



2025:KER:97773

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 19TH DAY OF DECEMBER 2025 / 28TH AGRAHAYANA, 1947

RSA NO. 980 OF 2013

**AGAINST THE JUDGMENT AND DECREE DATED 25.06.2013 IN AS
NO.82 OF 2011 OF THE SUB COURT, PERUMBAVOOR ARISING OUT
OF THE JUDGMENT AND DECREE DATED 15.06.2011 IN OS NO.226
OF 2008 OF THE MUNSIF COURT, PERUMBAVOOR**

APPELLANTS[APPELLANTS/DEFENDANTS NOS.1 & 2]:

- 1 N.K.RAMACHANDRAN
AGED 58 YEARS, S/O KUNJAPPAN, NJARAKKATTU
HOUSE, VENGOLA KARA, VENGOLA VILLAGE,
KUNNATHUNADU TALUK
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
SRI KUNJAPPAN, S/O RAMAN N.K, NJARAKKATTU
HOUSE, KADAYIRUPU KARA, AICKARANADU NORTH
VILLAGE**
- 2 PANKAJAM
AGED 50 YEARS, W/O RAMACHANDRAN N.J,
NJARAKKATTU HOUSE, VENGOLA KARA, VANGOLA
VILLAGE, KUNNATHUNADU TALUK
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
SRI KUNJAPPAN, S/O RAMAN N.K, NJARAKKATTU
HOUSE, KADAYIRUPU KARA, AICKARANADU NORTH
VILLAGE**

**BY ADV
SRI.P.THOMAS GEEVERGHESE**

RESPONDENTS[RESPONDENTS/PLAINTIFF & DEFENDANTS NOS.3 & 4]:

- 1 T.B.SUNIL KUMAR
AGED 40 YEARS, S/O BHASKARAN PILLA,**



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**THEKKEPILLY HOUSE, ELEMBAKAPPILLY KARA,
KOOVAPPADY VILLAGE, KUNNATHUNADU TALUK,
PIN-683 544**

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**N.E ABRAHAM(DIED)
AGED 78 YEARS, S/O ITHAPPIRI, NJATTUKALA
HOUSE, VALAMPURA KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK, PIN-683 548
(IT IS RECORDED THAT THE 3RD RESPONDENT IS THE
SON OF THE DECEASED 2ND RESPONDENT AS PER
ORDER DATED 13/10/2025)**

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**KURIAKOSE
AGED 38 YEARS, S/O N.E ABRAHAM, NJATTUKALA
HOUSE, VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK, PIN-683 548**

BY ADVS.

SRI.T.KRISHNANUNNI (SR.), FOR R1

SRI.THAREEQ ANWAR K., FOR R1

SRI.K.C.KIRAN, FOR R1

SRI.JAMSHEED HAFIZ, FOR R1

G.SREEKUMAR CHELUR, FOR R2 AND R3(B/O)

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19.12.2025, ALONG WITH RSA.1097/2013, 1100/2013 AND
CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**



2025:KER:97773

R.S.A Nos.980, 1097, 1100 and 1188 of 2013

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 19TH DAY OF DECEMBER 2025 / 28TH AGRAHAYANA, 1947

RSA NO. 1097 OF 2013

**AGAINST THE JUDGMENT AND DECREE DATED 25.06.2013 IN AS
NO.81 OF 2011 OF THE SUB COURT, PERUMBAVOOR ARISING OUT
OF THE JUDGMENT AND DECREE DATED 15.06.2011 IN OS NO.226
OF 2008 OF THE MUNSIF COURT, PERUMBAVOOR**

APPELLANTS/APPELLANTS/DEFENDANTS 3 AND 4:

