K.P. Subbarama Sastri & Ors. Etc vs K.S. Raghavan & Ors. Etc on 3 April, 1987

Equivalent citations: 1987 AIR 1257, 1987 SCR (2) 767, AIR 1987 SUPREME COURT 1257, 1987 (1) SCC 183, (1987) 1 RENCJ 62, (1987) 1 KANT LJ 186, (1987) 1 CURCC 216, (1987) 1 RENTLR 105, 1987 SCFBRC 126, 1987 MPRCJ 110, (1987) 2 JT 53 (SC), (1987) 1 SCJ 686, 1987 2 UJ (SC) 105, (1987) 2 ALL RENTCAS 256, (1987) 1 RENCR 276, (1987) 2 CURLJ(CCR) 166.2, (1987) 1 KER LT 753, 1987 2 SCC 423, 1987 3 JT 53, 1987 UJ(SC) 1 79, (1987) 100 MAD LW 1114, (1987) 2 CURLJ(CCR) 166.1, (1986) 4 SUPREME 294, (1986) JT 1028 (SC), (1987) 1 SUPREME 370, (1987) 2 COMLJ 98, (1987) 2 SCJ 257, 1987 (2) SCC 424, (1987) MAHLR 1067

Author: V. Khalid

Bench: V. Khalid, G.L. Oza

PETITIONER:
K.P. SUBBARAMA SASTRI & ORS. ETC.

Vs.

RESPONDENT:
K.S. RAGHAVAN & ORS. ETC.

DATE OF JUDGMENT03/04/1987

BENCH:
KHALID, V. (J)
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KHALID, V. (J)
OZA, G.L. (J)

CITATION:
1987 AIR 1257 1987 SCR (2) 767
1987 SCC (2) 424 JT 1987 (2) 53
1987 SCALE (1)681

ACT:
Contract Act, 872:s. 74--Kuris and Chitties--Prized subscriber executing bond--Provision for payment in lump sum with 12% interest on default--Whether unconscionable and penal.
Kerala Chitties Act, 1975: ss. 6, 7 & 28--Prized subscriber defaulting to pay subscriptions--Consequences

of--Whole sum becoming payable in lump sum with 12% interest--Such provision whether unconscionable and penal.

HEADNOTE:

The respondents who were subscribers to a Kuri (Chit Fund) in 1962, committed default after they had prized the tickets and realised the amounts. The bonds executed by them contained a provision that in case of default they would be liable to pay all the future instalments in a lumpsum with interest at 12% without giving any credit for the dividend.

The suit filed for realisation of the principal sum with interest and the balance Kuri due was decreed by the trial court in 1965. In appeal before the High Court it was contended for the defendant-respondents that the stipulation in the agreement that on default the Kuri foreman would be entitled to recover the entire balance amount with 12% interest in a lump sum without giving credit to the subscribers was unconscionable and penal and hence not enforceable. The Division Bench took the view that the Kuri transaction and the contract between the Kuri foreman and the subscribers burdened them with unconscionable interest and were unreasonable. It, therefore, partly allowed the appeal by modifying the decree refixing the interest.

Allowing the appeal by appellants-plaintiffs and dismissing the appeal by other subscribers by special leave, the Court,

HELD: Where a contract provides for payment of money in instalments and contains also a stipulation that on default being committed in paying any of the instalments the whole sum shall become payable at once, the true test for determining whether the said condition is in the
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nature of a penalty is to find out whether the amounts referred to in the agreement were debita in praesenti although solvenda in futuro or whether they were to become due to the promisee on the respective dates when the instalments were payable. [771E-G]

If on proper consideration of a contract it is found that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments then the stipulation would not be penal. If on the other hand the court comes to the conclusion that the debt becomes due only on the respective dates fixed for the instalments, the stipulation would be in the nature of a penalty. [771G-H; 772A-B]

In the instant case there was nothing unconscionable about the contract. A subscriber to a Kuri truly and really becomes a debtor for the prized amount paid to him, The facility of repayment in instalments is only a concessional facility. The stipulation enabling the foreman to withdraw this facility on default of punctual payment of the instal-

ment could not, therefore, be said to be penal. [770G-H; 771A-B]

P.K. Achuthan v. State Bank of Travancore, Calicut, [1974] K.L.T. 806 (F.B.), approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 85 (N) of 1972.

From the Judgment and Order dated 27.11.1970 of the Kerala High Court in A.S. No. 380 of 1965.

WITH SPECIAL LEAVE PETITION (CIVIL) No. 2908of 1975. From the Judgment and Order dated 15.1.1975 of the Kerala High Court in Second Appeal No. 390 of 1971. T.S. Krishna Murthy lyer, A.S. Nambiar, G.N. Rao and Ms. Shanta Vasudevan for the Appellants in C.A. No. 85(N) of 1972 and Respondents in SLP. No. 2908 of 1975. N.M. Ghatate and S. Balakrishnan for the Respondents in C.A. No. 85(N) of 1972 and Petitioners in S.L.P. No. 2908 of 1975.

The Judgment of the Court was delivered by KHALID, J. We will first deal with Civil Appeal 85/1972. The appellants were the plaintiffs in O.S. No. 78 of 1964 on the files of the Subordinate Judge's Court, Palghat. The suit was based on a Kuri transaction (Chit Fund). The re- spondents were subscribers to the Kuri. They committed default after they had prized it and realised the Kuri amounts. Hence the suit was filed for realisation of the principal sum with interest and the balance Kuri due. The suit was decreed by the Subordinate Judge by his Judgment dated 24th June, 1965. An appeal was filed before the High Court. A Division Bench of the High Court heard the appeal and partly allowed it by modifying the decree of the Trial Court refixing the interest, largely influenced by the fact that the Kuri transaction and the contract between the foreman of the Kuri and the subscribers (defaulted) burdened the subscribers with unconscionable interest and were unrea- sonable.

