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restored with costs throughout. In this judgment the CHIEF JUSTICE concurs.

REILLY, J.—I agree that the suit should be dismissed with costs throughout and that Exhibit I does not require registration either as an instrument of trust or as a gift deed. The trust to which it relates is a religious trust. The gift to which it refers appears to have been made otherwise than by Exhibit I; and, if it were intended to be made by Exhibit I, then, as it was not a gift to a "living person" within the meaning of section 5 of the Transfer of Property Act, the document would not require registration.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Ramesam and Mr. Justice Beasley.

1927, March 8.

NARAYANA AYYANGAR AND 2 OTHERS (PLAINTIFFS), PETITIONERS,

v.

K. VELLACHAMI AMBALAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Chit Fund, promotion of—'Lottery' within sec. 294-A, Indian Penal Code—'Wagering Contract' within sec. 30 of the Contract Act.

The promotion of a chit fund wherein the number of subscribers is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time is neither an offence within section 294-A of the Indian Penal Code nor a "wagering contract" within section 30 of the Indian Contract Act, even

* Civil Revision Petition No. 366 of 1924.

though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. *Shanmuga Mudali* v. *Kumaraswami Mudali*, (1925) I.L.R., 48 Mad., 661, approved. *Veeranan Ambalam* v. *Ayyachi Ambalam* (1925) 49 M.L.J., 791, overruled. Loss of interest for those who get paid only their capital at the closing of the fund is no loss in law.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif of Manamadura in S.C.S. No. 546 of 1923.

In this case the defendants were the promoters of the chit fund in question. According to the rules framed by them for the fund they proposed to work the chit as soon as 500 people became subscribers, each agreeing to subscribe 1 rupee a month. The rules further provided that the chit was to run for 50 months and at the end of each month Rs. 50 was to be given by the defendants to the person who was determined by the casting of lots out of the 500. Any person whose name was so drawn by lot either in the first month or in any of the succeeding 49 months got Rs. 50 and he was thenceforward relieved from paying the further monthly instalments. After the 50th lot was cast the chit fund was to be closed and all the remaining 450 people were to be given by the defendants each Rs. 50. Under such rules the plaintiffs who subscribed for two chits subscribed Rs. 36 for 18 months at the rate of Rs. 2 a month. As the defendants refused to run the chit fund after the 18th month the plaintiffs brought this suit for Rs. 36 and interest. The defendants pleaded that the chit fund was a lottery, that the transaction between the parties amounted to a wagering contract and that it was therefore unenforceable. Upholding the defendants' plea, the Munsif dismissed the suit. Hence this revision petition by the plaintiffs.

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ORDER OF REFERENCE TO A FULL BENCH BY WALLER, J.

Petitioners were subscribers to a chit fund. They sued to recover from the stakeholders Rs. 36, being the amount paid by them for 18 instalments at Rs. 2 a month. The defendants set up the usual dishonest plea that the fund was a lottery and their plea was accepted by the lower Court. Two questions *arise:*

(1) Whether the fund is a lottery;

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

On both of these questions there is a great conflict of authority. The cardinal feature of this fund and of all the other funds dealt with in the decisions cited before me is this:—that lots are drawn for prizes monthly and that the winners get Rs. 50 the full amount of the chit—without any liability for further subscriptions. After the 50th drawing, the unsuccessful subscribers get back the full amount of their subscriptions, but without interest.

On the first question, PHILLIPS J., held in *Sankunni* v. *Ikkora Kirtti*(1) that a chit fund of this description was a lottery. The question arose again before KRISHNAN and ODGERS, JJ. They agree with PHILLIPS, J., on the first question, but disagreed on the second. KRISHNAN, J., thought that the arrangement to give prizes was separable from the main contract, which was to return the subscriptions. ODGERS, J., held that the subscriber was not entitled to recover. In *Shanmuga Mudali* v. *Kumaraswami Mudali*(2), RAMESAM and VENKATASUBBA RAO, JJ., dissented from these two decisions on the first question and held that a fund of this kind was not a lottery at all. In *Veeranan Ambalam* v. *Ayyachi Ambalam*(3), SPENCER and MADHAVAN NAYAR, JJ., declined to follow this decision and held that such a fund was a lottery. On the second question they disagreed with KRISHNAN, J., and agreed with ODGERS, J.