**1 N.E.ABRAHAM (DIED, LHR RECORDED)
AGED 80 YEARS, S/O. ITHAPPIRI, NJATTUKALA
HOUSE, VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK.,
[THE 2ND APPELLANT IS RECORDED AS THE LEGAL
HEIR OF DECEASED 1ST APPELLANT , AS PER ORDER
DATED 13/10/2025 VIDE MEMO DATED 13.10.2025 IN
CONNECTED CASE RSA No.1100/13.]**

**2 KURIAKOSE
AGED 40 YEARS, S/O. N.E.ABRAHAM, NJATTUKALA
HOUSE, VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK.**

**BY ADV
SHRI.G.SREEKUMAR (CHELUR)**

RESPONDENTS/RESPONDENTS/PLAINTIFF AND DEFENDANTS 1 AND 2:

**1 T.B.SUNILKUMAR
AGED 42 YEARS, S/O. BHASKARAN PILLAI,
THEKEPILLY HOUSE, ELAMBAKAPILLY KARA,
KOOVAPADY VILLAGE, KUNNATHUNADU TALUK-682 019.**



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2 **N.K.RAMACHANDRAN**
AGED 60 YEARS, S/O. KUNJAPPAN, NJARAKATTU
HOUSE, VENGOLA KARA, VENGOLA VILLAGE,
KUNNATHUNADU TALUK,
REP.BY HIS POWER OF ATTORNEY HOLDER KUNJAPPAN,
AGED 80, S/O. RAMAN N.K., NJARAKATU HOUSE,
KADAYIRUPPU KARA, AICKARANADU NORTH VILLAGE,
PIN-682 311.

3 **PANKAJAM**
AGED 52 YEARS, W/O. RAMACHANDRAN N.K.,
NJARAKATTU HOUSE, VENGOLA KARA, VENGOLA
VILLAGE, KUNNATHUNADU TALUK, REP.BY HER POWER
OF ATTORNEY HOLDER KUNJAPPAN, AGED 80, S/O.
RAMAN N.K., NJARAKATU HOUSE, KADAYIRUPU KARA,
AICKARANADU NORTH VILLAGE, PIN-682 311.

BY ADVS.

SRI.T.KRISHNANUNNI (SR.), FOR R1

SRI.THAREEQ ANWAR K., FOR R1

SRI.K.C.KIRAN, FOR R1

SMT.MEENA.A., FOR R1

SMT.P.A.SHEEJA, FOR R1

SRI.P.THOMAS GEEVERGHESE, FOR R2 AND R3

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19.12.2025, ALONG WITH RSA.980/2013 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



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R.S.A Nos.980, 1097, 1100 and 1188 of 2013

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 19TH DAY OF DECEMBER 2025 / 28TH AGRAHAYANA, 1947

RSA NO. 1100 OF 2013

**AGAINST THE JUDGMENT AND DECREE DATED 25.06.2013 IN AS
NO.82 OF 2011 OF THE SUB COURT, PERUMBAVOOR ARISING OUT
OF THE JUDGMENT AND DECREE DATED 15.06.2011 IN OS NO.226
OF 2008 OF THE MUNSIF COURT, PERUMBAVOOR**

APPELLANTS/RESPONDENTS 2 AND 3/DEFENDANTS 3 AND 4:

**1 N.E. ABRAHAM (DIED, LHR RECORDED)
AGED 80 YEARS, S/O. ITHAPPIRI, NJATTUKALA
HOUSE, VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK.
[THE 2ND APPELLANT IS RECORDED AS THE LEGAL
HEIR OF DECEASED 1ST APPELLANT AS PER ORDER
DATED 13.10.2025 VIDE MEMO DATED 13.10.2025.]**

**2 KURIAKOSE
AGED 40, S/O.N.E. ABRAHAM, NJATTUKALA HOUSE,
VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK.**

**BY ADV
SHRI.G.SREEKUMAR (CHELUR)**

**RESPONDENTS/FIRST RESPONDENT AND APPELLANTS 1 AND
2/PLAINTIFF AND DEFENDANTS 1 AND 2:**

**1 T.B. SUNIL KUMAR
AGED 42, S/O. BHASKARAN PILLAI, THEKEPILLY
HOUSE, ELAMBAKAPILLY KARA, KOOVAPADY VILLAGE,
KUNNATHUNADU TALUK - 682 544.**



