KERALA HIGH COURT

Janardhana Mallan

Vs

Gangadharan

S.A. No. 751 of 1977

(P. Subramonian Poti, Ag. C.J., T. Chandrasekhara Menon, M.P. Menon, U.L. Bhat and K. Sukumaran, JJ.)

22.12.1982

JUDGMENT

Subramonian Poti, Ag. C.J.

1. In this reference we are called upon to answer the question:

> "A prized subscriber in a chitty receives the prize amount executing a security bond to secure payment of future subscriptions which he is bound to pay under the terms of the chitty variola. The payment of future subscriptions are not defaulted. Nevertheless can it be said that a debt due to the foreman arises by reason of the receipt of the prize amount from the foreman on the execution of the security bond for securing future subscriptions ?"

This question was referred to a Full Bench and when the matter came up before the Full Bench the correctness of Full Bench decision in *Achuthan v. State Bank of Travancore, Calicut*[1], was canvassed in the case and that is how the matter is now before larger bench of thus Court.

2. The background of the reference may be stated in brief. The question referred arises in the Second Appeal filed by the plaintiffs in a suit for setting aside a sale deed executed by their father and elder brother in favour of the first defendant on 2-4-1955. The executants are dead. The plaintiffs sued for partition of 6/8 shares in the properties and also sought setting aside of the sale deed on the ground that it was not supported by consideration and necessity and the debts recited in the deed were not antecedent debts of the father, one of the debts so recited was the obligation to pay future subscriptions by a prized subscriber who had received the prize money and had executed a chitty security bond. Whether the amount of the future installments could be said to constitute a debt before the installments had fallen due is the controversy in the Second Appeal. The decision on the question whether the debt in controversy is an antecedent debt or not will go a long way in resolving the question whether the major portion of the debts could be said to be antecedent debt so as to sustain the document.

[1]1974 Ker LT 806

3. When a prized subscriber in a chitty receives the prize money and executes a security bond to secure the payment of future subscriptions in accordance with the obligations under the contract embodied in the chitty variola, does the prized subscriber become a debtor to the foreman ? A Full Bench of the Travancore High Court had in the decision in *Sundaram Pillai Easwaramoorthiya Pillai v. Vallithayi Narayana Vadivu*[2], expressed the view that the obligation of the prized subscriber to pay future subscriptions arises under the contract embodied in the chitty variola and consequently the debt could arise only on the date the future installment falls due and not on the date of the execution of the security bond. A Division Bench of the Kerala High Court expressed the same view in *Varkey Thomas v. Travancore Forward Bank Ltd*[3]., The matter again came up in this Court before a Division Bench in *Narayana Prabhu v. Janardhana Mallan*[4], when the Division Bench followed the earlier view after noticing the different views held on the subject by the High Court of Madras, all along, though in *Maruda Konar v. Veerammal*[5], Varadachariar J. had struck a different note. The reference of the question now before us has been occasioned mainly because the Full Bench in Achuthan's case (1974 Ker LT 806) has not noticed the earlier Division Bench decisions of this Court and the earlier Full Bench decision of the Travancore High Court.

4. Chitty, referred to also as Kuri, is an ancient institution in the Malabar coast. Over the years it has undergone considerable change. At one time it was intended for the benefit of the foreman "who induced his friends and acquaintances to subscribe to the chitty, promising to pay his own subscription punctually, to collect subscriptions periodically from the subscribers and to pay all collections (save those made at the first installment which he takes for himself) to such of the subscribers as may be determined by lot to be publicly drawn and to carry on the scheme, notwithstanding the default of any of the subscribers." (The Law of Chitties by A.M. Mathew). Though, originally, prizing of each installment was by drawing lots, a new class of chitties known as auction chitties came into being. The prize amount was paid to the subscriber who offered the largest discount from such amount, which discount was to be distributed among the subscribers as veethapalisa. In course of time the institution became quite popular as a form if rural banking. By subscribing in kuries from out of savings one could expect to get a substantial sum in a lump while prizing the kuri at a time of need. Chitties came to be statutorily regulated for the first time in Travancore by the Travancore Chitties Regulation 1094 passed on 8th December, 1918. That was amended from time to time and ultimately it was repealed, to be replaced by Travancore Chitties Act 26 of 1120. In the erstwhile Cochin State Cochin Kuries Act 7 of 1107 and the Cochin Starting of Kuries (Restriction) Act were enacted. The Travancore Act and the Cochin Acts were repealed by the Kerala Chitties Act 23 of 1975 which replaced the abovesaid Act with effect from 25-8-1975.

5. The Acts regulating Chitties were intended to define and limit the rights and obligations of the Chitty foreman as well as the subscribers, since collapse of chitties on a large scale would have adverse impact upon the economy and in particular the rural economy of the State. The obligation of the chitty foreman to each one of the subscribers and the subscribers *inter se* were governed only by the terms of the

[2](1926) 16 Trav LJ 143
[3]1962 Ker LT 383
[4] AIR 1974 Ker 108
[5] AIR 1936 Mad 985

contract. The chitty foreman would collect the subscriptions from the subscribers at each installment and after taking his commission and deducting the discount he would pay the balance

to the subscriber who prized the chitty at that installment. The chitty would function properly so long as the chitty foreman was prompt in his collection and the subscribers were equally prompt in paying their subscription. The default by a prized or non-prized subscriber would naturally have impact on the due payment of prize money to the subscribers. If the chitty foreman was unable to run his chitty properly and regularly and the chitty collapsed amounts would be due to non-prized subscribers by way of paid up chitty subscriptions while the foreman would be entitled to collect future subscriptions from the prized and non-prized subscribers. Though in the case of non-prized subscribers this could be adjusted against the amounts due to them, in the case of defaulting prized subscribers the amounts had to be recovered. Naturally the foreman may, under pressure from his creditors, the non-prized subscribers, assign his rights to collect future subscriptions from prized subscribers to one or other of them. Sometimes this may amount to preferring some creditor to the others, sometimes this may be in fraud of creditors and questions have arisen before courts on the right of the foreman to transfer the right to collect future subscriptions from prized subscribers. The courts had to consider in this context, the nature of the relationship between the subscribers and the foreman. We are speaking of times prior to the Regulation of chitties in the States of Travancore and Cochin by appropriate enactments.

6. There were differing views on the relationship between the subscribers and the foreman. At one time it was assumed that there was a sort of partnership arrangement between the subscribers. Yet another view was that the foreman was a Trustee in regard to the subscriptions due to him from prized subscribers and as a Trustee he was to see that this was utilized for discharging the dues of non-prized subscribers. Yet another view was that the fund arising by reason of the subscriptions was a common or mutual fund from out of which loans were being advanced to prized subscribers. None of these concepts arose from the terms of the contract between the foreman and the subscribers nor did they arise on the terms of any statute. Chitty being a peculiar institution and the solvency of the foreman being a matter of concern for the subscribers to the chitty and further the due conduct of the chitty being necessary to protect the interest of the subscribers who join the chitty the courts envisaged certain concepts in order to secure the rights of those to whom money was due from the foreman in respect of the chitty. Therefore even while resiling, later, from the theory of partnership and trusteeship, though not expressly, courts recognized some sort of right in the non prized subscriber in the future subscriptions due from prized subscribers to the foreman so as to limit the power of alienation by the foreman of the right to collect future subscriptions. Thus the approach of courts to the question from time to time was not strictly based on any legal obligation that could be read from contract, statute or custom but on what was required by the exigencies of the situation. The early cases of the Travancore High Court may, in this context, be referred to as they illustrate the point.

7. One of the earliest cases to which reference may be made in this context is the decision of a Bench of 5 Judges of Travancore High Court in *Mariandran Thommanthan v. Easwaran Marthandan*[6], It will be profitable to extract here a passage from that judgment which describes the relationship of parties in a chitty. At page 40 of the report the court said :

> "The relation which exists between the foreman of a Chitty and the subscribers, and of the subscribers among themselves, is somewhat complex and incapable of easy definition. The chitty is generally started for the benefit of the foreman. He induces his friends and

> acquaintances to subscribe to the chitty, promising to pay his own subscription punctually to collect subscriptions periodically from the subscribers, and to pay the collections (save those made at the first installment which he takes for himself) to such of the subscribers as may be determined by lot to be publicly drawn, and to carry on the scheme notwithstanding the default of any of the subscribers. The advantages of being a foreman are that he is entitled to receive the first installment of the collections, interest due from the subscribers who may make a default in payment of their subscriptions on due dates, and a small fee on all the collections. He is required to take security from those subscribers to whom the collections are paid, for the due discharge of their obligation as to future installments although in practice, the payment without security to a subscriber whose solvency is above suspicion is not uncommon. It being his (foreman's) duty to collect subscriptions and carry on the scheme, be, in his sole name and at his own expense, sues the defaulting subscribers and recovers from them the sums due with interest and costs. For the amounts due to them, the subscribers sue the foreman alone, as, under his contract with them, the latter is responsible for the collection and distribution of contributions."

