PETITIONER:
THE KERALA STATE FINANCIAL ENTERPRISE LTD.

Vs.

RESPONDENT:
JACOB ALEXANDER & ANR.

DATE OF JUDGMENT: 01/03/1996

BENCH:
G.B. PATTANAIK (J)
BENCH:
G.B. PATTANAIK (J)
RAMASWAMY, K.

CITATION:
1996 AIR 1552 1996 SCC (3) 427
JT 1996 (3) 421 1996 SCALE (2)790

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

G.B.PATTANAIK. J.

Leave granted.

This appeal by the defendant no. 2 is directed against the Full Bench Judgment of Kerala High Court in A.S. No. 235 of 1987 arising out of D.S. No. 120 of 1983.

The plaintiff filed the suit for a direction to the State of Kerala as well as Kerala State Financial Enterprises Limited. Trichur to pay the amount due as the plaintiff's share from the unpaid auction discount with interest. The plaintiff's case in nutshell is that the defendant no. 2 was conducting a kuri which started on 17.3.1972 and terminated on 17.7.1980. The kuri had 200 tickets each with four divisions, viz., A, B, C and D and the total amount of a ticket was Rs. 50, 000/-. The subscription for a ticket per month was Rs. 500/-. In all (Rs. 200 for A Division, Rs. 150/- for Division) there were 100 such instalments and 1018 subscribers. On each instalment two tickets were prized, one by lot and the other by auction. In case of prize by lot Rs. 5,000/- will be deducted as fixed discount and Rs. 45,000/- will be paid to the prized subscriber. Out of the fixed discount of Rs.5,000/-, Rs. 2,500/- would go as commission for the foreman and balance Rs. 2,5000/- would be divided among the subscribers in proportion to their share. In case of auction, the subscriber who bids for the maximum reduced amount would be prized and he would get an amount of Rs. 45,000/- less the auction deduction. The auction discount of all the divisions will be pooled together and would be divided among the subscribers. This auction discount is paid to those subscribers who pay the subscriptions promptly. A prized subscriber loses the share of the discount on default of payment of even one instalment. A non-prized subscriber would lose the share of auction discount if he defaults three or more instalments consecutively. The conduct of

kuries is governed by the Cochin kuries Act VII of 1107 (hereinafter referred to as 'the Act'). The plaintiff was a subscriber to Division A and Division B of the ticket and paid all the subscriptions promptly and regularly. But even after the termination of kuri plaintiff was not paid the proportionate share of unpaid auction discount, he filed the suit. Since the entire information remained with the foreman, the plaintiff expected to get Rs. 4,000/- and on the said amount he also calculated interest @ 12% per annum and filed the suit.

The defendant no. 2 contested the suit taking the stand that the kuri Vaimpu stipulate that the auction discount lost by the subscriber is to be divided among prompt subscribers and prompt suscribers are only entitled to the forfeited dividend as mentioned in clause 8(c) of the Vaimpu. According to defendant no. 2 the subscribers are entitled to get the amount as per the Vaimpu and since the Vaimpu does not contain any provision for distribution of the auction discount lost by a subscriber. The plaintiff's claim is untenable. Defendant no. 1, State of Kerala filed written Statement stating that the State is not a necessary party and State has nothing to do with the kuries conducted by defendant no. 2. On these pleadings the learned Trial Judge framed as many as six issues and on examining the relevant provisions of the Act as well as the Vaimpu and on examining the materials on record came to the conclusion that the foreman cannot claim anything more than what is specifically provided in the Vaimpu and under the Vaimpu the foreman can have commission as indicated. So far as amount of forfeited discount in respect of the non-Prized subscribers is concerned the learned Trial Judge came to the conclusion that in the absence of any specific provision either in the Act or in the Vaimpu and since the foreman cannot take or appropriate the amount more than what is provided for in the Vaimpu, the same should be distributed among the prompt subscribers on the termination of the kuri.

On examining the documentary evidence on record the court came to the conclusion that a sum of Rs. 1,81,003.35 remained outstanding with the foreman as undivided auction discount and to this amount a sum of Rs. 2.232.87 was to be added and therefore the total amount which remained with the foreman by way of unpaid auction discount was Rs.1,82,667.94 and the said amount has to be distributed among the prompt subscribers including the plaintiff. On calculating the number of prompt Subscribers the court came to the conclusion that the plaintiff was entitled to Rs. 41,247.40. With this conclusion the suit having been decreed, defendant no. 2 preferred an appeal to the High Court of Kerala.

The Division Bench which initially heard the appeal being of the opinion that it raises a substantial question of law, referred the matter to a Full Bench. The question formulated by the Division Bench for being answered by the Full Bench was "Whether the discount forfeited by the non-prized subscribers is liable to be distributed among the prompt and regular subscribers?" The Full Bench having considered the different provisions of the Act as well as the Vaimpu and taking into account the fact that the foreman has no right to retain any amount other than the commission or remuneration fixed under the Act and the Vaimpu, came to hold that the caution discount forfeited by the "non-prized" subscribers also will have to be distributed after the termination of the kuri in proportion to the share of the ticket. to the subscribers who have remitted regularly the installment amounts till that date. With the aforesaid finding the appeal having been dismissed and the judgment

and decree of the Principal Subordinate Judge, Trichur having been confirmed, the present appeal by special leave has been preferred.