I am informed that there are several unreported decisions on these questions. It is evident that funds of this sort are numerous. The promoters do not seem to have been proceeded against under the Criminal Law and the public must be in a state of complete uncertainty as to the legal position. The judiciary in the mufassal are in the same difficulty. It

(1) (1919) M.W.N., 570. (2) (1925) I.L.R., 48 Mad., 661.
(3) (1925) 49 M.L.J., 791.

seems to me essential that the controversy should be set at rest as soon as possible. I therefore order that this petition be placed before the Honourable the CHIEF JUSTICE with a view to its being referred to a Full Bench.

On this reference coming on before the Full Bench (SPENCER, RAMESAM and BEASLEY, JJ.)—

A. V. Narayanaswami Ayyar for petitioners.—No offence as is described in section 294-A, Indian Penal Code, has been committed in this case. No lottery office was kept inviting any and every one of the public to come and take part in the chit. The number of subscribers was determined beforehand. There was no gaming or wager involved in this transaction. If any transaction involves a risk or loss of one's money under cirumstances which depend upon chance, then it is a wager. *See Shunmuga Mudali* v. *Kumaraswami Mudali*(1) and *Thacker* v. *Hardy*(2) *Carlill* v. *Carbolic Smoke Ball Company*(3), 15 Halsbury's Laws of England, pages 268, 269. *Hampden* v. *Walsh*(4). In this case no subscriber had any chance of losing what he subscribed. At the worst those who had not the fortune to get prizes got their subscriptions in full at the closing of the fund without interest. *Veeranan Ambalam* v. *Ayyachi Ambalam*(5) holds that loss of interest for such people is a clear loss caused by the casting of lots and that that makes the transaction a wager. It is wrong. Loss of interest is no loss but only absence of gain; 15 Halsbury, 268, 269. He relied on *Shanmuga Mudali* v. *Kumaraswami Mudali*(1) and the arguments therein and English and Indian cases quoted therein. *Richards* v. *Starck*(6) relied on in *Veeranan Ambalam* v. *Ayyachi Ambalam*(5) has not been rightly decided. This decision is also opposed to two earlier decisions of the Court of Appeal, viz., *Fuller* v. *Perryman*(7) and *Hirst* v. *Williams and Perryman*(8).

S. R. Muttuswami Ayyar for respondent.—Whether the chit fund amounts to a wagering contract or not it certainly amounts to a lottery. There is a distribution of prizes by lot or chance which is the only definition of lottery given in dictionaries and also in judicial decisions. No element

(1) (1925) I.L.R., 48 Mad., 661.
(2) (1878) 4 Q.B.D., 685, 695.
(3) [1892] 2 Q.B., 484.
(4) (1876) 1 Q.B.D., 189, 192 and 197.
(5) (1925) 49 M.L.J., 791.
(6) [1911] 1 K.B., 296.
(7) (1894) 11 T.L.R., 350.
(8) (1895) 12 T.L.R., 128.

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of risk or loss is necessary in a lottery; *Kamakshi Achari* v. *Appavu Pillai*(1), *Taylor* v. *Smetten*(2), *Reg* v. *Harris*(3), 15 Halsbury, section 605; *Willis* v. *Young and Stembridge*(4), *Hunt* v. *Williams*(5).

In this case an office also was kept inviting the public to join the chit. See the Rules Book of the chit fund. So this chit fund is forbidden by law. The promoter has committed an offence under section 294-A, Indian Penal Code, and the plaintiffs by joining it have abetted it. So the contract is void under section 23 of the Indian Contract Act and therefore unenforceable. *In re Duraiswami Mudali*(6) is a decision directly in my favour and has not been noticed in *Shanmuga Mudali* v. *Kumaraswami Mudali*(7).