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- 2 **N.K. RAMACHANDRAN**
AGED 60, S/O. KUNJAPPAN, NJARAKATTU HOUSE,
VENGOLA KARA, VENGOLA VILLAGE, KUNNATHUNADU
TALUK, REPRESENTED BY HIS POWER OF ATTORNEY
HOLDER KUNJAPPAN, AGED 80, S/O. RAMAN N.K.,
NJARAKATTU HOUSE, KADAYIRUPU KARA, AICKARANADU
NORTH VILLAGE - 682 311.
- 3 **PANKAJAM**
AGED 52, W/O. RAMACHANDRAN N.K., NJARAKATTU
HOUSE, VENGOLA KARA, VENGOLA VILLAGE,
KUNNATHUNADU TALUK, REPRESENTED BY HIS POWER
OF ATTORNEY HOLDER KUNJAPPAN, AGED 80, S/O.
RAMAN N.K., NJARAKATTU HOUSE, KADAYIRUPU KARA,
AICKARANADU NORTH VILLAGE - 682 311.

BY ADVS.

SRI.T.KRISHNANUNNI (SR.), FOR R1

SRI.THAREEQ ANWAR K., FOR R1

SRI.K.C.KIRAN, FOR R1

SMT.MEENA.A., FOR R1

SMT.P.A.SHEEJA, FOR R1

SRI.P.THOMAS GEEVERGHESE, FOR R2 AND R3

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19.12.2025, ALONG WITH RSA.980/2013 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



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R.S.A Nos.980, 1097, 1100 and 1188 of 2013

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 19TH DAY OF DECEMBER 2025 / 28TH AGRAHAYANA, 1947

RSA NO. 1188 OF 2013

**AGAINST THE JUDGMENT AND DECREE DATED 25.06.2013 IN AS
NO.81 OF 2011 OF THE SUB COURT, PERUMBAVOOR ARISING OUT
OF THE JUDGMENT AND DECREE DATED 15.06.2011 IN OS NO.226
OF 2008 OF THE MUNSIF COURT, PERUMBAVOOR**

APPELLANTS[RESPONDENTS 2 & 3/DEFENDANTS NOS.1 & 2:

**1 N.K.RAMACHANDRAN
AGED 58 YEARS, S/O.KUNJAPPAN,NJARAKKATTU
HOUSE,VENGOLA KARA, VENGOLA VILLAGE,
KUNNATHUNADU TALUK,
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
SRI.KUNJAPPAN, AGED 78 YEARS, S/O.RAMAN.N.K,
NJARAKKATTU HOUSE, KADAYIRUPPU KARA,
AICKARANADU, NORTH VILLAGE.**

**2 PANKAJAM
AGED 50 YEARS, W/O.RAMACHANDRAN
N.K,, NJARAKKATTU HOUSE,VENGOLA KARA, VENGOLA
VILLAGE, KUNNATHUNADU TALUK,
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
SRI.KUNJAPPAN, AGED 78 YEARS, S/O.RAMAN.N.K,
NJARAKKATTU HOUSE, KADAYIRUPPU KARA,
AICKARANADU, NORTH VILLAGE.**

**BY ADV
SRI.P.THOMAS GEEVERGHESE**

**RESPONDENTS[APPELLANT NOS.1 & 2 AND 1ST
RESPONDENT/DEFENDANTS NOS.3 & 4 AND PLAINTIFF:**



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R.S.A Nos.980, 1097, 1100 and 1188 of 2013

