1969 KHC 205
Kerala High Court
V. R. Krishna Iyer, J.

Unnooli Alias Kuttimalu and Others v. Theyyu
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Hindu Law -- Business started by manager of joint family -- No presumption that it is joint family business -- Law condemns or connives at chitty as an institution of imprudence if it sanctions theory that a manager of a joint family may start a kuri as a device to come by the funds of other people and instead of using it as a revolving fund for smooth running of business, divert such adventitious cash in discharge of debts or other needs unconnected with kuri and violation of fiduciary obligations involved in the scheme -- To visit an act of kindness as distinguished from one done out of an obligation, with penalty of losing the property itself would be an unkind cut of law for being kind -- An asset, but not a burden can be blended -- Hence, before a kuri business could be said to have been blended with coparcenary property, the essential postulate is that what is blended is a beneficial asset

Important Para(s):3, 6

Hindu Law -- Pious obligation -- Applicability to Malabar Thiyyas -- May be applied as customary law -- Parties who want to invoke doctrine of pious obligation on a custom have to make it and part of their pleadings and adduce evidence

Important Para(s):14

Chitty -- Auction chit not illegal or immoral -- Illicit classes of chitties when plaintiff sues for balance sum due to him as per bid he is not a participant in a lottery and cannot be denied what is due to him

Important Para(s):16

Referred: AIR SC 1968 176; AIR 1947 Madras 76; Referred to

Advocates:

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ORDER

1. This Civil Revision Petition, stemming from a small cause, has raised thorny problems for which, after long arguments no rosy solutions could be found.

2. Let me state a few facts relating to the suit which was decreed by the Munsiff's Court and has been brought up by the defendants before me. A Kuri or Chitty was started by one Kumaran, now no more, admittedly out of his own resources, in which the plaintiff was a subscriber, had paid his subscriptions till the 31st instalment but 'prized' the ticket for an amount of Rs. 999/- at the 32nd round on 20-5-65. So long as Kumaran lived his kuri also survived and on the former's death in 1965 (January), it is alleged by the plaintiff that the kuri was continued by his eldest son, the 2nd defendant, for some time. Towards the prize amount of Rs. 999/- only Rs. 425/- had been paid by the 2nd defendant in six instalments. Subscriptions for subsequent months had fallen due which the foreman of the kuri was entitled to deduct from the amount due to the plaintiff. The legal representatives of Kumaran are the defendants. The lower court decreed the suit against the joint family of Kumaran, after giving credit for various instalments which had fallen due since the "prizing". The defendants challenge the decree in this revision.

3. Before me it has been contended for the revision petitioners that the kuri was Kumaran's sole business and not that of the joint family, either to begin with or later by any act of adoption or blending, and that a kuri was a speculative business which could not have been started or continued on behalf of a Hindu undivided family. The respondent controverted these points and added that, apart from the business of Kumaran being one belonging to the joint family the members of the family were bound because they had enjoyed the benefits of the business, income from which had been utilised for the reconstruction of a family house. It was also pressed before me - and duly controverted by the other side -