From this the court deduces that the foreman is a person to whom credit is given by the subscribers, and that he is personally liable to the subscribers for the proper conduct of the chitty and the performance of obligations arising out of it and that the success of the scheme depends entirely upon his personal care, judgment and integrity. The court observes in this background thus:

> "This circumstance and the manifold advantages he exclusively enjoys point to the conclusion that the relationship between him and the subscribers is somewhat different from that of ordinary partners. His position towards the unprized subscribers is analogous to that of a debtor, and towards the prized subscribers, who have received the collections, to that of a creditor."

The examination of this question was with a view to ascertain whether a chitty foreman had a power of alienation and the court was of the view that he did not have absolute power of alienation over the chitty funds, funds on which according to the court, unprized subscribers held a lien. While observing that prized subscribers from whom money was due to the foreman were in the position of ordinary debtors, non-prized subscribers were found to have a lien upon the amount due from prized subscribers on account of future installments to the extent of their claim against the foreman. Thus while the theory of partnership was not promoted the court read a lien though not based on my norms of the contract between the parties. Ormsby J. who

[6](1887) 5 TLR 38

concurred with the judgment of the Chief Justice and the two other Judges made a further observation thus :

> "In the absence of legislation, I can only hope that parties to chitty transactions (which are. I believe, most numerous) will themselves see that the variola itself contains an explicit statement of what they desire to be rights and obligations of the parties."

Kunhiraman Nair J. who also concurred with the other Judges, in his concurring judgment was evidently not willing to go the whole way with the Chief Justice and the other Judges. This is evident from the following statement in the concurring judgment :

> "The proper view to be taken of the rights and liabilities of the foreman of a chitty is that he is both the proprietor and manager of the chitty scheme and that the chitty installment bond is his property though subject perhaps to the claims of unprized subscribers."

(emphasis supplied)

8. We may now advert to a later Full Bench decision of the Travancore High Court rendered on 23rd November, 1899 in *Bhagavathi Ammal Lakshmi Ammal v. Venkatasubha Iyer*[7] A chitty foreman became bankrupt consequent on which the chitty collapsed after the 12th drawing. The plaintiff in the suit alleging that the chitty was a partnership concern, the losses in which are to be borne equally by all the subscribers, brought the suit making all the subscribers and their assignees parties, and the claim in the suit was for recovery with interest of the full amount at the subscriptions paid by her predecessor-in-interest. The suit was resisted by some of the defendants who had set up assignments in their favour in satisfaction of their claim for the prize money of a portion of the chitty fund. This assignment was impeached by the plaintiff as a fraud upon the nonprized subscribers. The Trial Court upheld the validity of such assignments. Thereupon the plaintiff filed the appeal. Vencobachariar C.J. described the chitty transaction in these words:

> "For all practical purposes, a chitty may be described shortly as a transaction by which a certain number of persons agree that each shall subscribe a certain sum of money or quantity of paddy by certain periodical installments and that each, in his turn as determined by lot, should take the whole of the subscribed amount in each drawing." The learned Chief Justice went on to consider the question whether the concern can be regarded as a partnership and what exactly is the position of the foreman and observed:
> "Although in some cases the members and subscribers were described as partners and the foreman as proprietor and manager of the fund, yet those words were used not in their strict sense but in a loose fashion by way of analogy. By the use of the word proprietor, it was not meant that foreman was the absolute owner of the concern. It cannot for a single moment be contended that the concern is a partnership or, strictly speaking, one even analogous to it,

[7](15 TLR 133)

> since mutual agency, which is the test of partnership, is wholly wanting in these mutual benefit funds."

He expressed the view that there can be no doubt that each subscriber enters into a contract as it were with the foreman and looks to him for getting the amount due to him.

9. Now we will refer to a decision of the Division Bench of Travancore High Court, *Narayanan v. Soaria*[8] a decision rendered in 1093 sometime prior to the Chitties Act. In a suit to recover

defaulted subscriptions by the assignee of a chitty security bond executed in favor of the foreman by the defendants on the occasion of receiving the prize amount defendants contended that the assignment was invalid since it was made after the collapse of the chitty and that without the consent of the non-prized subscribers. The decisions in *Mariandran Thommannathen v. Easwaran Marthandan*[9], *Bhagavathi Ammal Lakshmi Ammal v. Venkatasubha Iyer*[10] and *Easwara Iyen Vaikuntam Iyen v. M. Retnasamy Iyer*[11] were relied on in support of the case. But the court distinguished those cases as cases where the foreman who assigned the rights under the chitty security bond was insolvent. Though in the case before the court the chitty had collapsed the foreman was not shown to be insolvent and the court took the view that the mere fact that the chitty had collapsed was no sufficient reason for finding that the foreman ought not to assign the rights under the chitty security bond taken by him except with the consent of the non-prized subscribers. The assignment was held to be valid.

10. The decisions which we have adverted to were those rendered prior to the regulation of chitties by enactment in Travancore. The Travancore Chitties Regulation III of 1094 was the first attempt at defining the law relating to chitties. Though it was more or less in the lines of the decisions rendered by the Travancore High Court certain new provisions were introduced to define the obligations of the foreman and also concerning other matters. The Act defined a chitty as meaning :

> "A transaction by which one or more persons hereinafter called the foreman or foremen enter into an agreement with a number of persons, that every one of the contracting parties shall subscribe a certain amount of money or quantity of grain by periodical, installments for a certain definite period and that each in his turn, as determined by lot or by auction or in such other manner as may be provided for in the variola, shall be entitled to the prize amount."

The Act defined the obligations of the foreman including that to pay the prize amount to every prized subscriber. Prized subscribers were dealt with in part V of the Act. Section 25 of the Act provided that :

> "25. On demand in writing by the foreman, every prized subscriber shall, before drawing the prize amount, furnish sufficient security for the due payment at future subscriptions."

[8](34 TLR 167)
[9](1887) 5 TLR 38
[10](15 TLR 133)
[11](16 TLR 193)

Further in Section 26 it was provided that every prized subscriber shall pay his subscriptions regularly at the time and place mentioned in the variola, in default of which he shall be liable to such consequences as may be fixed in the variola. Section 27 restricted the right of the foreman to claim consolidated payment of all the future subscriptions from a defaulting prized subscriber and it was not to be unless demand was made for the same in writing. The controversy as to whether it was open to a foreman to transfer the right to the unpaid subscriptions by a prized subscriber was statutorily settled by incorporating Section 28 which read :-

> "28(1) Any voluntary or involuntary transfer of the rights of a foreman to receive subscriptions from prized subscribers shall, if it defeats or delays a non-prized or unpaid

prized subscriber, be voidable at the instance of such subscriber.

(2) When under sub-section (i) of this section a transfer is disputed by a subscriber, the burden of proving that the transfer does not defeat or delay such subscriber is upon the transferee."

Thus after this Act the rights of the parties to a chitty transaction were taken to have been defined by the provisions of statute. The obligations between the parties arise from contract which contract itself is subject to the statutory limitations and regulations. The protection that was sought to be given to non-prized subscribers prior to the commencement of the Act by assuming that there is some sort of a lien in their favour for monies due to them as against monies due from prized subscribers was placed on a statutory footing in Section 28 of the Act. It is by reason of the terms of the variola to which the foreman and the subscribers were parties that the subscribers had a duty to pay stated installments from time to time irrespective of whether they had prized the chitty or not. The foreman was under an obligation to pay the prized money on the chitty being bid by the subscriber. Thereupon if the foreman so demanded he was obliged to execute a security bond. The scheme of the Tranvancore Act XXVI of 1120 is more or less the same with the difference that there is no option in the matter of furnishing sufficient security for the due payment of future subscriptions under the later Act. Section 30 of that Act obliges every prized subscriber to furnish sufficient security before drawing the prize amount. That does not depend upon the volition of the foreman. Evidently that is intended to secure the interests of the non-prized subscribers.

11. The provisions of the Cochin Kuries Act VII of 1107 are more or less similar. The obligations of a prized subscriber under this Act correspond more or less to those under the provisions enacted later in the Travancore Chitties Act, 1120.

