
(1925) 01 MAD CK 0059
In the Madras High Court

Shanmuga Mudali

APPELLANT

Vs

Kumaraswami Mudali

RESPONDENT

Date of Decision : 16-01-1925

Acts Referred:

Penal Code, 1860 (IPC) — Section 294A

Citation : (1925) ILR (Mad) 661

Hon'ble Judges : Venkatasubba Rao, J; Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—The facts of the case have been stated by my learned brother, whose judgment I had the advantage of perusing and need not be repeated. I will only observe that the suit is not between the subscribers inter se or by a subscriber against the stake-holder. The stake-holder of the suit chit fund is a partnership consisting of the plaintiff and defendant and the object of the suit is to recover the moneys due to the plaintiff on the closing of the partnership. Unless the object of the main transaction is to commit an offence made punishable by the Indian Penal Code there can be no objection to enforcing the terms of a contract of this kind which is collateral to another transaction even when the main transaction itself is merely void (as where it amounts to a wager) and cannot be enforced; See *Shibho Mal v. Lachman Das* (1901) I.L.R., 23 All., *Bhola Nath v. Mul Chand* I.L.R., (1903) All, 639, *Chekka Venkataswamy v. Gajjila Nagabhushanam* (1904) 14 M.L.J., 326 which are cases of principal and agent. Cases of partnership are illustrated by *Sharp v. Taylor* (1849) 2 Ph., 801; 41 E.R., 1153 (case of fraud on the American law and on the English navigation laws), *Johnson v. Lansley* (1852) 12 C.B., 468; 138 E.R., 989 *Beeston v. Beeston* I.L.R., (1875) 1 Ex, 13, *Brookman v. Mather* (1913) 2927 (Avory, J.) and several others ending with. *Jeffrey v. Bamford* [1921] 2 K.B., 351. These are mostly cases of betting partnerships.

2. This leads to the question whether any offence has been committed in the formation and conduct of the main transaction, i.e., the chit fund. If it is an

offence it must be one punishable u/s 294-A of the Indian Penal Code. This section and Act V of 1844 are both founded on the terms of 42 Geo. III, Clause 119 and 4 Geo. IV, Clause 60 I agree with my learned brother in thinking that there is nothing to distinguish the present case in principle from *Iyyanar Kone v. Vidoomada Cone* ((1858) Sud. Dec., 53), *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R., 448 and *Vasudevan Nambudri v. Mammod* I.L.R.,(1899) 22 Mad., 212. *Sankunni v. Ikkora Kirtti* (1919) M.W.N., 570 and *Nagappa Pillai Vs. Arunachalam Chetty*, are not of much help as there is not much discussion on the question of what constitutes lottery.

3. The word " lottery " is not defined either in the Indian Penal Code or Act V of 1844 nor in the English Statutes. A definition has been attempted in Volume XV of Halsbury, Section 605, page 299, apparently with reference to the decided cases but, when the cases are examined, we are landed into difficulties. The only decision of the House of Lords available is *Wallingford v. Mutual Society* (1880) 5 App. CAS., 685; the facts of which have been fully stated by my learned brother. The observations of the Lord Chancellor (Lord Selborne), and Lords Blackburn, Hatherley and Watson (vide my learned brother's judgment) on the question whether the transaction was illegal under the Lottery Acts are very brief. In Halsbury, Volume XV, page 300, the case is cited as authority for the proposition when 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 lots will not vitiate the scheme. If so all chit funds, the main object of which is the promotion of co-operation, prudence and thrift, ought to be regarded as legitimate even though there is an element of chance and this is apparently the ratio decidendi of *Iyyanar Kone v. Vidoomada Cone* (1858) Sud. Dec., 53 and *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R., 448. In *Chitty on Contracts*, the opposite opinion of Jessel, M.R., in *Sykes v. Beadon* (1879) 11 Ch. D., 170 was regarded as overruled by the decision of the House of Lords in *Wallingford v. Mutual Society* (1880) 5 App. Cas., 685. It seems to me that Lord SELBORNE'S reason for holding that the society was not affected by the Lottery Act is indicated in the sentence

The other Act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets and that Act could have no application to the case.