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- 1 **N.E.ABRAHAM(DIED)**
AGED 78 YEARS, S/O.ITHAPPIRI, NJATTUKALA
HOUSE, VALAMPUR KARA, PATTIMATTOM VILLAGE,
KUNNATHUNADU TALUK, PIN - 683 541
(IT IS RECORDED THAT THE 2ND RESPONDENT IS THE
SON OF THE DECEASED 1ST RESPONDENT AS PER
ORDER DATED 13/10/2025)

- 2 **KURIAKOSE**
AGED 38 YEARS
S/O.N.E.ABRAHAM,NJATTUKALA HOUSE, VALAMPUR
KARA, PATTIMATTOM VILLAGE, KUNNATHUNADU TALUK,
PIN - 683 541

- 3 **T.B.SUNIL KUMAR**
AGED 40 YEARS, S/O.BHASKARAN PILLA,THEKKEPILLY
HOUSE, ELAMBAKAPPILLY KARA, KOOVAPPADY
VILLAGE, KUNNATHUNADU TALUK, PIN - 683 544

BY ADVS.
SRI.T.KRISHNANUNNI (SR.), FOR R3
SRI.THAREEQ ANWAR K., FOR R3
SMT.MEENA.A., FOR R3
SRI.G.SREEKUMAR CHELUR, FOR R1 AND R2 (B/O)

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19.12.2025, ALONG WITH RSA.980/2013 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



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R.S.A Nos.980, 1097, 1100 and 1188 of 2013

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“C.R”

EASWARAN S., J

**R.S.A No.980 of 2013,
R.S.A No.1097 of 2013,
R.S.A No.1100 of 2013,
and
R.S.A No.1188 of 2013**

Dated this the 19th day of December, 2025

COMMON JUDGMENT

These four appeals raise a common question and hence being considered together and are disposed of by this common judgment.

2. The appellants are the defendants in a suit for recovery of possession and a permanent prohibitory injunction. The plaint schedule property was purchased by the plaintiff by virtue of sale deed No.2819/1998 of SRO Puthencurz. Originally the property belonging to one Karuthedathu Yohannan, who had mortgaged the property for receiving a chitty amount from Thrissivaperoor Social Welfare Centre Kuri Unit, hereinafter called as the chitty company. In 1987, the company filed a suit and obtained a decree charged on the plaint schedule property. E.P No.271/1989 was



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filed before the Sub Court, Paravur, in which the schedule property was auctioned and the chitty company purchased the plaint schedule property and the sale was confirmed on 07.11.1990. Thereafter, the company obtained delivery of the property in a fresh proceeding as E.P No.63/1991. Subsequently, the plaint schedule property was sold to the plaintiff by the chitty company. Later, when defendants 1 and 2 tried to trespass into the property, plaintiff filed O.S No.298/1999 seeking injunction restraining the defendants from trespassing into the plaint schedule property. Finding that the plaintiff was divested of the possession of the suit property, the said suit was withdrawn with liberty to file a fresh suit and hence the present suit.

2.1 The defendants entered appearance and contested the suit by contending that the plaintiff had no right title and interest over the plaint schedule property. It was contended that the property originally belong to Yohannan, who had sold the property to one Suseela. In the year 1989, Suseela executed a sale deed in respect of the property in favour of defendants 1 and 2. The 1st defendant, in the year 1999 had executed a document in favour of the 2nd defendant and the 2nd defendant consequently sold the



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property to the 3rd defendant in the year 2005. The plaintiff contended that the subsequent documents are no longer valid in the eye of law. The defendants however raised the plea that as on the date of execution of the sale deed by the company in the favour of the plaintiff, the right title and interest over the property was already divested in favour of Suseela and in the absence of Suseela in the party array, the decree obtained by the chitty company is not executable. It was further contended that going by the nature of the document executed by Yohannan in favour of the chitty company, the right to enforce the security arose only on the default of the chitty amount and not from the date of execution of the deed. The fact that OS No.298/1999 was withdrawn would itself show that there is a cloud in the title of the plaintiff and in the absence of any prayer for declaration of title, the suit is not maintainable. On behalf of the plaintiff, Exts.A1 to A25 documents were produced and PW1 and PW2 were examined. On behalf of defendants, Exts.B1 to B21 documents were produced and DW1 to DW3 were examined. Exts.C1 and C2 are the reports of the Advocate Commissioner and Exts.C1(a) and C2(a) are the rough sketch and survey plan filed by the Advocate Commissioner. The