12. The question more or less similar to the one now raised before us came up for consideration before a Full Bench of the High Court of Travancore soon after the Travancore Debt Relief Act 1115 came into force. By that time chitties had been statutorily regulated in Travancore. In that case the 1st defendant, who was a subscriber to a chitty, prized the ticket on 28-6-1111 and executed a security bond to secure payment of future subscriptions. He defaulted payment of future subscriptions. The first of such defaults was on 23-6-1112. The notice demanding all the future subscriptions in a lump was issued on 19-2-1113. The Travancore Debt Relief Act 1115 would apply to confer benefits on the debtor if the debt was one incurred before 23-5-1112. The case of the decree holder was that the Debt Relief Act would not be applicable to the debt as the debt would arise only on the notice demanding future subscriptions in a lump being sent to the defaulting prized subscriber. Alternatively it was contended that it would be incurred only after the first default which itself was after the relevant date. The case of the chitty subscriber was that it was incurred when the security bond was executed and that being prior to 23-5-1112 the benefit of the Act would be, available. The question the Full Bench had therefore to decide was whether the debt in that case was incurred prior to 23-5-1112 or thereafter. If the debt was incurred not on the execution of the security bond, but either on the demand of the whole debt in a lump on default of the first installment the debt would be outside the scope of the Act. The scheme of the Chitties Act was examined by the Court in that case in paragraph 5 of the judgment. It would be profitable to extract the following passage from paragraph 5 of that judgment:

"The exact jural relationship created by a Chitty was the subject-matter of consideration in numerous early decisions of this court. In some cases, the relationship was called a partnership. In other cases, it was stated that the foreman occupied the position of a trustee. In still other cases, it was held that the legal relationship between a prized subscriber and the foreman was that which subsists between a creditor and a debtor. It was however realized that none of these jural ideas could exactly describe the relationship created between a foreman and the subscriber. This is not surprising, when it is realized that a Chitty is the outcome of an agreement. The relationship created is therefore one of contract, determined by the terms of the Variola. Though before the enactment of the Chitties Act, the rights and obligations of the parties to a Chitty had not been clearly defined, the Chitties Act has cured this defect. The Act defines the rights and duties of the foreman, the non-prized subscribers and the prized subscribers. Section 21 of the Act casts the duty on the part of each non-prized subscriber to pay his subscription at the time and place mentioned in the Variola. It also says that in default of such payment, he shall be liable to such consequences as may be provided for in the Variola. Section 26 is the corresponding section applicable to prized subscribers. That section says that every prized subscriber shall pay his subscriptions regularly at the time and place mentioned in the Variola, in default of which he shall be liable to such consequences as may be fixed in the Variola. Section 25 states that on demand in writing by the foreman, every prized subscriber shall, before drawing the prize amount, furnish sufficient security for the due payment of future subscriptions. It will be observed that both on non-prized and prized subscribers the duty is cast by the Act to pay the Chitty subscriptions regularly at the time and place mentioned in the Variola. It cannot be argued that the duty or liability to pay the future subscriptions in the case of a prized subscriber is cast upon him for the reason that he has prized the Chitty and received the prize amount. It is quite a different matter that on equitable consideration, a Court will not insist on the prized subscriber paying the future Chitty subscriptions, when the prize amount has been withheld from him by the foreman and will compel the foreman to make appropriations as each installment falls due of the subscription due in respect of it, from the prize amount in his hands. But the important matter to be kept in mind is that under the provisions of the Act, the duty to pay the future subscriptions as and when they fall due, on the part of a prized subscriber, is not made dependent on the payment of the prize amount to him. It will therefore be improper to say that it is the payment of the prize amount which creates the liability in the prized subscriber to pay the future subscriptions. The payment of the prize amount has therefore nothing to do with that liability."

That the execution of the security bond was not for the return of the prize amount, but was for securing the payment of future subscriptions was emphasized in paragraph 7 of the judgment. The Court said :-

"7. When a prized subscriber executes a security bond at the time when he receives the prize amount, the security bond is given, not for the prize amount which he has received

but for the payment of future subscriptions on the due dates. In other words, the security is furnished, not for ensuring the return of the prize amount but for the payment of future subscriptions, the amount of which will in most cases never correspond with the prize amount. Hence it is impossible to accept the position that the receipt of the prize amount by a subscriber makes him a borrower of this sum for the foreman, with the liability arising coinstant to return that amount in installments. It is here that the analogy of an installment bond does not hold good. In the case of a bond providing for payment by installments, the liability under the bond comes into existence at the time of the bond itself, though the installments themselves become payable later. But in the case of a Chitty hypothecation bond, the prized subscriber executes it, is not for the prize amount which has been given to him but as security for periodical payment of the future subscriptions which are not installments of the prize amount."

Sankarasubha Iyer, J. concluded thus :-

"8. It therefore appears to me that as between a foreman and a prized subscriber, the debt in respect of each installment of future subscriptions can come into existence only on the date on which the subscriptions fall due. The debt to discharge all the future subscriptions in a lump can arise only after the foreman has given the notice prescribed under Section 27 of the Chitties Act."

While Madhavan Pillay, J. concurred with the opinion of Sankarasubha Iyer, J. Joseph Thaliath, Ag. C.J. took a different view. According to the learned Acting Chief Justice :-

"When once the subscriber has bid the Chitty, received the prize-amount and executed the Chitty security-bond, his relationship with the foreman is exactly like that of a creditor and a debtor where the debtor has executed a bond undertaking to return the money lent in installments, and in default thereof, to pay the amount still due in a lump."

The learned Judge explained his dissenting view by the following logic :-

"I do not know how a person who has executed a bond which provides for payments in installments, incurs the liability to pay each installment on the date of such installment. Is he incurring liability piece-meal? The word 'incur' refers to an act done positively by some one. For, in the Century Dictionary, the meaning of the word 'incur' is given as "become liable or subject to, through one's own action," and in the Shorter Oxford Dictionary as to "to run into or to render oneself liable to." When installments become due in the case of a debtor above mentioned, he does not do anything on those dates to bring on any liability. It is by the act he did when he executed the bond that he incurred the liability."

We must pause here for a moment and state, with due respect to the learned Judge, that we are not in agreement with the view so expressed. If a person promises to pay not to meet a debt

already in existence he is obliged to pay only by reason of his undertaking, if the agreement is supported by consideration. His obligation is discharged by the payment on the date specified. If he fails to pay in terms of his obligation he is a defaulter and then arises a debt due from him to the promisee. He incurs a debt only then. It will of course be different in a case where the promise to pay at a future date is of an existing debt in which case it is not that he incurs a liability on the date of default, but the liability is already there. It becomes payable on a future date. It cannot be said that for that reason it is incurred on a future date. This distinction has evidently not been noticed.

13. We will now refer to an illuminating passage in the judgment of T.M. Krishnaswami Aiyar, Chief Justice of the High Court of Travancore in a case where a Karanavathi of a tarwad along with the other members of the tarwad were sued on a chitty security bond executed by the Karnavathi on prizing a chitty and receiving the prize amount. The question raised in that case was whether the chitty security bond on which the suit was based was justified by Tarwad necessity. That would be relevant only if the question was whether the tarwad was incurring a debt in receiving the prize amount and executing the security bond. If the prize amount due was an amount due to the tarwad necessarily as Karnavathi of the tarwad it was for her to receive the amount and no question of tarwad necessity would arise. We will now advert to the relevant passages in the said judgment, *Janaki Amma Devaki Amma and 2 others v. Uma Valiapotti Amma Raja Aul and eight others*[12]

> "The obligation to pay the future subscriptions in a chitty is undertaken by the original contract, which has been held to be binding on the tarwad. That obligation continues to be the same whether a prize is drawn or is not drawn. Where a prize is drawn there is only a security taken for the performance of the obligation already existent and no more."

Again at page 910 of the judgment the learned Chief Justice observed :-

> "The bidding at the auction for the prize is a mode of the realization of the benefit of the contract for the tarwad from the foreman. It may be done in an advantageous or disadvantageous or more advantageous manner. The

[12](1943 TLR 902) at 908

> karnawan may be liable for negligence or may merit the gratitude of its members. No question of necessity can arise over it, any more than in a case where the karnavan files a suit and recovers a debt due and is obliged to give a security for a pre-existing obligation in the course of a legitimate proceeding. The obligation to pay subscriptions after the prize is drawn is not a new undertaking that arises then, it is the same old obligation that was undertaken at the beginning of the chitty contract. It has to be got only secured by the chitty hypothecation bond on the prize being paid."

14. The question whether in the case of a prized subscriber receiving the prize money there is an element of borrowing was considered by a Division Bench of the High Court of Kerala in *Varkey Thomas v. Travancore Forward Bank Ltd*[13]*.,* Govinden Nair, J. speaking for the Bench followed the view expressed in the decision in *Sunderam Pillay Easwaramoorthiya Pillai v. Vallithavi Narayana. Vadiyu and two others*[14] which was adopted in the decision in *N.R. Krishnan v.*

Kunjamma Lekshmi Amma[15] Of Course there is no independent discussion of the question in that judgment. A later Division Bench of this Court in which one of us, the Acting Chief Justice, spoke for the Bench considered a similar question and in paragraph 10 of that Judgment in *Narayana Prabhu v. Janardhana Mallan*[16], this Court said :-

> "10. In this context the normal incidents of a kuri have to be noticed. The chitty foreman and the subscribers enter into a contract whereby the subscribers oblige themselves to pay subscriptions in stated installments and the foreman obliges himself to pay the prized amount when once the chitty is prized by the subscriber at any installment. This obligation of the subscriber arises from the stipulations in the contract. Even when he is a prized subscriber he has the same obligation to pay future subscriptions arising not by reason of the fact that he has prized the kuri but because of the contract entered into by him with the foreman to pay such subscriptions whether the kuri is prized or not. If he bids the kuri at any installment and demands the prize money the obligation of the foreman to pay the same also arises under the contract. Future subscriptions paid by the prized subscribers are not in discharge of the liability for the prized amount because the prize amount is received by the subscriber as of right and not as a loan. The liability to pay future subscriptions in terms of the kuri variola is only reinforced by the execution of the security bond by which the prized subscriber agrees that, on default, the foreman may recover the money as against the properties secured also. Quite often the amount of the security bond may bear no relation to the prize amount. The security bond is only for securing future subscriptions. It may not be right to assume that when a prized subscriber executes a security bond it is for repayment of the prize amount, the said amount being treated as a loan advanced by the foreman. It is more appropriate to treat the obligation to pay the future installments as only an obligation arising under the contract of kuri, with the further fact that by execution of the security bond the properties of the prized subscriber so secured are also made liable on default. In this view it cannot be said that there is a debt owing from the subscriber to the foreman because of the execution of

[13]1962 Ker LT 383 [15](1118) 17 TLT 721
[14](1926). 16 Trav LJ 143 [16] AIR 1974 Ker108

> the security bond. It cannot be said that the prize amount received by him is a debt due from him to the foreman. The debt would arise only as and when the installment falls due and remains unpaid. The security is offered to be effective in the event or contingency of such default being made."