Mr. Krishnamani, the learned senior counsel for the appellant placed before us the relevant provisions of the Act and the Vaimpu and contended that the High Court committed error by misreading clause 8(c) of the Vaimpu and by coming to the conclusion that the unpaid auction discount has to be distributed among the prompt and regularly paid subscribers. According to Mr. Krishnamani, it is the Vaimpu which determines the rights of the parties and since Vaimpu does not authorize distribution of the auction discount forfeited by the "non prized" subscribers, the conclusion of the High Court is erroneous in law.

Even though notice had been duly served on the plaintiff respondent but since the plaintiff did not appear either in person or through counsel and in view of the importance of the matter we thought it appropriate to take the assistance of a counsel and Mr. Sitaramiah, learned senior counsel agreed to render assistance to the court. We keep on record our deep appreciation for the services rendered by Mr. Sitaramiah, learned senior counsel. Mr. Sitaramiah placed before us the different provisions of the Act as well as the Vaimpu and contended that the foreman is not entitled to get a pie more than what is provided in the Vaimpu. In that view of the matter the reasonable conclusion is that the auction discount forfeited by the "non-prized" subscribers will have to be distributed among the regular subscribers on the termination of the kuri. He placed on record similar provisions in the Central Act, Andhra Pradesh and Tamil Nadu Acts.

In View of the rival submissions at the bar, it will be appropriate for us to examine different provisions of the Act as well as the relevant provisions of the Vaimpu:

"Kuri" has been defined in Section 3 of the Act. thus :

> "Kuri" means a transaction by which one or more person 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 instalments for a certain definite period, and that each in his turn as determined by lot or by auction or in such manner as may be provided for in the Vaimpu Shall be entitled to the prize amount'.

"Vaimpu" has been defined in Section 3(2) of the Act. thus :

> "Vaimpu" is a document containing the terms of agreement between the foreman and the subscribers relating to the Kuri.

"Kuri amount" has been defined in Section 3(3) of the Act, thus :

> "Kuri amount" means the sum total of the contributions payable by the subscribers for any instalment without any deduction for discount as defined in clause (4).

"Discount" has been defined in Section 3(4) of the Act, thus:

> "Discount" means the amount of money or quality of grain which a

prize-winner has, under the terms of the vaimpu, to forego for the payment of Veethapalisa, foreman's commission and other expenses.

"Prize amount" has been defined in Section 3(6) of the Act, thus:

"Prize amount" means the Kuri amount less the discount; it includes in the case of the fraction of a ticket the difference between the proportionate Kuri amount and the discount on the particular fraction of the ticket.

"Foreman" has been defined in Section 3(7) of the Act, thus:

"Foreman" is the person who under the Vaimpu is responsible for the conduct of the Kuri.

"Veethapalisa" has been defined in Section 3(9) of the Act, thus.

"Veethapalisa" is the share of a Subscriber in the discount available under the vaimpu for rateable distribution among the subscribers at each instalment of the Kuri.

Section 6(6) of the Act provides that in every Kuri there shall be a Vaimpu in duplicate and such vaimpu shall contain the mode and proportion in which the discount is distributed by way of veethapalisa, foreman's commission and other allowances, if any. Under Section 14 of the Act the foreman is entitled to obtain his prize at the instalment specified in the vaimpu without any deduction for discount and to such commission or remuneration as may be fixed by the vaimpu for the conduct of Kuri. Section 15 stipulate the duties of a foreman. Under Section 17 a foreman remains liable to subscribers for the amount due to them. Under Section 19 non-prized subscribers are required to pay their subscription in accordance with the provisions contained in the Vaimpu, within a period of 10 days grace from the due date to pay the subscription and in default of such payment then he is liable to such consequences as may be provided for in the Vaimpu. Section 20 of the Act empowers the foreman to remove a non-prized subscriber from the list of subscribers and to substitute any other person in his place if the non-prized subscriber defaults to pay his contribution in accordance with Section 19. Under Section 21 even a defaulting non-prized subscriber is entitled to recover from the foreman his contributions subject to such deductions as may be provided for in the Vaimpu. Section 22 deals with prized subscribers. Section 23 deals with the manner in which a prized subscriber is required to pay his subscription in accordance with vaimpu. English translation of Clauses 8 and 11b of the Vaimpu, which was produced before us by Mr. Krishnamani, may be quoted hareinbelow in extenso:

"8(a) Out of the amount of Rs. 10,000/- realised by the company as fixed discount from the two scratched numbers. One prized and the other auctioned, at every instalment, Rs 5,000/- will be appropriated as the Foreman's commission for the management of the Kuri by the company and the balance Rs. 5,000/- will be

distributed as dividend to the subscribers in two divisions, who have not been prized or who have not bid and auctioned ticket.

