(1925) 01 MAD CK 0004

In the Madras High Court

Shanmuga Mudaliar APPELLANT

Vs

Kumaraswami Mudali RESPONDENT

Date of Decision : 16-01-1925

Acts Referred:
Penal Code, 1860 (IPC) — Section 294A

Citation : 90 Ind. Cas. 420

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 they 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 the defendant and the object of the suit is to recover the monies 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 that 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, 23 A. 165 : A.W.N.

(1901) 33, Bhola Nath v. Mul Chand 25 A. 639 : A.W.N. (1903) 161, Chekka Venkataswamy v. Gajjila Nagabhushanam 14 M.L.J. 326 which

are cases of principal and agent. (sic) of partnership are illustrated by (sic) Taylor (1849) 2 Ph. 801 : 41 E.R. 1153 : 78 R.R. 298 (case of fraud

on the American Law and on the English Navigation Laws), Johnson v. Lansley (1852) 12 C.B. 468 : 92 R.R. 766 : 138 E.R. 989, Beeston v.

Beeston (1876) 1 Ex. D. 13 : 45 L.J. Ex. 230 : 33 L.T. 700 : 24 W.R. 96 and Brookman v. Mather (1913) 29 T.L.R. 276 and several others

ending with Jeffery & Co. v. Bamford (1921) 2 K.B. 351 : 90 L J.K.B. 664 : 125 L.T. 348 : 65 S.J. 530 : 37 T.L.R. 601. 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 294A of the Indian Penal Code. This section and Act V of 1844 are both founded on the terms of 42

Geo. 3 ch. 119 and 4 Geo. IV ch. 60. I agree with my learned brother in thinking that there is nothing to distinguish the present case in principle

from Iyyanar Kone v. Bidoomada Kone 1 S.D. 1858, 54, Kamakshi Achari v. Appava Pillai 1 M.H.C.R. 448 and Vasudevan Nambudri v.

Mammod 22 M. 212 : 8 Ind. Dec. 151. The cases in Sankunni v. Ikkora Kutti 52 Ind. Cas. 989; (1919 M.W.N. 570 : 10 L.W. 155 : 37 M.L.J.

209 and Nagappa Pillai v. Arunachalam Chetty 85 Ind. Cas. 1016 : 47 M.L.J. 876 : (1925) A.L.R. (M.) 281 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 the Halsbury''s Laws of England, Section 605, p. 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 A.C. 685 :

50 L.J.Q.B. 49 : 43 T.L. 253 : 29 W.R. 81, 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''s Laws of England, Volume XV, p. 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 facts 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.

Bidoomada Kone 1 S.D. 1858, 54 and Kamakshi Achari v. Appavu Pillai 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 : 48 L.J. Ch. 522 : 40 L.T. 243 : 27 W.R. 464 was regarded as overruled by the decision

of the House of Lords in Wallingford v. Mutual Society (1880) 5 A.C. 685 : 50 L.J.Q.B. 49 : 43 T.L. 253 : 29 W.R. 81. 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

this case."" If by the time a society of this kind became 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 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 (1895) 2 Q.B. 474 : 64

L.J.M.C. 234 : 15 R. 579 : 73 L.T. 215 : 44 W.R. 287 : 18 Cox C.C. 165 : 59 J.P. 598 a case of ""coupon competition"" advertised in a

newspaper, the coupons being filled up by purchasers of the news-papers with the names of the horses likely to come first, second, third and

fourth in a race, Pollock, B. and Wright, 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 (1891) 60 L.J.M.C. 116 : 64 L.T. 572 : 39 W.R. 570 : 17 Cox C.C. 307 : 55 J.P. 727

and Hall v. Cox (1899) 1 Q.B. 198 : 68 L.J.Q.B. 167 : 47 W.R. 161 : 79 L.T. 653 : 15 T.L.R. 82.

4. 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 all office was kept for the purpose. If so, there is no offence u/s 294-A of the Indian Penal Code. In the case of Reg. v.

Pearson 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.

5. In Taylor v. Smetten (1883) 11 Q.B.D. 207 : 52 L.J.M. 0. 101-;48 J P. 36 (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."" 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

purchaser?. There was an invitation to the public to purchase and any indefinite member 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: 62 L.J. Ch. 636 : 3 R. 388 : 68 L.T. 709 : 42 W.R. 74 is also a case where

the parties were invited to join 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 find 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 (1907) 1 K.B. 448 : 76 L.J.K.B. 390 : 96 L.T. 155 : 71 J.P. 6 : 23 T.L.R. 23, Lord Alverston,

Chief Justice, held it was a lottery. Darling, J., argued 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 R. v. Harris (1866) 10 Cox C.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 : 52 L.J.M. 0. 101; 48 J P. 36, 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 (1907) 1

K.B. 448 : 76 L.J.K.B. 390 : 96 L.T. 155 : 71 J.P. 6 : 23 T.L.R. 23. 1 am content to follow the decision of the House of Lords in Wallingford v.

Mutual Society (1880) 5 A.C. 685 : 50 L.J.Q.B. 49 : 43 T.L. 253 : 29 W.R. 81 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 Feral Code has been committed.