15. Now we will advert to the decision of the Full Bench in *P.K. Achuthan v. State Bank of Travancore, Calicut*[17] the correctness of which has been doubted. That, as we said earlier, has occasioned this reference. The question that arose before the learned Judges of the Full Bench concerned the legal effect of a clause in a chitty variola that on default of one installment by a prized subscriber the whole of the amount will fall due with 12% interest. The question was whether this will operate as a penal clause. If the amount was due on the date of receiving the prize amount and executing the security bond and only payment was postponed the acceleration of such payment would not amount to a penalty, but if on the other hand the amount was not due

as a debt when the security bond was executed on receipt of the prize money, then it will fall due only in future as and when the installments are defaulted and the process of acceleration would amount to a penalty. This was the view expressed by the Full Bench. It then examined the question whether payment had fallen due or in other words a debt had arisen on receiving the prize money and executing the chitty security bond in favour of the foreman. The Full Bench found that a debt had so arisen and if so acceleration of the dates of installment payment would not render the provision thereof penal in character. Reference was made by the Full Bench to ***John*** *wallingford v. The Directors and Company of the Mutual Society and the official Liquidator thereof*[18] which was referred to as the leading English Case on the subject. The following passage in that judgment was quoted by the Full Bench (at p. 50) :-

> "The real matter seems to stand thus. These mortgage bonds were given to secure the #6000, which sum was treated as advanced, although money did not pass and also the premiums, which would become due by installments according to the rules of the society: and the payment of which under those rules was liable to be accelerated, if any of the installments were not punctually paid. I cannot think that such an acceleration of payments has anything in common with a penalty. It was a contract for certain payments which were debita in praesenti although solvenda in futuro, and, being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments which were originally deferred. I think therefore, that it would not be right for your Lordships in your order to give effect to that contention on the part of the appellant....."

Reference was then made to the following passage in Halsbury's Law of England (third edition). Volume 3, paragraph 655 :-

> "Where a bond is conditioned for the payment of a sum of money by stated installments, and it is provided that in default of payment of any one

[17](1974 Ker LT 806)

[18](1880) 5 AC 685

> installment the whole sum remaining unpaid shall become payable, the acceleration of the payment of the remaining installments is not a penalty, and on default in respect of any installment the entire sum may be claimed."

Reference was also made to illustration (f) to Section 74 of the Indian Contract Act, 1872. With great respect, the fact that in the case before the House of Lords the mortgage bond had been executed to secure due payment of a sum of # 6000 which was treated as advance and therefore was an existing liability with payment only being postponed does not appear to have been noticed. Therefore there was a contract for certain payments which was 'debita in praesenti' although 'solvenda in futuro'. The passage in Halsbury's Laws of England also referred to a bond necessarily referring to an existing liability, payment alone being postponed. Illustration (f) to Section 74 also refers to an undertaking to repay a loan. None of these referred to a case where there was no existing debt. The Full Bench proceeded to examine the nature of a kuri or chitty

transaction and made reference to the decision in *Bhagavathi Ammal Lakshmi Ammal v. M. Vengatasubba Iyer and 26 others*[19] to which we had already adverted to and also to the following passage in *Gunu Narasimha Iyer v. Muthuswamy Chidambaram*[20]

> "An ordinary chitty however is essentially a loan transaction in which each subscriber gets a loan from a common fund, only the order of taking the loan is settled by lots and to that extent the getting of interest alone as distinguished from the principal is made to depend on chance. Further the benefit of the loan is given to all alike".

16. What has essentially to be noticed here is that the reliance on the theory of a mutual fund or a common fund would not be justified as it was not founded on any sound legal principle and was conceived at a time when there was no statutory regulation of chitties. What we have explained earlier in this judgment would be sufficient to indicate that whatever might have been the earlier view as to the incidents of a chitty the rights and liabilities of the parties stand crystallized by the statutory regulations made as early as in 1094 in Travancore Area and 1107 in Cochin Area.

17. The Full Bench also adverted to the decision of a Division Bench in *Commr. of Income-tax v. Kottayam Co-operative Bank Ltd*[21]*.,* constituted by two of the learned Judges who sat in the Full Bench. Section 80P(2)(a)(i) of the Income Tax Act, 1961 provided for certain deduction in respect of income of Co-operative Societies of certain amounts and that was in the case of co-operative societies carrying on the business of banking or providing credit facilities to its members, whether conduct of chitties by a co-operative society amounted to provision of credit facilities to its members had to be considered in that case. Referring to the decision in *Gunu Narasimha Iyer v. Muthuswamy Chidambaram*[22] particularly to the passage which we have extracted earlier and to the decisions of the Madras High Court in *Kamakshi Achari v. Appayu Pilai*[23]*)* and *Vasudevan Nambudri v. Mammod*[24] the court expressed the view that "the dominant motive which prompts most people to join chit

[19](15 TLR 133) [21](1974 Ker LT 510) [23](1862-63) 1 Mad HCR 448
[20](18 TLR 56) [22](18 TLR 56) [24](1899 ILR 22 Mad 212)

fund schemes is to avail themselves of the facility of bidding the kuries when they are in urgent need of finance so that they may receive the chit amount in lump" and the court further said that such amount is received "as loan with the facility of repaying it in monthly installments".

18. It is relevant to notice that the Full Bench supported the provision for accelerated payment on an entirely different reason also. In the case of a foreman of a chit his relation to subscribers is of a special nature so that special necessity exists justifying stringent provisions being incorporated in the agreement for the protection of his interests. Whether a clause would be in terrorem would necessarily depend on the purpose of the provision and if that is not to terrorise the person obliged to act it would not born the realms of penalty. To that reasoning of the Full Bench no exception can be taken.

19. We thus see that the decision of the Full Bench in Achuthan's case is mainly based on the adoption of the view expressed in *Bhagavathi Ammal Lakshmi Ammal v. Vengatasubba Iyer and 26 others*[25] that in a chitty there is a common fund out of which loans are advanced to subscribers, a view no doubt once expressed by the Travancore High Court. The validity of this view has been eroded. It is unfortunate that the attention of the Full Bench was not drawn to the

decisions of the Full Bench of the Travancore. High Court in *Sundaram Pillay Easwaramoorthiya Pillay v. Vallithavi Narayana Vidivu and 2 others* [26]the decision in *Janaki Amma Devaki Amma v. Uma Valliapoti Amma Raja Avl*[27] and the two Division Bench decisions of the Kerala High Court which had specifically considered this question. Consequently therefore there was no occasion for the Full Bench to examine the logic or the reasonableness of the approach made in those cases.