(b) Since the company does not take a forman's ticket all subscribers are entitled to the dividend from the first instalment and it is sufficient if they pay only the balance amount after such deduction (dividend).

(c) Auction discount will be distributed to all subscribers in proportion to their ticket share, irrespective of whether prized, non prized, auctioned or non auctioned. But prized and auctioned subscribers will not be eligible for the auction discount if they do not pay the instalments within the due date. The auction discount, so forfeited by the prized and auctioned subscribers will be distributed after the termination of the Kuri, in proportion to the share of the ticket. To the subscribers who have remitted regularly the instalment amount till that date.

(d) Those subscribers who are eligible for the dividend as above stated, need remit at each instalment only the amount after deduction of dividend, as their share. But if the dividend amount exceeds the instalment amount, such exceeds the instalment amount, such excess will be paid in cash to the subscribers.

11(b) If the non prized and non auctioned subscribers do not remit the instalment amount within ten days of the due date, they can pay the said amount together with 12% interest on or before the next due date. If it is not so done, grace period (10 days) will not be allowed for the next and succeeding instalments and such subscribers will forfeit the discounts (dividend, auction discount)of the three defaulted instalments if they default continuously two instalments along with the interest and fail to remit the third instalment, unless otherwise permitted by the company, the tickets of subscribers, who have defaulted continuously three instalments, will be scratched and they will automatically lose their right to be subscribers. The company will have the right to remove their names from the kuri list and will have the power to

transfer to itself or enroll fresh subscribers instead. But non-removal from the list of subscribers or non-substitution of another in such cases shall not be construed as having allowed the continuous defaulter to continue as a subscriber."

The provisions of chit Funds Act. 1961 and its constitutional validity came up for consideration before this court in the case of Shriram Chits and Investment (P) Ltd. v. Union of India and others. S.C.C. 1993(4) Suppl. 226. The said Act is pari materia with the Act now under consideration. This court considered the role of foreman in the chit transactions and came to hold and indicated the manner in which unscrupulous foreman resorted to unfair methods to secure illegal gains, thus:

"The foreman derives his income in different ways, both legal and illegal. In the former category can be included items such as admission fee from members, penal interest or penalty fee from defaulting members and forfeiture of their dividend, interest on loans to non-prized chit holders. fees for transfer of shares in the chit, deduction from the subscription paid by a member who wants to resign, dividends on the chit reserved for himself interest on the chit prize taken without deduction, interest on the chit prize which the prized member may not be in a position to collect immediately, and subscriptions paid by members who discontinue in the middle of the scheme but do not care to claim refund.

The unscrupulous among the foremen resort to so many unfair methods to secure illegal gains. A few of these methods are briefly mentioned below:

(i) Enrollment of fictitious members to completes the required number of members in a chit series. If a real and needy non-prized member is not able to come forward to offer a high discount at the auction. One of these benami members is Shown to get the prize thereby depriving the real members of the opportunity, (ii) Similarly, it is possible to exploit needy non-prized member or a new member so that he gets the prize only at the maximum discount. (iii) The prized member is supposed to get the amount soon after the draw or auction is over of course on furnishing the security. But the foreman adopts tactics which delay the actual payment for a considerable time, meanwhile he uses the money interest-free. If he

> succeeds in delaying the payment till the succeeding draw, the earlier prize winner is given the prize out of the collections of the succeeding draw. Thus, one instalment is perpetually in the hands of the foreman to be utilized in any way he likes.
>
> The above are only examples to illustrate the way in which some foremen minimize their profits. They do not take into account the cases where the foreman and his associates disappear from the scene and are untraceable. The police have many such cases on their record. During 1962-66, as many as 255 chitties collapsed in several districts of Kerala on account of such malpractices."

Bearing in mind what has been stated by this court in the aforesaid case with regard to the manner in which the foreman exploits the subscribers and on examining the provisions of the Act and the Vaimpu referred to earlier, we have no hesitation to come to the conclusion that a foreman is only entitled to the commission as is provided in the vaimpu and is not entitled to anything more. In view of the specific language used in clause 8(c) of the vaimpu, the amount of auction discount has to be distributed among all the subscribers in proportion to their ticket share. We are further of the view that the forfeited discount of non-prized subscribers will have to be distributed among the subscribers who have remitted their subscriptions regularly. It is true that there is no specific provision in the vaimpu but since under the Act and the vaimpu the entitlement of the foreman has been indicated and the foreman cannot take anything more than what is provided for and therefore the amount has to be distributed among the regular subscribers. In our considered opinion, the Full Bench of the Kerala High Court rightly answered the question and we do not find any legal infirmity in the same. This appeal is accordingly dismissed but in the circumstances without any order as to costs.