value for his

subscription would not prevent the scheme from being a lottery and it is only when the chances of a prize are obtained wholly gratuitously that the

scheme would not be a lottery. Viewed in this light the scheme under consideration is clearly a lottery, and publication of relative proposals by the

defendants, the promoters, was not seriously disputed. The drawing was according to Clause (9) of Ex. I(a), the kuri regulations, to take place at

the temple premises at 8 A.M. on the 25th of every month and the evidence is that it took place accordingly in the portico of the temple till the

discontinuance of the kuri after 45 drawings. There was thus a habitual and regular user of the portico for drawing the lottery and this in my opinion

amounts to keeping a place for the purpose of drawing the lottery, within the meaning of Section 294-A of the Indian Penal Code. The Promoters

would therefore be guilty under both clauses of Section 294-A of the Indian Penal Code, but lottery per se is not an offence nor was it suggested

that the subscribers were parties or privies to the publication of the relative proposals. They had no control whatever over the place of drawing and

it is impossible to hold that by purchasing tickets they intentionally aided the keeping of a place for the purpose of drawing a lottery. They would

not therefore be guilty of any offence and the object of Section 294-A of the Indian Penal Code was undoubtedly to save people from the effects

of unauthorised lotteries. If so the subscribers would be a protected class and the principle of "in pari delicto" cannot be invoked. Even otherwise

the delictum in such cases would not be at par and the second part of Section 84 of the Indian Trusts Act which requires the transferee of

property for an illegal purpose to hold it for the benefit of the transferor who is not as guilty as himself would be applicable. The subscribers would in this view be entitled to recover what was actually paid by them and Clause (13) of Ex. I(a), the kuri regulations, does not exclude the personal liability of the promoters.