20. Now we will advert to the consideration of this question by the Cochin High Court and also by the Madras High Court. The decisions of the Madras High Court have been adverted to by the Full Bench and it may be profitable to advert to them and to examine how far the logic of those decisions should persuade this Court to fall in line with the view expressed therein. Before that we think it would be appropriate once again to highlight the controversy before us on the question referred. As noticed by the eminent Judge T.M. Krishnaswami Iyer C.J. in Devaki Amma's case (1943 TLR 902) an obligation to pay future subscription in chitty undertaken under the original contract continues to be the same whether the prize is drawn or not or the prize amount is received or not. For the purpose of solvency of the chitty certain provisions are incorporated in the statute as additional obligations of the subscribers. But for such obligations there will be no difference between the liability of the prized subscriber and the non-prized subscriber and both arise out of the same contract. Three views as to the nature of the liability of the prized subscriber who had received prize money on the execution of chitty security bond have been placed before us and these are: (a) such liability arises on the terms of the chitty variola, a debtor-creditor relationship arising on the very date the chitty variola is subscribed to since by agreeing to the terms of the variola the subscriber undertakes to pay in future installments and such undertaking amounts to a debt on the very date he becomes a

[25](15 TLR 133) [27](1943 TLR 902)

[26](1926-16 TLJ 143)

subscriber. (b) a debt arises on the execution of the chitty security bond by the prized subscriber, to a debt arises on the date of default of future subscriptions. If there would be no justification to assume any relationship between parties other than that specified by the terms of the contract and the provisions of the statute - we have no reason to say that any other rights and obligation should be read into relationship of the parties - then we cannot but envisage the obligation to pay subscriptions as obligations undertaken by the subscriber under the contract. Even after prizing and receiving the amount the same obligation continues. In the case of one who does not prize his ticket he too has the obligation to pay in installments on agreed dates. If the amounts are paid on the due dates no liability would arise. When once default of payment of any installment is made that becomes a debt. That is by reason of the contract. The obligation to pay on future dates is supported by consideration, the subscriber being allowed to bid and prize his ticket whereupon the whole prize amount has to be paid. The prize amount is the whole amount of the ticket less the discount and commission irrespective of at what installment it is bid. There is no incurring of a fresh obligation to pay the future subscriptions, for, the obligation is there. The statute, and in particular Section 27 of the Kerala Chitties Act, and the corresponding provisions in the Act which it repealed contemplated furnishing of security not for any fresh obligation but "for the due payment of future subscriptions" which under Section 28 every prized subscriber is bound to pay at the time and place mentioned in the variola. Section 28 reiterates the contractual obligation and Section 27 makes it clear that this is not in substitution of an earlier obligation but to secure the earlier obligation, we are not referring to the provisions of the repealed enactments only because the position is not materially different thereunder. We therefore find that there is a

promise to pay in future and the obligation arises by reason of such promise.

21. An obligation is a legal tie and gives rise to a legal relationship. When an obligation arises out of a contract its nature depends on the terms of the contract, when the obligation concerns payment of money that may mature into a debt when such debt is incurred. All such obligations need not be debts though they may result in the incurring of debts depending on the terms of the contract. Till such debts are incurred the relationship of the parties bound by the legal tie or obligation arising under the contract would not be that of debtor and creditor. That status would arise only on the debt coming into existence which, as we pointed out, need not be simultaneous with the emergence of the obligation between the parties under the terms of the contract.

22. When under the terms of a contract there is a provision to pay on a future date not in repayment of an existing debt but by way of discharge of the obligation arising from the terms of that contract no debt would arise merely by reason of the premise to pay. An obligation would arise on the terms of the contract that obligation being to perform what was undertaken namely the promise to pay. A distinction has necessarily to be drawn between a case where parties agree upon discharge of an existing debt on a future date and a case where though there is no existing debt one party undertakes to pay to the other party specified sums of money on future dates and such contract is supported by consideration. In the former case liability to pay would arise only on the future dates specified though the relationship of debtor and creditor exists all along while in the latter where there is only a promise to pay only on non-payment on the date specified a date would arise and consequently the relationship of debtor and creditor also would arise only then. This aspect of the matter has not been placed before the Full Bench and naturally therefore there was no occasion for the Full Bench to examine it.

23. It may not be necessary to make an exhaustive reference to the early case law of the Cochin Court as we find an exhaustive reference to it in the majority decision of the Full Bench in *Joseph v. Lonan*[28]. Ouseph. J. with whom Sahasranama Ayyar. J. concurred has referred in his judgment to the earlier decisions of the Cochin Court. The court was dealing with an appeal in a suit by the plaintiff to restrain the first defendant by a permanent injunction from conducting the kuri in future and to appoint a Receiver to conduct such Kuri. Such a suit was held to be not maintainable and the suit was dismissed. The question of maintainability was raised in the appeal. Dealing with that Ouseph J. expressed his view:

> "I may at once say that I am unable to accept the position taken up on behalf of the appellants, whatever may be the early history as to the origin of kuries, an ordinary kuri, as it is at present understood, does not, in my opinion partake of the nature of an association or company. It is purely a business concern started and conducted by one or more individuals who are generally known as starters. The subscribers are persons who, driven by motives of their own, accept the terms and conditions offered by the starter and take tickets in it. The relationship thus created between the starter and a subscriber is purely one of contract."

It may be useful to refer to the following passage at page 397:

"The subscribers have no right, in the absence of any special stipulation to that effect, to compel the starter to keep the kuri collections as a separate fund out of which the prizemoney should be paid. The remedy of a subscriber who wins or auctions his ticket is only to proceed, if necessary, personally against the starter, just like any other simple creditor of his or against properties, if any, secured for the due conduct of the kuri. The starter also will not be heard, when the prize-money is demanded, to say that there was no sufficient collection owing to the default, wilful or otherwise, on the part of the subscribers.....The true position, in my opinion, is shortly this, viz., that, in the absence of special terms to the contrary, the relationship between the starter and a subscriber is purely one of ordinary contract, that there is no sort of fiduciary relationship between them and that a subscriber does not also get any lien or control over subscriptions collected by the starter."

After referring to the various decisions of the Cochin Court the Court noticed thus:

"Thus, so far as our decisions go, we find that there is more or less a unanimity of opinion that in a kuri concern there is no fiduciary relationship created between the starter and the subscriber. The same is the view held by the

[28](1935) 25 CLR 387

Madras High Court. According to its decision reported in 1912 Mad WN 1235 "An ordinary Malabar kuri is not a company or partnership composed of the Karaiswan and subscribers and that no general rights and obligations and no mutual rights and duties are created so as to include all of them as one body. The contracting parties in such a kuri are the Karaiswan on the one side and each of the subscribers on the other side and there are as many separate contracts as there are subscribers. The transaction between the Karaiswan and the holder of any particular ticket is quite a different transaction from that between the Karaiswan and the Holder of any other ticket". The decisions in Travancore are not at all uniform. "The jural relationship of subscribers of the chitty to the foreman and to one another has been" says the author of the Law of Chitties "the subject of much speculation and much canvassing has led to many theories." After referring to the several decisions bearing on the question the author says, 'But it may be taken to be settled law now that in an ordinary chitty the relation between foreman and subscriber is one of contract on the terms of the Variola and that there is no manner of jural relationship between one subscriber and another." (Paga 41). The authorities are thus generally against the position taken up on behalf of the appellants." Sahasranama Ayyar J. who evidently had the advantage of perusing the instructive and elaborate judgments of the other judges concurred with the conclusion reached by Ouseph J. and also expressed general agreement with the reasons given by the learned Judge in support of the conclusion. In *Raman v. Cathrina Rodrigues*[29], Narayana Ayyar C.J. speaking for the Division Bench refers to the position of a kuri starter and states thus :

"The obligation to make good the prize money to the subscriber is an unavoidable and compulsory one, the money cannot be kept back from the subscriber, and, if the

subscriber does not take out the money on good security, that money will remain in the hands of the starter as subscriber's money only, subject to the terms and conditions of the Kurivari."

Sahasranama Iyer J. concurring with this expressed the view thus at page 106 thus :-

"The starter incurs the correlative obligation to pay the bid or prize money, and may, if he so chooses, as a condition of such payment, insist upon reasonable security being furnished by the subscriber for the due performance of his obligation to pay the future subscriptions. That being so, when the starter makes good the bid or prize money to the subscriber, and the latter executes a security bond ensuring regular payment by him of the future subscriptions there is no lending or borrowing involved in the transaction. The idea of a loan properly so called has no place therein."

The view, we must notice, is expressed in categorical terms. There is an exhaustive reference again to this question in a Full Bench decision in *Ananthapadmanabha Ayyar v. Kallianikutti Amma*[30] was affirmed by the Full Bench in that case. Before a Division Bench of the Cochin High Court the question arose whether a debt fell within the scope of Cochin Agricultural Relief Act 18 of 1114. A kuri security bond

[29](1935) 25 CLR 101

[30](28 CLR 652): (1935) 25 CLR 101

was executed by the subscriber in 1111 long before the Act came into force, but the installments which were defaulted fell due after the commencement of the Act. Whether the Act would apply to such a debt was the question which the court had to decide. In dealing with this question. Krishna Menon, J. observed thus in *Vasudevan Namboori v. The Mundur Church*[31]:-

"3. On many occasions this court has held that joining a kuri or the mere drawing of the kuri amount is not equivalent to incurring a liability. The kuri is a familiar form of investment in this State and it is on that basis it has been held that the karnavan of a Malabar tarwad can on his own initiative join a kuri though he cannot incur a liability on behalf of the tarwad without the consent of the members of the tarwad. In a sense a kuri subscriber incurs a liability the moment he joins the kuri i.e., in the sense that he is bound to pay the subscriptions according to the terms incorporated in the kuri vaimba. In this case there was no debt outstanding on 1st Chingam 1115 i.e. at the commencement of the Agriculturists' Relief Act. The subscriber became indebted to the kuri starter only when he defaulted the subscription i.e. after 1st Chingam 1115. Therefore this is a case of a debt incurred after the commencement of the Act. No doubt both the kuri starter as well as the subscriber had rights and liabilities under the contract governing the kuri transaction even before 1st Chingam 1115. But one party became indebted to the other only after 1st Chingam 1115. This is the way in which I would interpret Section 14 and that leads to the same conclusion as that arrived at by the learned Chief Justice, namely that this second appeal has to be allowed with costs throughout."