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trial court on appreciation of the oral and documentary evidence came to the conclusion that in the light of Exts.A4, A5 and A6 documents, a clear case of mortgage is made out and therefore the chitty company had a first charge over the property and consequential sale by Yohanan, during the pendency of the mortgage was not binding upon the chitty company. Consequently, the plaintiff was granted a decree for recovery of possession and injunction. Aggrieved, the defendants preferred A.S Nos.81/2011 and 82/2011 before the Sub Court, Perumbavoor. By judgment dated 25.06.2013, the First Appellate Court confirmed the findings of the trial court and dismissed the suit and hence the appeal.

3. On 10.10.2013, this Court admitted the appeal and framed the following substantial questions of law for considerations:-

1. Whether the property sold in execution of the decree and the property claimed by the defendants 3 and 4 are one and the same?
2. When the auction purchaser does not seek delivery of the property within one year can he file a separate suit for recovery of possession on the strength of the alleged deed obtained in the court auction ?
3. Is there any difficulties between Mortgage and Chitty - Hypothecation Bonds when the suit is not brought



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following the procedure under Order 34 can a property be simply put up for sale since that property was not attached ?

4. Heard Shri.P.Thomas Geeverghese, the learned counsel appearing for the appellants / defendants 1 and 2 in R.S.A Nos.980/2013 and 1188/2013, Shri.G.Sreekumar (Chelur), the learned counsel appearing for the appellants / defendants 3 and 4 in R.S.A No.1100/2013 and 1097/2013 and Shri.T.Krishnanunni, the learned Senior Counsel assisted by Shri.Thareeq Anwar, the learned counsel appearing for the 1st respondent / plaintiff.

5. Shri.P.Thomas Geeverghese, the learned counsel appearing for the appellants in R.S.A Nos.980/2013 and 1188/2013 raised the following submissions:-

(a) The execution of Exts.A4, A5 and A6 agreements by late Yohannan in favour of the Chitty Company has no legal sanctity inasmuch as the agreements are only a chitty hypothecation bond. Such an agreement does not have any legal efficacy. A debt under a chitty security bond would arise only on the date of default and going by the averments in Ext.A9 plaint, the default occurred only on 20.04.1985 and by that time, Yohannan had transferred the property in favour of Suseela.



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(b) Going by the provisions contained under the Chit Funds Act, 1982, a civil suit is barred under Section 64 of the Chit Funds Act. The remedy of the company, if any, was to initiate arbitration proceedings and not otherwise.

(c) Even assuming for argument sake that a suit was maintainable inasmuch as the subsequent assignees of the property are not made a party, the decree passed is not executable.

(d) The right of Yohannan over the property survives in the form of equity of redemption, which has been transferred to Suseela and later to the defendants and therefore at any rate, they are entitled to exercise the right of equity of redemption.

(e) The nature of the chitty security bond having been clearly explained by the Full Bench of this Court in **P.K.Achuthan v. SBT Calicut [1974 KHC 181]**. Going by the decision of the Hon'ble Supreme Court, in **Shriram Chits and Investment (P) Ltd v. Union of India and Others [1993 supp (4) SCC 226]**, no debtor and creditor relationship is established between a subscriber and a chitty company in case of execution of a security bond.



(f) Lastly it is contended that admittedly the chitty company was based at Bangalore and therefore they could not have filed a suit for recovery of money at Thrissur.