that the parties were Thiyyas of Ponnani and were governed by Hindu Law, including the theory of pious obligation and so the father's debts were recoverable from the sons. It follows from what I have said that we have to consider (1) whether Kumaran's joint family was a trading family, (2) whether the kuri business had been started or adopted by or blended with the other assets of the joint family and (3) whether the Thiyyas of Ponnani, like the defendants, were governed by the Hindu law doctrine of pious obligation. I shall proceed to deal with these points together. The last word on findings of fact belongs to the Trial Court as against the revisional Court, except where the judgment is not in accordance with law. Viewed that way, I am not inclined to disturb the learned Munsiff's holding that "the amount due to the plaintiff as per the auction kuri is Rs. 424/- and interest from 1-4-1967 at 5%". A decree for that amount will be meaningful for the plaintiff only if he can recover it from the assets of the joint family of which Kumaran was the head presumably because there are no sufficient separate assets left behind by him. Let us therefore consider the pros and cons of the substantial controversy in this case viz. the liability of the joint family or at least of the sons, to the extent of their shares in the joint family. Admittedly, the kuri was not started as a family business nor carried on with the aid of family funds although in the light of Ex.A4 and other evidence in the case it can be safely held that there was a joint family, with property, of which Kumaran was the manager till his death. Nor am I persuaded, by any materials on record, to take the view that conducting kuries is the kulachara of the defendants' family. So then, how could this kuri - or, rather, could it at all? - become a joint family business, so as to make the liabilities arising therefrom, realisable out of the assets of the family? Whether a new business commenced by the manager of a joint family is his separate business or not must depend upon the circumstances of each case. If the other coparceners are adult members, the business may have that character if consent, express or implied, of such coparceners had been given to the commencement of the business, but in this case there is no such positive evidence. Apparently it was an independent adventure of the father. There is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business, even if that member is the manager, unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or funds or that the earnings of the business were so blended with the joint family estate as to imply a fusion of the two assets. (See the decision in AIR 1968 SC 1276). In

the absence of evidence about family funds or property having been utilised, the endeavour of the plaintiff has been to show that the business had been blended with the joint family estate and had thus ceased to be separate. Proof thereof is derived from the fact that the income from the kuri, or rather the subscriptions given by the ticket holders had been freely used for the construction of the family house. Of course, the other members can adopt the business with the consent of the manager as a joint family business by enjoying the benefit of the business. The question in each case is not of any presumption, but of an inference to be drawn from the conduct of the manager and the other coparceners. In the present case, although the plaintiff went to the extent of contending that the kuri was started for the purpose of financing the reconstruction of the family house the evidence, at best, only shows that the kuri moneys where pumped in for putting up the building. It is but reasonable, therefore, to hold that the kuri was started by Kumaran on his own but that he utilised money which thereby came into his hands for helping the family reconstruct its house. The argument that the starting of the kuri was itself for a family necessity and so was binding on the family may involve dangerous implications as can hardly hold good in a prudent scheme of things, because while a debt may be contracted or alienation effected for a binding purpose a manager cannot start a business whereby he comes into possession of other people's moneys and diverts them into an unproductive channel thereby landing the family in a much larger financial liability later; any such chitty with an unbusiness like plan of action will be condemned to collapse in its infancy; for, if subscriptions from the members are not ploughed back for regularly paying the prize money but are siphoned off for user in an non self generating venture like a family house, however pressing the need for it, the central idea of a revolving fund which keeps a kuri going will fail. Legally speaking, the foreman of a chitty is a fiduciary of others' funds which he cannot divert for purposes extraneous and injurious to the scheme, albeit urgent from his family point of view. For helping a person or his family out of financial straits by collective aid we have another indigenous mutual aid institution called Kurikalyanam or Changathi Kuri by which a person sends out invitations to his friends and well wishers to meet at his place for a quasi cocktail party and there to contribute some sums by way of help to lift him out of his distress and he. in turn, often repays later by similar contributions when those others conduct such Kurikalyanams. Such a philanthropic institution cannot be confused with a regular kuri or chitti which is a commercial adventure of a banking nature. The

law condemns or connives at the chitty as an institution of imprudence if it sanctions the theory that a manager of a joint family may start a kuri as a device to come by the funds of other people and, instead of using it as a revolving fund for the smooth running of the business, divert such adventitious cash for discharge of debts or other needs unconnected with the kuri and in violation of the fiduciary obligations involved in the scheme. That cannot be. Viewed also from the interests of the joint family, a kuri, being a speculative business, h beyond the powers of the kartha. By 'speculative' in this context, is meant involving such financial risks as to make it unsafe to stake the interests of an essentially conservative, non commercial quasi corporate body like a Hindu undivided family. Judicial pronouncements also reinforce these propositions.