A. V. Narayanaswami Ayyar replied.

JUDGMENT.

SPENCER, J.—This suit was brought to recover Rs. 55-15-6 alleged to be due from the first defendant, who promoted a chit fund to which the plaintiffs and others subscribed for 15 months till it was stopped.

The Principal District Munsif of Manamadura, dismissed the suit upon the preliminary point that this chit fund constituted a lottery and that a suit to recover money contributed to a lottery would not lie. The first defendant raised this defence among others in his written statement; but no evidence was taken to establish whether this particular chit fund was a lottery. It is essential to know how it was organized and advertised and whether any one who liked could join by merely paying subscriptions. The rules of the fund as given in the printed book filed with the plaint are not sufficient to make this clear. The learned District Munsif, from his observation in paragraph 7 of his judgment, appears to have held the opinion that the

(1) (1863) 1 M.H.C.R., 448, 449.
(2) (1883) 11 Q.B.D., 207.
(3) (1866) 10 Cox C.C., 352.
(4) [1907] 1 K.B., 448.
(5) (1888) 52 J.P., 821.
(6) (1890) 1 Weir, 251.
(7) (1925) I.L.R., 48 Mad., 661.

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

Before the dismissal of the suit upon this preliminary point can be upheld, we must call for a finding to be returned within one month of the reopening of this Court after the ensuing summer vacation, whether an offence as defined by section 294-A of the Indian Penal Code was committed when the chit transaction in suit was formed and whether all who joined in the transaction including the plaintiffs were guilty of an offence. Either side may adduce evidence upon this point.

Ten days will be allowed for objections.

RAMESAM, J.—I agree that the finding has to be called for.

BEASLEY, J.—I agree.

In compliance with the above order, the District Munsif of Manamadura submitted the following finding stating that neither side offered any evidence on the question and proceeded as follows:—

"The plea was raised by the defendants. The onus is on them. Nothing is placed before me by them wherefrom I could determine how the chit fund was organized and advertised and whether any one who liked could join by merely paying subscriptions, points considered to be essential for a satisfactory solution of the question whether the chit fund was a lottery. As observed in the order of remand, the rules of the fund as given in the printed book filed with the plaint are not sufficient to make this clear. In spite of facilities having been afforded to defendants, they have not chosen to appear before me and let in evidence though I waited till this day. I must therefore answer the question in the negative."

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The Civil Revision Petition coming on for final hearing, the Court (KUMARASWAMI SASTRI, RAMESAM and BEASLEY, JJ.) delivered the following

JUDGMENT :—

RAMESAM, J. RAMESAM, J.—This case has been referred to a Full Bench on account of a conflict between the earlier decisions of this Court. The question is whether the terms of a chit fund transaction cannot be enforced in a court of law. There are only two conceivable grounds on which courts can refuse to enforce the terms of a chit fund: (1) that it is an unlawful transaction as it involves the commission of an offence under section 294-A of the Indian Penal Code—(vide sections 23 and 24 of the Contract Act), (2) that it amounts to a wagering contract and is therefore void under section 30 of the Contract Act. In the present case we called for a finding as to whether an offence has been committed and the finding is that none has been committed as no office or place for the purpose of drawing any lottery was kept. The only other ground is whether it amounts to a wagering contract and I think this is all what SPENCER, J., meant in *Veeranan Ambalam* v. *Ayyachi Ambalam*(1), where he says :—

> "The civil law, however, goes further and prevents obligations arising out of lotteries being enforced in a court of law whether the lottery is held in an office to which the public have access or in a private place,"

though he uses the word "lottery" and not the words "a wagering contract." In my judgment in *Shanmuga Mudali* v. *Kumaraswami Mudali*(2) also I concluded by saying that the chit fund before us was not a lottery and I did not use the words "wagering contract." It would be convenient to use the latter

(1) (1925) 49 M.L.J., 791. (2) (1925) I.L.R., 48 Mad. 661.

term as that is the phrase used in the Contract Act. In *Hampden* v. *Walsh*(1) a "wager" was described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening. In *Thacker* v. *Hardy*(2) COTTON, L.J., says:—

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose; but turns out the other way he will win."