4. If by the time a society of this kind becomes known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person, keeps a lottery office at which the public were invited to join and to pay, within the meaning of the English Acts or Section 294-A of the Indian Penal Code. In other words, it is not that every lottery constitutes an offence, but the keeping of a lottery office which is a standing invitation to the public that constitutes the offence. In *Stoddart v. Sagar*; *Sagar v. Stoddart* [1895] 2 Q.B., 474 a case of "Coupon competition" advertised in a newspaper, the coupons being filled up by purchasers of the

newspapers with the names of the horses likely to come first, second, third and fourth in a race, Pollock, B., and Weight, J., held that the facts do not show anything amounting to a lottery. No reasons were given. But the cases cited in the arguments show that it was regarded as a case where the success depended not on mere chance but on some skill. If so, the case does not help us. So also the decisions in *Caminada v. Hulton* (1391) 64 T.L.B. 572 and *Hall v. Coa* [1899] 1 Q.B., 198

5. In the present case there is nothing to show when and how the 500 subscribers joined the fund, and whether there was any invitation to the public to join it and an office was kept for the purpose. If so, there is no offence u/s 294-A of the Penal Code. In the case in *Reg v. Pearson* (1893) 37 S.J., 749 (the facts of which are stated by my learned brother) the Public Prosecutor conceded that, if the competition was confined to meteorological savants, there might have been no offence. Sir JOHN BRIDGE thought that it was a pure lottery so far as those persons were concerned to whom the scheme was addressed. It is unnecessary for me now to discuss the soundness of the distinction.

6. In *Taylor v. Smetten* (1883) 11 Q.B.D., 207 (the facts of which are stated by my learned brother) HAWKINS, J, says :

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.

7. In other words, the price paid for each packet included something more than the proper price of the tea. If so, the aggregate of such amount was distributed unequally between the purchasers. There was an invitation to the public to purchase and any indefinite number may purchase. It is certainly a lottery. But, as it is also not clear that there was anything in the nature of prizes and as it is possible that every purchaser might have been cheated it is worse than a lottery in which at least some get prizes. *Barclay v. Pearson* [1893] 2 Ch., 154, is also a case where the parties were invited to join in the competition and no limits were placed on the members that might join and the result did not depend on skill. So far it contained the elements of a lottery. But if each competitor paid no more than the proper price of the newspaper (as to the ascertaining of which there can be no difficulty) he paid nothing for the chance and the prizes were paid only out of the large profits realized by the proprietor of the newspaper by the increased circulation. I have some doubts as to why it should be held to be a lottery, as the case falls within the dictum of DARLING, J., in the next case. In *Willis v. Young and Stembidge* (1907) 1 K.B., 448, Lord Alverstone, Chief Justice, held it was a lottery. Darling, J., who agreed that if the chances of a prize were obtained wholly gratuitously the scheme could not be a lottery. But, on the facts of the case, it is not necessary that the holders of the medals including the successful ones should be purchasers of the Telegraph. It is possible that none of the medal-holders is a purchaser and the actual purchasers of the Telegraph who have paid

no more than the proper price might have purchased without any knowledge of the medals or the chance of a prize connected with them. The case presents to me some difficulties. The case of *Keg v. Harris* (1866) 10 CC.C., 352, presents to me the same difficulty. Though Montagu Smith, J., begins the judgment by saying:

Whether the full value of the shilling was or was not received by the subscribers

the inference is irresistible, as pointed out by Hawkins, J., in *Taylor v. Smetten* (1883) 11 Q.B.D., 207 that the shilling included more than the price of the goods sold. If so, it is a lottery. If not, the observation of Montagu Smith, J., would be in conflict with Darling, J.'s dictum in *Willis v. Young and Stembridge* [1907] 1 K.B., 448. I am content to follow the decision of the House of Lords in *Wallingford v. Mutual Society* (1880) 5 App. Cas., 685 and hold that the chit fund before us is not a lottery and also, even if it is, no offence u/s 294-A of the Indian Penal Code has been committed.