4. In this connection a Full Bench decision of the Madras High Court, Narayanan Nambudiripad v. Varnasi alias Maravancheri Vadakketath Manakkal Sankaran Nambudiripad (AIR 1947 Mad. 76), throws considerable light on the problems raised in the present case. Wadsworth Offg. C. J. observed:
'Now, the general rule laid down by the Privy Council in Sanyasi Charan Mandal v. Krishnadhan Banerji (49 Cal. 560) and Benares Bank Ltd.. v. Hari Narain (54 All. 564) is that the manager of a join Hindu family cannot impose on the joint family, and particularly on the minor members thereof, liability for debts incurred in connection with a new trade or business."
His Lordship continues:
"Is there anything peculiar about the running of a kuri or chit which would take such an activity out of the category of a new and speculative business?"
And then the answer is furnished in the subsequent discussion:
"Ramesan J., dealing with an East Coast family held in Natesa Aiyar v. Sahasranama Aiyar (53 MLJ 550) that the running of a chit fund was a speculative business and that a joint Hindu family could not be bound by liabilities incurred by the manager for such purposes."
After referring to some decisions striking a contrary note, the Full Bench observed:
"We find it somewhat difficult to appreciate the ground on which the application of the rule laid down by the Privy Council in 49 Cal. 560 was excluded. If authority is needed for the proposition that the running of a kuri is a money lending business it can be found in the decision in Ramaswami Bhagavathar v. Nagendrayya (19 Mad. 31). Leaving aside the aspect in which each of the

subscribers may be said to be a borrower from the common fund, and concentrating our attention on the position of the stakeholder as organiser and guarantor of the whole concern and the person who hopes in the long run to make the greatest profit out of it, it is difficult to see how the venture can from this stand point be anything other than a profit earning business.....It does however seem to us that the obligation incurred by a family manager who in order to raise money not only becomes a subscriber to such a fund but undertakes the responsibility for seeing it through to a successful conclusion, is one which cannot be made a family liability unless such an activity is clearly within the powers of the manager.....It seems to us that Ramesan J. was right
in his conclusion in 53 MLJ 550 that such an undertaking is from its very nature and from the long period over which the business extends a risky business...We may add that Abdur Rahman and Somayya JJ. in an unreported decision, Kuthannur Kizhakkathara Bhagavathi by executive officer Arikkath Ravunni Nair v. Kalyani App. No. 148 of 1940 dealing with the powers of a trustee in Malabar to bind devaswom property with liabilities arising out of the running of a kuri, held that such a transaction was of a speculative nature which could not properly bind the trust. We consider that it is not, in the absence of a special custom, within the power of the Manager of a nambudiri illom to bind the properties of the family, with the liabilities arising out of the running of a kuri "
We may as well substitute 'Thiyya' for 'Nambudiri' and then the ratio decidendi of the Full Bench decision will apply to our case.

5. An interesting facet of law pursued in the aforesaid decision, when it came for final decision before the Division Bench, in the light of the opinion of the Full Bench, has some relevancy to our discussion also. Their Lordships proceeded to consider whether the joint family could be made liable, in some way, if the kuri was in fact started to finance certain necessary expenditure of the family. The liability was negatived because every subscriber was making a payment to the stakeholder who, in his individual capacity, must be deemed to have advanced the money to the joint family. So much so, any claim based on the failure to repay to the stake holder money advanced by him to the joint family must, in the first instance, be made by the stake holder against the family, his own family though. But, no decree can be granted to the subscriber against the family as stake holder. However, their Lordships added that it may be open to the subscriber, in execution of his decree against the stake holder, to claim anything

which may be recoverable by the latter from his joint family by reason of its indebtedness to him, where of course, the question of limitation, family necessity etc. may have to be gone into. So far as the suit by the subscriber is concerned, a decree against the joint family of the defendants cannot be directly granted. I adopt this reasoning.