In *Carlill* v. *Carbolic Smoke Ball Company*(3) HAWKINS, J., defines a wager thus:—

"A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum of stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties . . . if either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

In my opinion almost all the varieties of chit funds that have come up before the courts in this Presidency including the present chit fund do not satisfy the above definitions and are not wagering contracts. It is said that there is an element of uncertainty in all of them and there is an inequality between the position of the parties. Some draw money early and are in a position to make larger gain by interest, others draw late and lose interest. In my opinion, loss of interest is not loss strictly so called. It may be failure to make a profit. If a person makes a hand loan to a friend and gets back

(1) (1876) 1 Q.B.D., 189 at 194. (2) (1878) 4 Q.B.D., 685.
(3) [1892] 2 Q.B., 484, 490.

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his money after some time without any interest, he does not lose any part of his money but only fails to make a profit, namely, interest. There are so many varieties of interest ranging from zero to very high rates of interest. It cannot be said that any one is bound to earn a particular rate and that not earning a particular rate is loss. It is clear that in most chit fund transactions, no subscriber loses the money he has contributed; and so long as getting back the actual amount of subscription is always assured the interval of time however long it may be is immaterial and it cannot be said any subscriber loses. But even otherwise the definitions as given by the English Judges are not satisfied by these chit funds. I therefore adhere to the opinion expressed by me in *Shanmuga Mudali* v. *Kumaraswami Mudali*(1) that these are all perfectly lawful transactions covered by the decision in *Wallingford* v. *Mutual Society*(2) and they are enforceable in courts. The opposite conclusion of SPENCER and MADHAVAN NAIR, JJ., in *Veeranan Ambalam* v. *Ayyachi Ambalam*(3) was mainly based upon a judgment of CHANNEL, J., in *Richards* v. *Starck*(4). That case never went up to the Court of Appeal and as pointed out in Halsbury's Laws of England, Vol. XV, p. 269, it is inconsistent with two earlier decisions of the Court of Appeal which were not considered by CHANNEL, J., viz., *Fuller* v. *Perryman*(5) and *Hirst* v. *Williams and Perryman*(6) decided by ESHER, M.R. SMITH and RIGBY, L. JJ. These cases were not considered by CHANNEL, J., and are clearly inconsistent with his judgment. Following these decisions and *Wallingford* v. *Mutual Society*(2) and the definitions of 'wagering contract' already cited, I am of opinion that

(1) (1925) I.L.R., 48 Mad., 661.
(2) (1880) 5 A.C., 685.
(3) (1925) 49 M.L.J., 791.
(4) [1911] 1 K.B., 296.
(5) (1894) 11 T.L.R., 350.
(6) (1895) 12 T.L.R., 128.

the suit chit fund is not a wagering contract and there is no objection to enforce its terms in a Court of Law.

In this view, it is unnecessary to consider the further contention of the petitioner that, even if the transaction itself is void as a wagering contract, the money paid can be refunded. Vide *Barclay* v. *Pearson*(1) and *Hampden* v. *Walsh*(2) already cited.

In conclusion I may say that if it is considered that chit fund transactions require to be regulated in the interests of the public to avoid the perpetration of fraud on poor and innocent persons, legislation on the lines of the Provident Fund Act is the proper course and not to declare them illegal by the straining of the law relating to wagering contracts. The decision of the court below is reversed and the suit remanded for disposal according to law. The petitioner will get costs of his petition. The costs of the lower court will abide and follow the result.

KUMARASWAMI SASTRI, J.—I agree.

BEASLEY, J.—I agree.

N.R.

(1) [1893] Ch., 154. (2) (1876) 1 Q.B.D., 189.