6. Shri.G.Sreekumar (Chelur) the learned counsel appearing for the appellants in R.S.A Nos.1097/2013 and 1100/2013, adopted the arguments of Shri.P.Thomas Geeverghese, the learned counsel appearing for the appellants in R.S.A Nos.980/2013 and 1188/2013. But however also raised the following submissions.

a) The decree in respect of 23.47 Ares of land, is un-executable because just before passing of the decree the schedule to the plaint, was amended. Though the amendment was allowed, the same was not carried forward to the decree and so much so that, there is no decree against 23.47 Ares of land. Since, the decree is a formal expression of the views of the court, inasmuch as there is no decree enabling the company to put up the property for sale in respect of the plaint schedule property, no consequences flows out of the sale certificate.

b) It is also not clear as to whether the chitty company had taken delivery of the property and in the absence of any delivery



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within a period of one year, no right title and interest stood conveyed into the hands of the company and thereby the plaintiff in the present suit also did not have a title.

c) Despite a cloud being created on the title of the plaintiff, no declaration of title was sought for and a mere recovery of possession will not suffice.

d) Ext.A9 suit is framed in contravention to the provisions of Order 34 Rule 2 of the Code of Civil Procedure, and hence has no legal efficacy and therefore the decree itself is a nullity.

e) Lastly, it is contended that despite the fact that the issue of ouster of jurisdiction, not been raised before the courts below, since, it is a pure question of law, it is permissible for the appellants to raise the contentions before this Court.

7. Per contra, Shri.T.Krishnanunni, the learned Senior Counsel appearing on behalf of the respondent / plaintiff countered the submissions of the learned counsel for the appellants that none of the contentions raised before this Court is sustainable in the eye of law. The contentions of the senior Counsel are summarized as follows.



a) It is too late for the defendants to contend that Exts.A4, A5 and A6 did not create any interest over the property. It is further pointed out that in the nature of contentions raised by the parties, it is evidently clear that Exts.A4, A5 and A6 are nothing but a security created by late Yohannan over his property and it is nothing but a simple mortgage.

b) Exts.A4, A5 and A6 being registered documents triggers the operation of Section 3 of the Transfer of Property Act and it constitutes a constructive notice to the appellants.

c) By Ext.A9 plaint, Ext.A11 auction certificate and Ext.A12 delivery report, it is explicitly proved beyond doubt that the property in question has been delivered to the chitty company and therefore the plea that the chitty company has not taken delivery of the property cannot be sustained. In fact, the original defendants in the suit for recovery of money had acknowledged the fact that the delivery of the property was given to the chitty company. Thus, a subsequent assignee, pending a mortgage need not be made a party by a mortgagee to recover the amount secured by the mortgagor.



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8. I have considered the rival submissions raised across the Bar, perused the judgments rendered by the courts below and the records of these cases.

Whether a debtor- creditor relationship exists when a subscriber bids a prized chit.

9. This question assumes significance in the context of this case since the appellants assert before this court that the plaintiff in OS No 251/1987 did not have any right to file a suit for recovery of money. Both sides presented their own interpretation of the Exts.A4 to A6 documents. The decision in the appeal ultimately revolves upon the construction placed by this court to these documents. The further question would be whether Exts.A4, A5 and A6 constitutes a simple mortgage, or a chitty hypothecation bond. Before going into the above question of law, this court needs to address this issue so as to proceed further. The learned counsel for the appellants argued that Exts.A4 to A6 is only a security bond executed by a subscriber of a chitty, in favour of the company conducting the 'kuri' business, no mortgage is created, but the same becomes enforceable only on the date of default. To support their contentions the decision of the Full



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Bench of this Court **P.K.Achuthan v. SBT, Calicut** [1974 KHC

181] is pressed into service. Paragraph 7 of the decision of the Full

Bench reads as under:-

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

10. It is further argued that, the decision in **P.K Achuthan** (supra) was affirmed by the Three Bench Decision of the Hon'ble Supreme Court in **Shriram Chits and**