8. That being so, the suit is maintainable. The appeal is allowed, the decrees of the Courts below will be reversed and the suit remanded for disposal according to law. The appellant will be entitled to his costs here and in the lower appellate Court. In the first Court the costs will abide the result.

9. The appellant will be entitled to a refund of Court-fee.

Venkatasubba Rao, J.

10. The plaintiff has filed this suit for the recovery of a sum of money due to him on the footing of a promissory note executed by the defendant. The suit is resisted on the ground that the plaintiff and the defendant were as partners engaged in a lottery, that the accounts of the partnership were settled, that the note was executed for the amount which was found due by the defendant to the plaintiff and that as lotteries are prohibited by law, the plaintiff should not be permitted to enforce his promissory note. The nature of the transaction may be briefly set forth. The plaintiff and the defendant promoted what is described as a "Chit Fund." A capital fund of Rs. 500 a month is raised by 500 subscribers subscribing each, one rupee per mensem. At the end of the month there is a drawing by lot and the subscriber who draws the ticket is paid Rs. 50 and his connection with the transaction forthwith ceases. This process is repeated month after month till the end of the 49th month. It will be seen that by this time, 49 subscribers will have drawn the tickets and received each a sum of Rs. 50 and that they have consequently severed their connection with the fund. At the close of the 50th month, each of the remaining subscribers is paid Rs. 50 and the stakeholders divide the profit and the fund is dissolved.

11. Let me now examine what the essential features of this transaction are--

(1) There is no uncertainty in regard to the sum which each subscriber receives. It is clearly understood from the start that every member will be paid Rs. 50. He receives neither more nor less. The sum which each subscriber gets is thus fixed.

(2) No subscriber takes the risk of losing any portion of the amount subscribed. The utmost that any subscriber may be required to contribute is Rs. 50 and each subscriber gets the same back.

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

12. But it may be asked, so far as the first 49 are concerned, they get more than what they pay, how is this made possible? The fund as it comes in is invested and earns interest. The aggregate amount of interest is utilized in paying the first 49 members the excess over what they contribute and there is still a surplus which leaves to the stake-holders a fair margin of profit. There is some element of chance in regard to the first 49 subscribers. The member who draws the first lot would in return for the one rupee that he pays in gets Rs. 50. The subscriber who draws the second lot pays Rs. 2 and gets Rs. 50. This goes on until the 49th member who subscribes as much as 49 and receives Rs. 50. Then chance ceases to play any part in regard to the remaining 451 members who receive at the end of the 50th month each a sum of Rs. 50. What the 451 members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers. The remaining portion of the interest earned is retained by the stake-holders as their profit.

13. The fact that emerges from this description is that while chance determines the disposal of the interest earned there is absolute certainty with reference to the distribution of the capital fund itself. 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 as the scheme is in their case an incentive to thrift.

14. There is another feature of the scheme to which I may advert. Under Rule 8 of the Chit Fund Rules any of the subscribers is entitled to obtain by way of loan, after being subscriber for seven months, an amount not exceeding three-fourths of the total contribution made by him on executing a promissory note agreeing to repay the sum with interest at 12 annas per cent per mensem. If a larger amount is required there is a provision under which it may be advanced under proper safeguards. Rule 6 provides that when the member draws his amount the sum due by him on account of loan is to be deducted and the balance alone is to be paid to him.

15. In my opinion there is nothing to distinguish this case in principle from *Iyyanar Kone v. Vidoomada Cone* (1858) Sud. Dec., 53, *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R., 448 and *Vasudevan Nambudri v. Mammod* I.L.R. (1899) Mad., 212.

16. The transactions in all the three cases were similar and they may thus be described in the form of an illustration. A stake-holder promotes a chit fund with.