6. If we view the kuri of Kumaran as his personal business, can the circumstance that the moneys therefrom flowed into the building operations transmute the business into a joint family asset? May be, that Kumaran paid these sums out of affection or generosity for the other members of the family and not with the intention of abandoning his separate ownership of the kuri, in which case there can be no blending; for, the property, separate or acquired, of a member of a joint Hindu family, may be impressed with the character of joint family property only if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein; but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property or that the income of the separate property was utilised, out of generosity, to support persons whom the holder was not bound to support, abandonment cannot be inferred nor fusion of funds spelt out. To visit an act of kindness, as distinguished from one done out of an obligation, with the penalty of losing the property itself would be an unkind cut of the law for being kind. And when that act is ambiguous, courts may well presume that its author did not intend that which would deprive him of the corpus itself. There is another obstacle in the way of applying the principle of blending in this case. For, throwing into the common stock or blending is a beneficial process and not a detrimental device. An asset, but not a burden, can be blended with joint family property, lest the theory of throwing into the common stock be turned into a trap whereby a Kartha may fob off his personal liabilities upon the joint family. You blend to enrich, not to ruin. Therefore, before a kuri business could be said to have been blended with coparcenary property, the essential postulate is that what is blended is a beneficial asset a fact which has not been established in this case and which the sequel has demonstrated to the contrary An allied and alternative contention was urged before me that because Kumaran's eldest son, 2nd defendant, paid off part of the prize money to the plaintiff, therefore, there was a case of adoption of the business by the family. Can a successing manager

make a broken business of a deceased member a joint family business and thus create liabilities for the family? I think not. Moreover, the consent of all the other coparceners may, perhaps be necessary for proving that the joint family, as such, has adopted the business as its own, a situation which cannot arise where there are minor coparceners, as in this case.

7. A case of blending must be reflected in the pleading and such pleading is missing in the present case. Any amount of evidence, in the absence of pleading in that behalf, cannot be pressed into service for proving an issue which does not arise on the pleadings. Therefore, on the present averments in the plaint and the materials on record, I am unable to uphold the contention that the kuri conducted by Kumaran was a joint family business. The lower court has found the joint family liable for the kuri amount due to the plaintiff because Kumaran lived with the rest of the members in the family house which itself was built with the aid of the kuri moneys in his hands. I have already given my reasons to hold this conclusion to be fallacious.

8. Another important contention presented with dexterity, by both sides relates to the application of the theory of pious obligation to the defendants in the case, who are Thiyyas of Ponnani. The ruling reported in Chinnaswamy Koundan v. Anthonyswami (I960 KLT 843) was cited to show that the pious obligation rule of the Hindu Law has been applied even to the Tamil Vaniya Christian Community. But I must point out that their Lordships of the Division Bench upheld the application of that rule of Hindu Law, because there was positive evidence that the Vaniya Christian Community had actually adopted it as customary law.

9. There is none here. Again, can we say - certainly there is no evidence in the present case - that the theological tenets of the Thiyya community, like those of Vedic Aryans, included the pious duty to pay off one's agnatic ancestor's debts to relieve them of the death torments consequent on non payment? As the Supreme Court in Sidheswar Mukherjee v. Bhubaneshwar Prasad Narain Singh (AIR 1953 SC 487) stated:
"This doctrine, as is well known has its origin in the conception of Smriti writers who regard non payment of debt as a positive sin, the evil consequences of which follow the undischarged debtor even in the after world. It is for the purpose of rescuing the father from his torments in the next world that an obligation is imposed upon the sons to pay their father's debts."

The dharmasastras demand of the sons to discharge the father's debts and thereby prevent posthumous torment in hell by his creditors. (It may be heresy to say that it was an ingenious invention of the priestly order to help the dominant creditor class obtain prompt payments of debts by the sons, in the event of the debtor's death). Since the 'Smrities' are the source of this rule, can it be in consonance with good conscience that a community should be bound by a law to which its members, the backward bulk of Kerala 'Sudras', had no direct access and the books in which they were written could neither be read nor heard read by them? Obedience to law involves accessibility to it and we cannot apply esoteric Vedic principles, as such, too hastily to people put under a cultural interdict against familiarity with sacred texts! For while the pristine period of Vedic culture viewed caste division not as a merit or misfortune traceable to the biological accident of birth, the later and darker ages witnessed stratification and petrification of society into birth based castes, banishing whole masses of people from Vedic culture.