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Investment (P) Ltd v. Union of India and Others [1993

supp (4) SCC 226]. The relevant paragraphs relied on by the

learned counsel for the appellants are as under :

19. The question as to the nature of chit agreement came up for consideration before a Full Bench of five Judges of the Kerala High Court in Janardhana Mallan v. Gangadharan, AIR 1983 Ker 178. The Full Bench there was concerned with the chit agreement under the Kerala Chitties Act (Act 23 of 1975) where the Kerala High Court speaking through Poti, Acting Chief Justice, took the view that on entering into the Chitty agreement a debt is not incurred by the subscriber for the amount of all the future instalments and in respect of such amount there is no debtor-creditor relationship. 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 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. Therefore, 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. The Full Bench in this decision overruled its earlier decision in the case of P. K. Achuthan v. State Bank of Travancore, Calicut, AIR 1975 Ker 47. While rendering the decision in Janardhana Mallan (AIR 1983 Ker 178) the Full Bench of the Kerala High Court considered a catena of decisions starting from 1937 in the matter of Ramanatha Ayyar v. G.G.Narayanaswami Ayyar, AIR 1937 Mad 364. The Andhra Pradesh High Court also, while dealing with the transaction of a chit fund organisation, in the matter of Dhoosa Narasimloo v. Yelala Rajanna, ILR 1958 AP 409, where the petitioner had filed a suit in the Court of the District Judge against the



respondents on a promissory note executed by them for the amount they drew in a pool from a chit fund organisation and where the District Judge had dismissed the suit for want of a licence under S.9(2) of the Hyderabad Money Lenders Act (Act V of 1349 F.) and on revision, the question that came for consideration was whether the chit fund organisation could be regarded as a moneylender within the meaning of the said Act and whether its transactions partake the nature of a loan. Srinivasachari, J. speaking for the Court held that the amount drawn by a member of a chit fund who bid at the periodical auction giving the largest discount could not come within the definition of a loan within the meaning of the Money Lenders Act nor could such a transaction be regarded as a money lending transaction and in the circumstances S.9 of the Hyderabad Money Lenders Act (V of 1349 F) could have no application to such a case. At page 415 of the aforesaid report it has been observed "in our opinion there is nothing in the chit fund transaction which could be called the business of money lending. It is in essence an organisation for mutual benefit." It approved the decision of the Madras High Court in *P.N.Raghavan Pattar v. S.Arumugham*, (1934 (68) Mad LJ 283 : AIR 1935 Mad. 385). That was also a case of chit fund transaction and the question for decision was whether a provision in the bond for payment of the whole amount in default of any one instalment was in the nature of a penalty coming within S.74, Illustration (g) of the Contract Act. The learned Judges ruled that a chit fund transaction was not a case of borrowing at all and it was entirely different from a loan transaction. The learned Judges further held that "a loan envisages the relationship of a creditor and a debtor insofar as the lender and the borrower are concerned. There cannot be the relationship of a creditor and debtor between the stake holder and a subscriber, in a chit fund transaction. If the stake-holder advances any amount he advances only to one of the members, the funds of the whole body of the chit fund, as the funds belong to the whole lot of



subscribers, the members, borrower is as much a creditor as a debtor. The amounts are in deposit with the stake-holder only as a trustee for the benefit of the members of the fund." Srinivasachari, J. noticed the observations of Srinivasa Iyengar, J. in Kudkunjee Timmarsa Pai v. Kanjarpane Subba Rao, AIR 1928 Mad 256 where Srinivasa Iyengar, J. regarded the position of the Manager of a kuri chit as a trustee for all the subscribers of the chit fund.