20 subscribers, each subscriber paying monthly subscription of Rs. 10. The fund lasts for 20 months. The total subscription for one month is thus Rs. 200. Each subscriber in turn is paid the entire sum of Rs. 200, the order in which, the members are to get the sum being determined by lot. The subscriber to whom the sum is paid executes a bond in favour of the stake-holder agreeing to pay regularly future subscriptions as they fall due. In the case of *Iyyanar Kone v. Vidoomada Cone* (1858) Sud. Dec., 53 three learned Judges expressed the opinion that the scheme is a provident and beneficial arrangement under which each member derives the advantage of having the use in his turn of a round sum, the only thing determined by lot, being the turn in which that advantage shall be enjoyed. The learned Judges observed that the latter circumstance did not in their opinion bring the case within the scope of Act V of 1844, an Act for the suppression of lotteries.

17. The material portion of the Act runs thus:

All lotteries not authorized by Government shall from and after the 31st March 1844 be deemed and are hereby declared common and public nuisances and against law.

18. In *Kamakshi Achari v. Appavu. Pillai* (1863) 1 M.H.C.R., 448 Scotland, C.J., and Frere, J, base their decision on the ground that

it is not the case of a few out of a number of subscribers obtaining prizes by lot.

19. The learned Judges further say that the right of the subscribers to the return of their contribution is not made a matter of risk or speculation. They hold that a transaction is not necessarily a lottery within either the spirit or the letter of the Act, simply because a matter of whatever kind is agreed to be decided by lot. The Act that was in force was still the same Act, V of 1844.

20. In *Vasudevan Nambudri v. Mammood* I.L.R(1899), Mad., 212 Shephard, O.C.J., and Moore, J., upheld the transaction on the ground that the law as laid down in *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H C.K., 448 was followed without question for 35 years and the introduction of Section 294-A into the Indian Penal Code made no difference.

21. *Wallingford v. Mutual Society* (1880) 5 A C 685, a decision of the House of Lords, is a very useful authority. The object of the mutual society was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation and ultimately to divide among the members all the profits that had been made. An "appropriation certificate" was issued to every member on his entering the society and certified his title to receive an advance out of the funds of the society and to participate in its profits. "The appropriations" or advances were to be made in the following manner. 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. The appellant took up appropriation certificates and obtained advances and did not make the required repayments.

22. In an action against Mm, he pleaded among other things 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 unlawful under the Lottery Acts. The Lord Chancellor (Lord Selborne) observes that one of the Acts relied upon had reference to gambling transactions only and the transaction before the house was not a gambling transaction : the other Act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets and that Act could have no application to the case. The learned Lord observes that no case was made worthy of a moment's consideration in support of the contention that the transactions were illegal under the Lottery Acts. Lord Blackburn, Lord Hatherley, and Lord Watson were equally emphatic in their opinion that the plea was not in the slightest degree made out.

23. A contrary opinion was no doubt expressed by Jessell, M.R., in *Sykes v. Beadon* (1879) 11 Ch. D., 170. There was a combination formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with bonus. The learned Master of the Rolls at page 190 observes :

If that is not a lottery, it is very difficult, at all events, to my mind, to understand what a lottery is. It is called a division by lot which means lottery. It says that the selections of certificates shall be by lot and has to be done in the ordinary way by chance and the benefits as I said before are unequal.

23. Chitty in his *Treatise on Contracts* at page 805 (17th edition 1921) seems to suggest that the opinion of Jessell, M.R., cannot now prevail in view of the later decision of the House of Lords.

24. A chit fund of the description with which we are called on to deal was held to be illegal by Phillips, J., in *Sankunni v. Ikkora Kirtti* (1919) M.W.N., 570 and Colebridge, J., was of the opinion that this case required reconsideration and upon a reference by him. *Krishnan and Odgers, JJ.*, held in *Nagappa Pillai Vs. Arunachalam Chetty*, that such a scheme was illegal, although the learned Judges differed on another point.