10. An interesting line of argument to repel the application of the rule of pious obligation to Thiyyas of Malabar is suggested by the strand of reasoning adopted by Chief Justice Mr. M. S. Menon in the ruling reported in Dharmodayam Company v. Balakrishnan (1962 KLT 712). Dealing with the imposition of pious obligation upon Calicut Thiyyas, his Lordship the Chief Justice observed:
"There is no doubt that polyandry was prevalent among the Thiyyas of Calicut. It is very doubtful indeed whether a doctrine like doctrine of pious obligation will ever gain currency in a community that recognised more husbands than one."
The pious obligation is laid on the son to discharge his father's debt. Who is his father, if his mother were polyandrous? Where certainty of paternity cannot be postulated, obligations of sonship stand excluded. This theory of the son's liability is traced to the ancient Dharmasastras, evolved by Vedic Aryans who frowned upon polyandry, although their masculine conscience made no bones about polygamy. We must go to the dawn of Thiyya history to find out whether they were given to polyandrous practices. If they were, they could not have assimilated or applied the law of pious obligation. And there is some evidence that here and there, they and thandans, an allied group, were The decision in Dharmodayam Company v. Balakrishnan (1962 KLT 712) itself speaks of polyandry as having been prevalent among the Thiyyas of Calicut. Since there was nothing peculiarly endemic to Calicut, probably marital pluralism, both ways,

prevailed or was permitted in the community in the rest of South Malabar also. Now, all castes are converging towards monogamy but that is irrelevant for the present problem which deals with the debris of history.

11. Another historical feature may also be touched upon in this connection. The late L. K. Ananthakrishna Iyer in his book on Cochin Tribes and Castes deals with Ezhavas and Tiyyas. "The etymology of the words 'Izhuvan and 'Tiyyan', goes to show that they were probably immigrants from Ceylon. The word 'Tiyyan' is another form of 'dweepan', which means and islander while Izhuvan' signifies one that belongs to Isham, which is an old name for Ceylon". There is a widely accepted belief that Tiyyans came to the west coast of India from the island of Ceylon. If they crossed the seas and settled here they must have carried with them their island personal laws which certainly would not have included the Dharmasastras of the Vedic Aryans. In any view, the non brahmins of Kerala, more so the Tiyyas, are likely to have been somewhat impervious to Vedic influence in regard to social practices and legal theories based thereon. The big social gap that must have existed between the Tiyya community and its practices on the one hand and the Brahmin community and the Dharmasastras on the other, in the early days when the personal laws now applied by the Courts are supposed to have crystallised, makes the applicability of Hindu Law, proprio vigore, unlikely. Why, the Malayala Brahmins i. e., the Nambudiries whom, as a superior class, they might have copied, themselves had eschewed the rule of pious obligation. The Ezhavas of Palghat, by contrast, were living in the midst of Tamil Brahmins and had probably adopted, as custom, their rule of pious obligation.

12. The non acceptance of the rule of pious obligation by Nambudiri Brahmins was traceable to the adoption by them of impartiality: see Muttayan Chetti v. Sangili Vira Pandia Chinnatambiar, Zamindar of Sivagiri (ILR 6 Mad. 1),Kunhu Kutty Ammah v. Mallaprathu alias Kesavan Nambudiri (ILR 38 Mad. 527) and Balakrishnan v. Chittoor Bank (AIR 1936 Mad. 936 at 938). A Division Bench of the Madras High Court held, in an early decision Raman Menon v. Chathunni (ILR 17 Mad. 184), that according to the custom prevailing among the Makkathayam Tiyyas of South Malabar compulsory partition could not be effected at the will of one member of the tarwad. The late L. K. Anathakrishna Iyer in his book on the Cochin Tribes and Castes observes: "it has been decided that the rule of impartibility applies to the Tiyyans irrespective of the rule of