24. Now we come to the Madras view. We will refer to the earliest case of the Madras High Court cited before us that reported in *Kamakshi Achari v. Appavu Pillai*[32],. The question there was whether a chitty was illegal as being a lottery within the meaning of Act V of 1844, an Act for the suppression of all lotteries not authorised by the Government. The suit was brought upon a bond given for part of a sum of money "obtained upon loan from a common fund by means of the drawing of lots" and the question submitted for decision in effect was, whether or not the arrangement by which the loan had been obtained was illegal as being a lottery within the meaning of Act 5 of 1844. Whether there was speculation, risk and gaming in such an arrangement was the question that the court had to decide and taking note of the transaction the court expressed its opinion that the transaction was not necessarily a lottery merely because the prizing was to be taking lots. The question referred to the High Court itself referred to the bond as one given for "a loan from a common fund." There was no occasion for the court to examine this. The court evidently assumed that the amount was simply a loan from the common fund to each subscriber in turn. It is not as if this question was considered by the Madras High Court in that case. But that decision is of significance, for, it appears to have been assumed that in a chitty there is a common fund contributed by the subscribers from which each one of them in turn takes loans. This is relevant and important because the later decisions of the High Court of Madras are not based so much on logic as on the rule of stare decisis.

[31](37 CLR 302)

[32](1862-63) 1 Mad HCR 448

Therefore the decisions of the Madras High Court have necessarily to be viewed in their historical perspective.

25. The decision in *Vasudevan Nambudri v. Mammod*[33]rendered by the Division Bench of the Madras High Court on September 1, 1898 referred to by the Full Bench in Achuthan's case (1974 Ker LT 806) is really of no assistance, for, in stating the facts relating to the suit reference is made to the plaintiff organising a kuri by which "a number of persons agreed that each shall subscribe a certain sum of money by periodical installments and that each in his turn, as determined by lot, shall take the whole of the subscription for each installment, all being returned the amount of their contributions, the common fund being lent to each subscriber in turn." The statement of facts proceeds on the assumption that there is common fund in a chitty, a concept quite consistent with the assumption by the same Court to which we have adverted to earlier. That was not a matter on which there was discussion by the Court and as we said the assumption may not be justified.

26. It may not be necessary to refer here to all the decisions of the Madras High Court as there is a reference to the more or less consistent view of the Madras High Court in *Kannan v. Subramania*[34], to which we will now advert. It would appear from that decision that it was the force of precedents that persuaded the Bench to adopt the view the court had expressed on earlier occasions. The question that arose in Kannan's case in CRP 257 of 1939 dealt with in that report concerned the date on which the liability of the judgment-debtors was incurred. The decree-holder's case was that a security bond only reaffirmed the preexisting liability of the judgment-debtors to pay their subscriptions according to their installments fixed on the kuri vari. They contended that the character of the liability to pay future installments did not change by reason of the security bond and therefore the liability to pay future installments could not be deemed to have been incurred before such installments fell due. The judgment debtors contended that whatever might be the position with regard to non-prized subscribers, in regard to prized subscribers they could be considered only as borrowers of the sum received less the installments

already paid by them, undertaking to repay the loan installments that still remain to be paid and the liability under the security bond which they have executed for the due payment of such installments are 'debitum in praesenti solvendum in futuro' incurred on the respective date of the bonds. After noticing these respective contentions Patanjali Sastri J. proceeded to state thus :-

> "The question is one of some difficulty not the least part of which arises from the somewhat conflicting decisions dealing with these peculiar kuri transactions which are so common in some parts of this presidency. On the whole however we are of opinion that the judgment-debtors' contention is supported by a preponderance of authority and must be accepted. It will be observed that the kuri vari makes a distinction between the liability of a subscriber who has bid for and received the amount at an auction and the liability of one who has not yet been thus benefited. In the latter case, para 5 provides that if the installment is not paid on the date fixed for an auction, the

[33](1898) ILR 22 Mad 212)

[34] AIR 1941 Mad 231

> subscriber will have no right to participate in the discount realized from the successful bidder at the auction, and further, if it remains unpaid even after one month from the date of the auction, the stake-holder shall be at liberty to remove the name of the subscriber and admit another in his place, while in the former if the benefited subscriber commits default in paying any installment remaining due it is provided that the money due for such installment or the entire amount due for all the future installments till the termination of the chit fund, shall be realized by the stakeholder together with profit at eight annas per day from the date of default, a provision which also finds a place in the security bond, Ext.1. It is thus clear that the liability of a successful bidder at an auction held under the kuri is placed on a different footing from that of an ordinary subscriber, and it will not therefore be correct to say that the security bond merely affirmed the pre-existing liability to pay the installments of the contribution to the kuri fund. It has been repeatedly held by this Court - and it must now be taken as settled - that a provision in a kuri entitling the stakeholder to recover from the benefited subscriber the amount of all the installments immediately on default in the payment of any one of them is not penal and is enforceable, although there has been some difference of opinion as to the ground on which such decision is to be based." It was the preponderance of the authority that persuaded the Bench to take the view it did. The decision in *Marudakonar v. Veerammal*[35], was noticed by that court as striking a different note, nevertheless the court expressed the view thus :-
>
> "We are therefore of opinion that in view of the several decisions of this Court referred to above, the liability of the judgment-debtors must be considered to have been incurred on the date of the mortgage bond."

Independent of acting on the precedents of that court there is no persuasive reasoning in that judgment in support of its conclusion.

27. We may in this context refer to a decision of *Chief Justice Basley in Ramanatha Iyyar v.*

Narayanaswami[36]. where the learned Judge discussed the nature of the obligation of a subscriber towards a stakeholder. That question arose in the context of the plea by a plaintiff in a suit who had obtained a promissory note in respect of installment payable by a chitty subscriber, falling back on the original consideration and seeking a decree on that basis. It was contended in that context that a contract entered into by such a subscriber is to lend money to the foreman and therefore such a contract would not be enforceable. Dealing with this the learned Judge said thus :-

> "I do not agree as I quite fail to see how it can possibly be said that this is in any sense a contract entered into by a subscriber to lend money to the stakeholder. It seems to me to be more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stakeholder under the rules of the chit fund and when he has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay."

[35] AIR 1936 Mad 985

[36] AIR 1937 Mad 364

28. In *Maruda Konar v. Veerammal, AIR 1936 Madras 985(Supra)* the question was whether an assignee of the rights of a foreman in regard to the right to collect future subscription from a prized subscriber could sue notwithstanding the fact that the chitty was not conducted till its due termination. It was contended that when the chitty collapsed the obligation of the subscribers to pay also came to an end. In this context Varadachariar J. speaking for the Bench said thus :-

> "It seems to me only reasonable to hold that in cases like the present the security bond must be interpreted in the light of the rules and the obligation undertaken by it is not repayment of the benefit already received as if it were a debt but the payment of future subscriptions whether the continuance of the chit was a condition precedent or not, will not depend merely on the terms of the bond but must be decided with reference to the surrounding circumstances, including the rules of the chit fund."

We must say that having examined the Madras decisions we see no logical basis for the assumption of a common fund in a chitty and advance of any loan to a subscriber from out of such common fund.

29. Finally the learned counsel for the respondent Sri. Balasubramoniam contended that a debt may arise without borrowing or loan and that even liabilities arising otherwise than by borrowing would fall within the scope of the term debt. We do not see reason to demur to this proposition. Debts may arise by reason of a statutory liability. They may arise by reason of contractual obligations such as by the obligation to pay rent. Whether the term 'debt' has to be understood in a broader sense or not will necessarily depend on the scope of the enactment in which the term is used.

30. The question here is not whether what has arisen is a debt or not, but whether any debt has arisen at all by reason of the execution of the security bond or by the execution of the chitty variola. The term 'debt' has been understood to take in the liability to pay Income-tax within the scope of the Wealth Tax Act, 1957 in the decision in *Kesoram Industries v. Wealth Tax Commr*[37]*.,*

That is evidently because the liability to pay Income-tax arises on the valuation date during the accounting year as held by the Supreme Court in that case. The decision in *Ramanathan v. Ramanathan*[38], is also of no assistance to the learned counsel, for, what was held in that case was that within the scope of the Madras Agriculturists Debt Relief Act a deposit of money is a liability and the depositee incurs a liability although time for repayment would come only when a demand is made.