6. That being so, the suit is maintainable, The appeal is allowed, the decrees of He 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.

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

Venkatasubba Rao, J.

8. 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 defendants 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 sat 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 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 stake-holders divide the profit and the fund is dissolved.

9. 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 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. 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.

10. 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 utilised 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 Rs. 49 and receive 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 449

members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers. The

remaining portion of the interest earned is retained by the stakeholders as their profit.

11. 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 and the

scheme is in their case an incentive to thrift.

12. There is another feature of the schemel 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 7 months, an amount not exceeding 3/4th of the total contribution made by him on executing a

promissory note agreeing to re-pay 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.

13. In my opinion there is nothing to distinguish this case in principle from Iyyanar Kone v. Bidoomada Kone 1 S.D. 1858 54, Kamakshi Asari v.

Appavu Pillai 1 M.H.C.R. 448 and Vasudevan Nambudri v. Mammod (11)

14. 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 a 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 decided by the Sudder Udalat, 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.

15. The material portion of the Act runs thus:

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

16. In Kamakshi Achari v. Appavu Pillai 1 M.H.C.R. 448 Scotland, C.J., and Frere, J., based their decision on the ground:

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

17. The learned Judges further say that the right of the subscribers to the return of their contributions 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 lots. The Act that was in force was still the same Act V of 1844.

18. In Vasudevan Nambudri v. Mammod 22 M. 212 : 8 Ind. Dec. 151 Shepherd, O.C.J., and Moore, J., upheld the transaction on the ground

that the law as laid down in Kamakshi Achari v. Appavu Pillai 1 M.H.C.R. 448 was followed without question for 35 years and the introduction of

Section 294-A into the Indian Penal Code made no difference.

19. Wallingford v. Mutual Society (1880) 5 A.C. 685 : 50 L.J.Q.B. 49 : 43 T.L. 253 : 29 W.R. 81, 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 re-payments. In an action against him 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 Selbourne) 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 observed 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.

20. A contrary opinion was no doubt expressed by Jessel. M.R. in Sykes v. Beadon (1879) 11 Ch. D. 170 : 48 L.J. Ch. 522 : 40 L.T. 243 : 27

W.R. 464. 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 preferable divided bonds bearing interest with bonus. The learned Master of the

Rolls at page 190 Page of (1879) 11 Ch. D.--[Ed.] 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

pays that the selections of certificates shall be by lot, and that is to be done in the ordinary way, by chance, and the benefits, as I said before, are

unequal.

21. Chitty in his treatise on Contracts at page 805 (17th Edition 1921) seems to suggest that the opinion of Jessel, M.R., cannot now prevail in

view of the latter decision of the House of Lords.

22. 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 Kutti 52 Ind. Cas.

989; (1919; M.W.N. 570 : 10 L.W. 155 : 37 M.L.J. 209 and Coleridge, J., was of the opinion that this case required re-consideration and upon

a reference by him, Krishnan and Odgers, JJ., held in Nagappa Pillai v. Arunachalam Chetty 85 Ind. Cas. 1016 : 47 M.L.J. 876 : (1925) A.L.R.

(M.) 281 that such a scheme was illegal although the learned Judges differed on another point.

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

24. In Taylor v. Smetten (1883) 11 Q.B.D. 207 : 52 L.J.M. 0. 101;48 J P. 36, each packet of tea sold contained a coupon entitling the purchaser

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 this 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 obivious that loss was hazarded by each

purchaser of tea packet. Barclay v. Pearson (1893) 2 Ch. 154: 62 L.J. Ch. 636 : 3 R. 388 : 68 L.T. 709 : 42 W.R. 74 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 words 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.

25. In Reg v. Pearson 37 S.J. 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.

26. In Willis v. Young (1907) 1 K.B. 448 : 76 L.J.K.B. 390 : 96 L.T. 155 : 71 J.P. 6 : 23 T.L.R. 23, 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 Weekly Telegraph to-day"". The winning numbers which were arbitrarily selected

were published in the newspaper. 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"" 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"".

27. In R. v. Harris (1866) 10 Cox 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 ï¿½ 250 was distributed in ""bonuses"".

28. 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.

29. A view different from what I am disposed to take was no doubt taken as I have said in Sankunni v. Ikkeora Kutti 52 Ind. Cas. 989; (1919;

M.W.N. 570 : 10 L.W. 155 : 37 M.L.J. 209, 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 A.C. 685 : 50 L.J.Q.B. 49 : 43 T.L. 253 : 29 W.R. 81.'' Nor does it appear that

this case was cited before the Bench that decided Nagappa Pillai v. Arunachalam

Chetty 85 Ind. Cas. 1016 : 47 M.L.J. 876 : (1925) A.L.R. (M.)

281.

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

31. 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 : 92 R.R. 766 : 138 E.R. 989, Beeston v. Beeston (1876) 1 Ex. D.

13 : 45 L.J. Ex. 230 : 33 L.T. 700 : 24 W.R. 96 and Shibho Mal v. Lachman Das 23 A. 165 : A.W.N. (1901) 33 are examples.

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