To appreciate the reasoning of the Division Bench it is necessary to set out the scheme of the Kuri. The respondents took two tickets in a Kuri (Chit Fund) started by the appel- lants in September, 1962. Under the scheme of the Kuri, there will be bidding at monthly intervals. The subscriber bids and prizes the ticket depending upon his need. When he does so, he voluntarily surrenders the benefit of dividends which is distributed among the subscribers. For example, suppose the Kuri amount is Rs.5,000 consisting of 50 tickets valued at Rs.100. At the first bid the lowest bid is 3500 by A. A gets this amount and the balance of Rs.1500 will be distributed among the other subscribers. But the prized subscriber has a duty to pay the entire amount in instal- ments without default. Here the respondent bid and prized both the tickets; one on the third draw and the other at the th and received the amounts. As per rules of the Kuri they executed bonds to secure future instalments. However, they committed default in paying the future instalments. That resulted in the suit. The main contention which found favour with the High Court, raised in defence, was that the rules of 'the Kuri contained several unconscionable and penal provisions like the provisions relating to the payment of all the future instalments in a lump with interest at 12% ignoring the claim of the defaulting subscribers to their share in the reduction (the dividend).

The Kuri system was in vogue in the erstwhile Travancore State and in the Cochin State, prior to the formation of Kerala State and they were governed in those two areas by the Travancore Chit Act of 1945 (Act 26 of 1120-M.E.) which came into force on 20-6-1945, and the Cochin KUries Act 7 of 1106. There was no corresponding Act for Malabar area from which area the present appeal arises. After the formation of the Kerala State, Kuri trans- actions in the State are governed by the Kerala Chitties Act, 1975, as amended by Act 19 of 1978. The High Court after taking into account the interest stipulated observed that it was unconscionable and penal and reduced the amount to Rs.10,000 and modified the decree to that extent. The reason that persuaded the High Court to do so was its con- cern at the unreasonableness of the terms of the contract and the High Court expressed it in the following words:

> "Before we leave this case, we wish to add a few words. In our experience, we have not yet come across such a kurivari which has so many unconscionable provisions. Ground No. 5 in the memorandum of grounds of appeal shows the amount payable by the appellants. the amount received by them, etc. to show the unconscion- ableness. The appellants received only Rs. 16,185 (on both the tickets together); and, all told, they already paid back Rs.5,100 as subscriptions. The claim in the suit towards future instalments is Rs.21,000 with interest of Rs.1,785. And all this within less than two years, the date of commencement of the Kuri being 20th September, 1962 and the date of suit being 2nd September, 1964 for receiving a little over Rs.16,000 the appellants have to pay a little less than Rs.28,000. In our considered opinion, such transactions should not be allowed, and people who carry on such transactions are really unsocial elements. We are told that the same stake-holders are carrying on such kuries even now without any hindrance, because there is no law to control the conduct of chit funds now in the Malabar area. It is time that the Government moved in the matter and brought some legislation to control such unsocial activities."

A full Bench of the Kerala High Court had occasion to consider the correctness of this view and in a decision reported in 1974 K.L.T. 806, such Kuri transactions were upheld and the decision of the Division Bench was reversed. According to the full Bench, there was nothing unconscion- able about the contract. Before the full Bench it was con- tended that this stipulation in the agreement where a sub- scriber prized his chit, providing that on default the Kuri foreman would be entitled to recover the entire balance amount with 12% interest in a lump sum without giving credit to the subscribers, is penal in nature and held in terrorem for securing due performance of their promise and hence not enforceable. Eradi, J. as he then was, speaking for the full Bench held that a subscriber truly and really becomes a debtor for the prized amount paid to him, that the facility of repayment in instalments is only a concessional facility and that stipulation enabling the foreman to withdraw the concessional facility on default of punctual payment of the instalments would not be penal or unconscionable. We quote below the observations made by the full Bench in paragraphs 6 & 7:

> "6. The question whether a particular stipula- tion in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special

nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipula- tion was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promiser so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty."

"7. Where a contract provides for payment of money in instalments and contains also a stipulation that on default being committed in paying any of the instalments the whole sum shall become payable at once, the true test for determining whether the said condition is in the nature of a penalty is to find out whether the amounts referred to in the agree- ment were debita in praesenti although solven- da in futuro or whether they were to become due to the promisee only on the respective dates when the instalments were payable. If on a proper construction of a contract it is found that the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalments he would with- draw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal; if, on the other hand, on a proper consideration of the terms of the contract the court comes to the conclusion that the debt itself arises or becomes due and payable by the debtor only on the respective dates fixed for the instalments the stipula- tion that on default being made in the payment of any instalment the whole of the balance should become due and payable would be in the nature of a penalty."

We agree with the law so laid down by the full Bench. The result is that the appeal has to be allowed. Accord- ingly, we set aside the Judgment of the High Court and allow this appeal but in the circumstances of the case, without costs.

Special leave granted in S.L.P. (Civil) 2908/75. Here the Judgment of the High Court is challenged by a subscriber putting forth the arguments that found favour with the Division Bench in the earlier appeal. We adopt the reasoning of the full Bench in 1974 KLT 806, which was followed by the Division Bench in the Judgment under appeal in this case. The appeal, therefore, has to fail and is dismissed. However, with no order as to costs.

P.S.S. Appeal dis-
missed.