31. In the light of the above discussion we do not think it would be possible to say that on entering into the chitty agreement a debt is incurred by the subscriber for the amount of all the future installments and in respect of such amount there is a debtor-creditor relationship. As we have stated earlier in this judgment the chitty variola only embodies a promise to pay on future dates. That is not a promise to repay an existing debt, but to pay in discharge of a contractual obligation. For similar reasons neither the prizing of the chitty nor the execution of the security bond would give rise to a

[37] AIR 1966 SC 1370
[38] AIR 1968 SC 1047

debt for the prize amount is not received as a loan but as of right by virtue of the terms of the contract between the parties. We reiterate that the provisions of the relevant Acts relating to chitties to which we have made advertence also only indicate this. In this view we are of the opinion that to the extent the earlier decision of the Full Bench in Achutham's case, 1974 Ker LT 806 has referred to the creation of the debtor-creditor relationship on the prizing of the chitty and the execution of the security bond we respectfully differ. The decision of the Division Bench in 1976 KLT 205 which follows the Full Bench decision must also therefore be found to have not rightly stated the law. We therefore answer the question referred to us in the negative, namely, that no debt due to the foreman arises by reason of the receipt of the prize amount or of the execution of the security bond for securing future subscriptions.

32. P. Subramonian Poti, Ag. C.J. (Single Bench Judgment) :- The validity of a sale deed executed by a Hindu father in respect of ancestral property belonging to him and his sons as coparceners is challenged by the plaintiffs in this case who are 6 out of his 7 sons and that is the question for decision in this Second Appeal. Admittedly the suit property along with other properties were obtained by the branch of the plaintiffs represented by their father as Manager in a family partition of the year 1951. While he was in possession of those properties he alienated the plaint property in 1955 in favour of the first defendant for a consideration of Rs. 9,000/-. Besides the plaintiffs he had a son the 3rd defendant who was a major on the date. The mother had no share in the property. The father acted as guardian of the parties. This sale deed was attacked by the children on the ground that there was no consideration for the sale deed binding on the family, there was no necessity to sell the family property since the family was affluent and had surplus income, the sale deed was not binding in regard to the 6/8 shares of the plaintiffs and therefore the plaintiffs are entitled to seek division of the property. The alienee first defendant sought to support the sale deed on the plea that there was pressure on the estate, that it was to meet the debts that the sale was effected, that Rs. 100/- was received in cash out of the sale consideration of Rs. 9,00/- that the debts being antecedent debts irrespective of the question of family necessity the sale must be binding on the family and therefore the plaintiffs must be non-suited. The trial court did not raise necessary issues in the case and unfortunately the parties to the suit also did not point out the need for more specific issues. The main issue in the case was "whether document No.1000/1955 of Cranganore Registry is void and not binding on the

plaintiffs for any of the reasons stated in the plaint?." The consequence of raising such an omnibus issue in the case was that despite the very elaborate judgment of the learned Subordinate Judge there has not been specific attention to matters relevant in a suit of this nature and consequently there has not been specific finding on matters such as questions of family necessity extent to which the document was supported by consideration and such other matters as are normally to be dealt with by the court in a suit of this nature. No doubt in the elaborate discussion the court has made various observations and expressed its views. The result of the discussions is that it finds that the document of sale is executed for discharge of antecedent debts to the extent of Rs. 5,750/- and that the document is therefore valid. The appellate court concurred with this, though it would appear that on the question of family necessity it purported to differ from the trial court. I say it purported for it is not possible to categorically state that it has entered a finding on this question. I will advert to that in due course. The court having found that the document was supported by antecedent debts to the extent of Rs. 5,750/-, held that the sale was not liable to be ignored or set aside. The plaintiffs were non-suited. Accordingly they are before this Court now.

33. Though several questions were raised in the memorandum of appeal, at the time of admission of the appeal the learned Judge who admitted the appeal limited notice on questions 1 and 2 formulated in the memorandum of appeal. These questions read:

> "1. Whether the reservation for payment of future kuri subscriptions will constitute an antecedent debt so as to bind the same on the principle of pious obligation particularly in the face of the decision in 1973 Ker LR 665?
> 2. Whether a sale can be sustained in law, when it is found that there is failure of consideration to the extent of 50% sale price particularly when no enquiry is made by the vendor and the sale deed is created by 2 adults when there are 6 minor members in the family?
> This question is also stated in para 5 of the appeal memorandum."

Before I go into these questions it is necessary to state the background of the controversy.

34. The consideration for the document Ext.P2 is made up of 13 items including a sum of Rs. 100/- received as cash consideration that being the 13th item. In the judgment of the trial court there is an exhaustive consideration of the evidence regarding (each of these items of consideration mentioned in the document. I see no reason to take exception to the discussion and the findings reached after elaborate discussion has my acceptance. It is found that two debts totalling to Rs. 600/- have not been proved, that item 7, a debt for Rs. 1,700/-, has also not been satisfactorily proved, that item 9, a debt of Rs. 400/-, is not shown to be amount lent as alleged in the document, that item No.10 a sum of Rs. 200/- also has not been proved, that item 11 for Rs. 250/- is also an item of debt the genuineness of which has not been proved and further that item 13, a sum of Rs. 100/- cannot be antecedent debt. The total amount is a sum of Rs. 3250/-. With regard to the balance there is a controversy in regard to one item of Rs. 1,250/- and that controversy is covered by the first question in the appeal. Evidently the attempt of the plaintiffs is to establish that a sum of Rs. 1,250/- shown as item 1 of the consideration in the sale deed is not a debt and consequently not an antecedent debt. If that is not shown to be antecedent debt the

balance would be only Rs. 4,500/- and if that alone out of the total consideration of Rs. 9,000/- is antecedent debt the document cannot be supported as one executed for the discharge of antecedent debt. That evidently is the purpose of raising the first question in the appeal. That is a question which it was not easy to resolve particularly because different views had been taken by this court on the question whether a liability that may arise on account of execution of a chitty security bond for prize money received in a chitty is a debt. Since the correctness of the Full Bench decision of this Court in *P.K. Achuthan v. State Bank of Travancore* [39]was doubted the question was referred to a Bench of five Judges and that question has now been answered. The view taken by the Full Bench in Achuthan's case has not been accepted by the Full Bench in answering the question referred. The answer to the question as

[39](1974 Ker LT 806)

given by the Larger Bench of this Court reads thus :

> "We therefore answer the question referred to us in the negative, namely, that no debt due to the foreman arises by reason of the receipt of the prize amount or of the execution of the security bond for securing future subscriptions."
>
> A copy of the order of the Larger Bench is appended to this judgment.

35. It therefore follows that the sum of Rs. 1,250/- represented by the chitty security bond is the amount for which the bond was executed to secure future subscriptions and that cannot represent debt on the date the bond was executed. Naturally it cannot be an antecedent debt. Antecedent debt is only Rs. 4,500/-

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36. Before I proceed to consider the further question whether if half of the consideration alone represents antecedent debt the document would be supportable on the ground that having been executed to discharge antecedent debts it is binding on the sons. I would notice a contention of learned counsel for respondents that despite the finding of the Full Bench it must be held that the antecedent debt includes Rs. 1,250/- also. According to counsel Ext.D-15 security bond is mortgage executed by the subscriber in favour of the chitty foreman and even though it cannot be a debt in respect of any amount borrowed it would be a debt on account of the mortgage having been executed in respect of a liability that may arise and as such it should fall within the scope of the term 'debt'. I fail to appreciate this contention. The definition of mortgage in Section 58 of the Transfer of Property Act is a plain answer to the contention raised. A mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. There is necessarily a transfer of interest in specific immovable property by reason of the execution of the mortgage. That would be there irrespective of whether a debt has arisen or not because it is a necessary element of mortgage, but a mortgage is not always executed for securing debt which has already arisen. A mortgage can be executed for securing payment of money to be advanced. Money which may be paid later may be secured by a current mortgage. Instances are too many to need citation. Equitable mortgages executed in favour of Banks to secure overdraft accounts would operate as mortgages but the debts thereunder would arise only when liability is incurred by reason of a debit being found in the overdraft account as a result of operating the account. Execution of mortgage by itself does not give rise to a debt. The argument that the execution of the mortgage is sufficient for treating the consideration of Rs. 1,250/- as a debt in addition to Rs. 4,500/- found cannot be sustained.

37. Now I will deal with the larger question concerning the right of a Hindu father to alienate ancestral property in which the sons have interest so as to bind the sons' interest also. A distinction has necessarily to be noticed between the right of the manager of a Hindu joint family to alienate ancestral property and that of a father to alienate ancestral property so as to bind the share of his sons. The law has been succinctly stated in Hunoomanpersaud's case (1856) 6 Moo Ind App 393. The Hindu law envisages an obligation in the son to discharge the debts of his father irrespective of whether such debts were incurred for family necessity or not. That obligation of the sons would not extend to their person but to their interest in ancestral property. The only exception would be an avyavaharika debt incurred by the father for illegal or immoral purposes. Where the father seeks to discharge his debts, not necessarily incurred for the benefit of the family, from out of the interests of the sons in joint family property the sons will have no defense, for it is their legal obligation to submit to such liability. Therefore apart from seeking to sustain an alienation on the plea that the alienation is justified by the family necessity or benefit to the estate it is open to an alienee in a case where alienation is by a Hindu father to show that the alienation, though not proved to be for family necessity or for the benefit of the estate was made to discharge the antecedent debts of the father. The debts must necessarily be antecedent in point of time and must not be tainted. Once that is established the alienee would succeed in his defense.