25. The cases relied on by the defendant are easily distinguishable.

26. In *Taylor v. Smetten* (1888) 11 Q.B.D., 207 each packet of tea sold contained a coupon entitling the purchasers to a prize and although the tea was worth the money paid for it, it was held that the transaction was a lottery. The prizes were of an infinite variety and were not made known before the sale of the tea. The intending purchaser purchased the tea and the coupon together, whatever the value of the coupon might turn out to be. There was no doubt that in buying the

tea he also took the chance of getting something of value in the nature of a prize. It might turn out to be anything. The price paid was not merely for the tea but also for the chance. The seller only undertook that he would give away the prize; but the prize might be anything; it might not be worth half a penny. In this case, it is obvious that loss was hazarded by each purchaser of the packet.

27. *Barclay v. Pearson* [1893] 2 Ch., 154 related to a missing word competition and the scheme of it was that the competitors were to cut out coupons in a newspaper and fill in the word missing from a paragraph, the missing word being in the hands of a third party, enclosed in a sealed envelope. The whole of the money received in entrance was to be divided equally amongst those competitors who filled in the missing word correctly. Here the distribution takes place by chance, the fund itself being the contribution of all the competitors.

28. In *Reg v. Pearson* (1893) 37 SJ 749 a newspaper proprietor announced that he intended to carry on a weather forecast competition and people were invited to predict the number of hours of bright sunshine and the number of rainy days. The competitors who most nearly forecasted the weather were to obtain the prizes. Sir JOHN BRIDGE observed that the transaction was purely a lottery so far as those persons were concerned to whom the scheme was addressed. It was a competition of chance and not of skill. If the competition was confined to meteorological savants the case might be different. The competition was held to be quite as mischievous as the missing word competition. It is clear that while many lose, a few win the prizes, and that the fund out of which the prizes come is that contributed by the losing as well as the winning competitors. In *Willis v. Young and Stembridge* [1907] 1 K.B., 448 the proprietors of the *Weekly Telegraph* devised a still more ingenious scheme. They caused medals to be distributed gratuitously among the members of the public. Each medal bore the words. "Keep this. It may be worth hundred pounds ; see the *Weeldy Telegraph* to-day." The winning numbers which were arbitrarily selected were published in the newspapers. It was not necessary that the holder of the medal should purchase a copy of the paper as information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the proprietors was attained and the circulation of the paper increased considerably. The point I am trying to make is thus brought out very clearly by Lord Alverstone, C.J.

The money for the prizes however comes out of the receipts of the respondents and these in their turn come to a considerable extent from the people who buy the paper although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals, therefore, contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper and also the money for the prize winners in this competition come.

29. Darling, J., expresses the same idea very shortly thus:

In the present instance, 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.

30. In *Reg v. Harris* (1866) 10 C C., 352 the scheme judged by this test is clearly a lottery. The fund out of which the prizes came was contributed by the whole body of subscribers and it is obvious that, the ticket-holders did not in all cases obtain full value for the shilling which each purchaser of the ticket was required to pay, even assuming that the entire ? 250 was distributed in "bonuses."

31. In the present case, however, as I have shown, the prizes paid to the first 49 members are not paid out of the contributions made by the subscribers; the money for the prizes comes out of the interest earned on the capital fund contributed. The cases cited for the defendant are thus clearly distinguishable.

32. A view different from what I am disposed to take was no doubt taken, as I have said in *Sankunni v. Ikkora Kirtti* (1919) M.W.N., 570 but the respondent against whom the decision was given was unrepresented and the attention of the Court was not drawn to *Wallingford v. Mutual Society* (1880) 5 App. Cas., 685. Nor does it appear that this case was cited before the bench that decided *Nagappa Pillai Vs. Arunachalam Chetty*, .

33. In my opinion, therefore, the transaction is not a lottery and the plaintiff is entitled to judgment.

34. In the view I have taken, it is unnecessary to deal with the contention based on the distinction between void and illegal transactions, or to discuss the group of cases of which *Johnson v. Lansley* (1852) 12 C.B., 468; 138 E.R., 989, *Beeston v. Beeston* (1875) 1. EX., 13 and *Shibho Mal v. Lachman Das* I.L.R.(1901)All., 165, are examples.

35. I agree with my learned brother in the order proposed by him.