succession obtaining among them". We are not so much concerned with whether the Makkathayam Tiyyas of this century have accepted impartibility, but whether that caste had in the early days, when the personal laws got set, adopted the rule of impartiality; for, the rule of pious obligation, to some extent, goes ill with impartiality. In Kunhu Kutty Ammah v. Mallaprathu alias Kesavan Nambudiri (ILR 38 Mad. 527) reliance was placed, to exclude the application of pious obligation to Namboodiris, on the theory that they were following the doctrine of corporate ownership of Illom properties, that there was no question of anybody's share being alienated or seized in execution for the debts either of himself or of his father and that in these circumstances the illom property, as a whole, could be made liable only for the debts binding on the illom and not on a member thereof, even though he be the father. See Balakrishnan v. Chittoor Bank (AIR 1935 Mad. 937 at 938). Where impartiality prevails in a family consisting of not merely father and sons but also brothers and their sons the theory of pious obligation cannot work. In this view, it becomes very relevant to know whether the Makkathayam Thiyyas of South Malabar, in the good old days, had been practising impartibility. The subsequent adoption of partibility would not bring in the rule of pious obligation, as may be inferred from the ruling relating to Nambudiries reported in Narayanan Nambudiripad v. Varnasi alias Varavancheri Vadakketath Mannakkal Sankaran Nambudiripad (AIR 1947 Mad. 76, 82.)

13. After all, when Courts seek to discover the legacy of personal laws of a backward community they have to project themselves into the misty past and remember that those laws could not be alienated from the then social facts. Disenchantment with the law would be the direct product of rigidly imposing on a community with its own social organisation, legal obligations flowing from a socio religious ideology not consciously subscribed to by it. Of course, it was perfectly open to the Thiyyas of South Malabar to have adopted the rule of pious obligation as a custom, although even here we cannot forget that the Namboodiries themselves had not accepted this theory.

14. The correct legal approach in an enquiry like this has been set out in Dharmodayam Company v. Balakrishnan (1962 KLT 712), already adverted to in another context. The rule of pious obligation is part of the Hindu law, but the Hindu law as such does not apply to Thiyyas. As customary law it may well apply, provided there is the requisite proof. Custom, being a source of law, will bind the community of the locality. In Battukkaval Chakutti v. Cothembra

Chandukutti (AIR 1927 Mad. 877) a case relating to Thiyyas of Calicut the Madras High Court observed:

"We think the Makkathayam Thiyyas are governed by, what is called the customary law and that when a question arises as to what is the rule of law governing them on any particular matter, what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently governed by prior decisions, the question will have to be determined with reference to the evidence in the case .....In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu law on that point must, we think, be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption is not that the Hindu law as such is the law governing them in all matters; if that be the presumption a person who alleges a rule of customary law at variance with it will have to prove it as a custom in derogation of the law. The presumption is simply that the rule of the Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges that the rule of the customary law on any particular point is something different, the evidence that he adduces in support of his allegation ought not to be subjected to those well known tests which are applied to the case of an alleged custom contrary to or in derogation of the law, but should be viewed simply as evidence adduced to show what is the rule of the customary law itself. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law".

This approach was approved by the Division Bench of the Kerala High Court in the ruling referred to above. In short, parties who want to invoke the doctrine of pious obligation qua custom have to make it a part of their pleadings and adduce evidence which, in this case, has not been done. Counsel for the respondent argues that on the existing facts and legal presumptions, he can successfully invoke the doctrine I do not think the attention of the parties or the Court has been drawn to this question and since a finding is necessary on it. it is proper to allow both sides to furnish appropriate pleadings and evidence and direct the Court to record its conclusion regarding the alleged custom. The respondent requests for such an opportunity and it is reasonable to allow it. I therefore send the case back to the Trial Court which will allow the plaintiff to amend his plaint to raise his plea regarding the applicability of the rule of pious obligation to the

defendants and their liability to pay their father's debt.

15. Before parting with this subject, I would like to observe that the Hindu Code, which encountered opposition and was eventually withdrawn in Parliament, did contain a clause (clause 88) abrogating the rule of pious "obligation for all Hindus The theological foundation of the moral duty of the son to discharge his father's(and not of any other relation's) debts has now lost much of its appeal. In this context, particularly when the Constitution directs the State to have a uniform Civil Code for all Indians, it is a matter worthy of serious consideration whether the rather obsolescent rule of pious obligation should be extended by the Courts to all the non Brahmin Makkathayees of Kerala. Although these considerations are largely for Parliament and not for the Courts they may serve to understand whether the Thiyyas of South Malabar had really assimilated this rule as custom.