38. It is evident that if an alienee establishes family necessity as justification for the alienation the question whether the alienation was to discharge antecedent debts may not be relevant, for even without consideration of that question the sale could be upheld. If he is unable to establish that the same is for family necessity it is open to him to support the alienation on the alternative ground that it was to discharge antecedent debts that the alienation was effected.

39. I have to consider in this case whether Ext.P-2 was executed to discharge antecedent debts. Evidence as now stands shows that by the execution of the sale deed antecedent debts of Rs. 4,250/- were discharged while other debts recited in the document. were either not shown to be incurred or not proved to be debts of the family. Can such alienation be sustained? It is well established that when an alienee who after making due enquiry about the existence of antecedent debts, is satisfied of their existence advances funds to the alienor so as to enable him to discharge those debts he cannot be expected to see to the actual application of the funds. Naturally that would be beyond him. When a person after due enquiry is satisfied of family necessity for incurring the debt and advances funds to meet such necessity it is not expected of him to see to the application of the funds. The case here is not that it has been proved that the antecedent debts to the extent of Rs. 8,900/- do exist but the alienee was not able to see to the actual discharge of the antecedent debts. On the other hand as the evidence now stands it has to be found that only half of the consideration is shown to be received for discharge of antecedent debts. Could the alienation be sustained on the ground that it was for discharge of antecedent debts in the above circumstances?

40. I may refer in this context to the decision of the Privy Council in *Sri Krishn Das v. Nathu Ram*[40], Referring to the decision in *Girdharee Lal v. Kanta Lall*[41] the learned Judges observed thus :-

> "Before a father has sold ancestral property for the discharge of his debts, if the

application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale."

On this the privy Council comments thus :-

[40] AIR 1927 PC 37

[41](1874) 1 Ind App 321

"While this is in itself a correct statement of the law so far as it goes, it does not by any means follow as the learned High Court Judges seem to have thought that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation and opinions would necessarily vary as to what constituted the "bulk of the proceeds" or "a small part" of the same in each particular case. The learned Judges seem to have lost sight of the true question which falls to be answered in such cases. viz., whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the *Bar of Hunoomanpersaud Panday v. Munraj Koonweree*[42] The case related to a charge upon property by way of mortgage, and not of a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property. The headnote states correctly the points actually decided so far as bearing on the present case :-

The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindu Law a limited and qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate .....the actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance, are the criteria to be regarded ....."

A lender however, in such circumstances is bound to inquire into the necessities of the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does inquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money.

In delivering the judgment of the Board Lord Justice Knight Bruce, after stating the law substantially as laid down in the headnote, said :-

The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived. (P. 424).

This decision was followed in the case of a sale by a Hindu widow in the case of *Ram Gopal Ghose v. Bullodeb Bose*[43] where it was held by the High Court of Calcutta that :-

Where there is no doubt as to the necessity for a sale by a Hindu widow and the vendee pays a fair price for the property sold, and acts throughout *bona fide* the mere fact of only two-third of the purchase money having been paid to creditors would not invalidate his

conveyance, he not being bound to see to the application of his money."

It is interesting to notice the case law which the Privy Council considered later in that judgment. The case in *Medai Daeavoi v. Nainar Tevan*[44]. to which advertance was made was one where a widow alienated a property in which she hadwidow's estate, for a sum of Rs. 5,300/- to satisfy a mortgage decree for Rs. 4,588.22 appropriating the balance to herself though that was not shown to be for any legal necessity. Reference was also made to the decision in *Dwarka Ram v. Jhulai Pande*[45]. in *Daulat v. Sankatha Prasad*[46], and *Masit Ullah v. Damudar Prasad*[47], In *Daulat v. Sankatha Prasad*[48]. a sum of Rs. 105/- out of the total consideration of Rs. 2,142-12-6 alone was not shown to be covered by legal necessity. The sale was sustained. In the last of the cases cited. *Masit Ullah v. Damudar Prasad*[49]. out of the total consideration of Rs. 18,400/-, a sum of Rs. 2,000/- was not shown to be applied for the discharge of antecedent debts. In that case again the document was upheld. The principle stated by the Privy Council in *Sri Krishn Das v. Nathu Ram*[50], has been followed in *Radhakrishnadas v. Kaluram*[51]. and *Arvind v. Anna*[52].

[42](1856) 6 Moo Ind App 393 (PC)
[43](1864) WR 385
[44] AIR 1922 PC 307

41. It may not be possible to lay down any strait-jacketted rule as to what proportion of the consideration should be shown to have been antecedent debt in order to sustain an alienation by a Hindu father. As observed by Sulaiman J. in *Sri Nath v. Jagannath*[53],

> "no hard and fast rule as regards any proportion can be laid down nor can one adopt any rule of thumb based on fractions or any graded scale."

42. A Hindu father's right to expect his sons to discharge his debt has given rise to the concept of his power to deal with ancestral property over which his sons also have right as coparceners. That authority would necessarily be limited to cases where the consideration for the sale is an antecedent debt. May be the entire consideration is not antecedent debt. If the consideration which does not so represent antecedent debt is a minor unsubstantial part the character of the document would nevertheless remain and the alienation would nevertheless be an alienation, the predominant objective of which is the discharge of his own debt with property belonging to himself and his sons or to his sons. That would not be the case where a substantial part of the consideration is not antecedent debt. If as in this case half of the consideration is to discharge a debt which is an antecedent debt and half is not it could not be said that the alienation was to discharge antecedent debt. No doubt the discharge of antecedent debt was also involved in such alienation. Therefore it cannot be said that in this case the alienation was effected to pay off antecedent debt of the father and as such the alienation is (not?) supportable.

43. Question No. 2 to which I have adverted earlier makes an unjustified assumption. I am particularly referring to the assumption in question No. 2 "when an enquiry is made by the vendor." The finding of the appellate court is that the enquiry has been made by the vendor. The finding of the appellate court appears to be that there was necessity for the sale deed. Not that these findings are supported by any discussion. The finding that enquiry was made by the vendor is contrary to the finding of the trial court which on elaborate discussion found that no enquiry was made by the vendor.

[45] AIR 1923 ALL 248
[47] AIR 1926 PC 105
[49] AIR 1926 PC 105

[46] AIR 1925 ALL 324 [48] AIR 1925 ALL 324(2) [50] AIR 1927 PC 37
[51] AIR 1967 SC 574 [53] AIR 1930 ALL 292 AT P. 298
[52] AIR 1980 SC 645

44. Normally a court hearing a Second Appeal is limited to the consideration of the question formulated at the time of admission of the appeal. That would be the scope of the Second Appeal. But this does not preclude a Court, in the interests of justice, from departing from this and allowing the parties to plead other questions in Second Appeal. In this case the real controversy between the parties cannot be said to be highlighted by the two questions on which notice was issued. It is not as if my finding that the sale deed cannot be supported on the ground that it is for discharge of antecedent debt would conclude the fate of this case. The question whether nevertheless the sale deed should be upheld as one executed for discharge of family necessity must necessarily engage this Court's attention. Perhaps if the question had been viewed in the proper perspective and dealt with by the Court below we would have been governed by the finding of the Court on the facts. But as I have said earlier there was absolutely no categorical finding either by the trial court or by the appellate court though it could perhaps be said, reading between the lines, that the trial court was of the view that there was no necessity while the appellate court might perhaps be understood to have said that there was necessity. A case cannot be disposed of particularly one which has been tried for several years and in which parties have chosen to adduce evidence, in an unsatisfactory manner. The question had to be tackled directly. Whether there was necessity far execution of a sale deed must depend upon consideration of various factors such as circumstances attendant upon the execution of the sale deed, the position of the family, availability of funds to meet its obligations, the need for raising funds at that time and whether that could be met by the transaction in question. These are matters which would go into a proper assessment of the question of necessity. Ultimately the court must express one way or the other definitely on that question. I can only say that it is unfortunate that in a litigation which has been carried on for a decade and half I am constrained to remit the case back for a fresh disposal though further enquiry is limited in its scope. I believe interests of justice require such a course and that is why I have chosen to hear on a question which is not directly covered by the two questions formulated at the time of admission of the Second Appeal. Consequently while holding that the sale deed Ext.P2 cannot be sustained as one executed to discharge the antecedent debts the question whether it could be said to be supported by family necessity in the light of the evidence on the other issues necessarily calls for consideration by the trial court. That court will go into that question and decide the matter afresh in accordance with law. That shall be done expeditiously. The court fee paid on the memorandum of Second Appeal will be refunded to the appellants. Parties are directed to suffer costs in the appeal. The case will stand posted in the Court below for appearance of parties to 17-2-1983.

Order accordingly.