K. P. Subbarama Sastri and Others

Vs

K. S. Raghavan and Others

Civil Appeal No. 85 (N) of 1972

K. S. Raghavan and Others

Vs

Parameshwara Sastrigal and Another

Special Leave Petition (Civil) No. 2908 of 1975

(G. L. Oza, V. Khalid JJ)

03.04.1987

JUDGMENT

V. KHALID, J. -

1. 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 respondents 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.

2. The suit was decreed by the Subordinate Judge by his judgment dated June 24, 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 to the Kuri and the subscribers (defaulted) burdened the subscribers with unconscionable interest and were unreasonable (K. S. Raghavan v. Subbarama Sastrigal, 1971 Ker LT 231).

3. 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 appellants 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 3,500 by A. A gets this amount and the balance of Rs. 1,500 will be distributed among the other subscribers. But the prized subscriber has a duty to pay the entire amount in instalments without default. Here the respondent bid and prized both the tickets; one on the third draw and the other at the tenth and received the amounts. As per ruled 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

ruled 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 a 12 per cent ignoring the claim of the defaulting subscribers to their share in the reduction (the dividend).

4. 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 June 20, 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 transactions 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 concern 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 out experience, we have not yet come across such a kuri vari 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 unconscionableness. 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 September 20, 1962 and the date of suit being September 2, 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.

5. A Full Bench of the Kerala High Court had occasion to consider the correctness of this view and in a decision reported in P. K. Achuthan v. State Bank of Travancore (1974 Ker LT 806), such Kuri transactions were upheld and the decision of the Division Bench was reversed. According to the Full Bench, there was nothing unconscionable about the contract. Before the Full Bench it was contended that this stipulation in the agreement where a subscriber prized his chit, providing that on default the Kuri foreman would be entitled to recover the entire balance amount with 12 per cent 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 instalment 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 and 7 :

The question whether a particular stipulation 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 stipulation 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, them the provision will be held to be one by way of penalty.

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 agreement were debita in praesenti although solvenda 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 instalment he would withdraw 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 and the debtor only on the respective dates fixed for the instalments the stipulation 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.

6. The result is that the appeal has to be allowed. Accordingly, we set aside the judgment of the High Court and allow this appeal but in the circumstances of the case, without costs.

7. Special leave granted in SLP (Civil) 2908/75. Here the judgment of the High Court is challenge 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 P. K. Achuthan v. State Bank of Travancore (1974 Ker LT 806), which was followed by the Division Bench in the judgment under appeal in this case.

8. The appeal, therefore, has to fail and is dismissed. However, with no order as to costs.

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