16. Let me notice one more point. Counsel for the revision petitioner hopefully argued that the debt in question was illegal and therefore not recoverable, that, being illegal and immoral, the pious duty of a son could not be invoked to discharge that debt and that the manager of a joint family could not make his family liable to meet the obligations which were incurred in the teeth of prohibition by the law. In support of his contention that an amount due to a subscriber by the stakeholder was illegal and immoral, being prohibited by the law as a lottery which the Indian Penal Code declares to be an offence, the learned counsel relied on 1937 (1) MLJ 231 and ILR 1939 Mad. 70. In both cases, dealing with the liability of the son for the obligation of the father arising out of the conduct of a chit fund where the subscriber sued for recovery of money subscribed by him to the chit fund, the Court held that as the liability of the father arose out of a transaction which was illegal, the sons were not liable for the debt of their deceased father. Mr. Justice Horwill referred to the ruling of Sesha Aiyar v. Krishna Aiyar (ILR 59 Mad. 562) where a kuri has been held to be a lottery, which undoubtedly is an illegal contract. The subscriber is a party to an illegal contract while the sons of a stakeholder are innocent persons. The contract between the subscriber and the stakeholder father was an illegal one and since the money was taken for an illegal purpose the person who paid it could not recover it in a civil Court. I am afraid these two decisions can be of no help in the present case. Sesha Aiyar v. Krishna Aiyar related to a case where drawing of lots was resorted to and the play of chance resulting in a gain was an essential feature of that scheme. There is another kind of kuri where there is no

lucky draw but a competitive bid. This latter type called auction chit does not involve the element of a lottery which taints the transaction as illegal. We are concerned in this present case with this second, licit class of chitties and so the plaintiff who sues for the balance sum due to him as per the bid at the 32nd round is not a participant in a lottery and cannot be denied what is due to him.

17. I am not dealing with the right of Kumaran's creditors to proceed against his joint family in enforcement of the debt due by it to him, when he advanced the kuri moneys for the reconstruction of the family residence. As was pointed out in AIR 1947 Mad. 76 FB a decree cannot be passed in favour of the creditor and against the joint family in an action brought by the former against the foreman of the kuri. However, it appears to be perfectly just and legal for the creditors of Kumaran to treat the debt due to him by his family if shown to be binding on the family as an asset in the hands of the legal representatives i. e. the defendants, and to proceed against and recover that debt in execution of their own decree, by appropriate proceedings in execution or otherwise. Although in this case the suit has been laid also against the joint family, I do not decide the question as to whether any advance has been made by Kumaran to his joint family and if so how much; nor do I decide whether such debt is binding on the joint family. These matters will have to be investigated when the decree holder chooses to execute his decree by attaching the debt due to Kumaran by his joint family.

18. To sum up, the finding that the Kuri was a joint family business is set aside. The plea that the rule of pious obligation applies to the defendants cannot be finally decided and is left open for decision in the suit after remand. The contention that a subscriber's claim against the stake holder in an auction chit is immoral or illegal is overruled. The amount found due by the lower Court on the basis that the eldest son of Kumaran made payments to the plaintiff is upheld.

19. I set aside the decree of the lower Court to the extent it has been passed against the joint family of the defendants, subject, of course, to my other findings and observations. However, I am sending the case back to the Trial Court for the limited purpose of deciding whether any of the defendants would be liable on the rule of pious obligation to answer the debt of the plaintiff. The plaintiff will be allowed to amend the plaint by the Trial Court, setting out his case regarding the defendant's liability on account of pious obligation; where upon the defendants will file their written statement. Both sides will he given opportunities to adduce

evidence and the court will adjudicate thereon. The C.R.P. is allowed as indicated above. There will be no order as to costs.