20. We were referred to the decision of this Court in K. P. Subbarama Sastri v. K.S. Raghavan, (1987 (2) SCC 424) wherein a contract providing for payment of money in instalments and stipulating that on default in payment of any of the instalments all the future instalments shall be payable at a time with interest was held not penal in nature in the case of kuri transaction under the Kerala Chitties Act, 1975. While upholding the transaction a Bench of this Court approved the decision of the earlier Full Bench decision of the Kerala High Court in the case P. K. Achuthan (AIR 1975 Ker 47) wherein the Kerala High Court had upheld such a transaction and held it to be of not a penal nature. In this context Eradi, J. (as His Lordship then was) speaking for the Full Bench observed that a subscriber truly and really becomes a debtor for the prized amount paid to him. It will be noticed that the later Full Bench decision of the Kerala High Court in Janardhana Mallan (AIR 1983 Ker 178) was not brought to the notice of this Court and the Court was referred to the overruled decision of the Kerala High Court. The fact remains that the question involved before us as to the true nature of transaction for the purpose of finding out of the relevant entry in the Constitution into which it may fall, was not involved in that case.

21. It appears to us, but for the discordant note struck by the other Full Bench of the Kerala High Court in the aforesaid case of P. K. Achuthan (AIR 1975 Ker 47), the consistent view of all the High Courts has been that it is not a money lending transaction and that there is no



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relationship of debtor and creditor for the purpose of it being treated as a money lending transaction.

11. Does ***Shriram Chits(supra)*** affirm the view of the full bench of this court in ***P.K. Achuthan(supra)***. Read as may, this court could not find any such proposition in Shriram Chits (Supra), as now canvassed by the learned Counsel for the appellants. The Supreme Court did not lay down that, in a case of subscriber of a chit, no debtor creditor relationship is made out. Nor did it lay down the proposition that law laid down by this court in P.K. Achuthan (supra) is the correct view.

12. In ***Oriental Kuries Ltd. rep. by its Chairman P.D.Jose v. Lissa and Others [2019 (19) SCC 732]***, the Supreme Court held that when a prized subscriber is allowed to draw the prized chit amount, it is in the nature of a loan.

Paragraph 10 of the decision reads as under :-

10. We do not agree with the view expressed by the Division Bench. When a prized subscriber is allowed to draw the chit amount, which is in the nature of a grant of a loan to him from the common fund in the hands of the foreman, with the concessional facility of effecting re-payment in installments; this is subject to the stipulation that the concession is liable to be withdrawn in the event of default being committed in payment of any of the installments.



The chit subscriber at the time of subscription, incurs a debt which is payable in installments. If a subscriber is permitted to withdraw the collected sum on his turn, without being bound to pay the future installments, it would jeopardize the interest of all other subscribers, and the entire mechanism of the chit fund system would collapse.

13. Therefore, it is beyond cavil that in a case where a subscriber of a chit, bids in an auction a prized chit, he is certainly bound to repay the amount as per the contract. It is difficult to envisage a situation to hold that in such a case no debtor - creditor relationship is made out. Therefore, the contrary plea is only to be rejected.

Whether Ext A4,A5 and A 6 can be construed as a simple mortgage.

14. Both sides are at serious variance as regards the exact nature of right which Exts.A4 to A6 document creates. The appellants contend that the same is only a security bond and hence the rights if any will accrue only on default. But then, it is beyond doubt that the relationship between Yohannan and the chit company was certainly that of a debtor- creditor relationship. Still, it will be expedient to construe the nature of the transaction to give a finality to the issue raised in the appeal.



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15. Pertinently, Exts.A4, A5 and A6 are not executed at the same time when Yohannan had bid for the prized chit in auction. The transaction is after Yohannan bidding the prized chit. Irrespective of the nature of the relationship between Yohannan and the chit company, as soon as Exts.A4, A5 and A6 are executed, the relationship gets elevated by itself into a debtor and creditor relationship, especially since he had offered his property as security for the amount he bid in auction. Therefore the creditor, chit company was entitled to maintain a suit purely based on Exts.A4, A5 and A6..

16. Moreover, Exts.A4, A5 and A6 documents being registered documents operates as a constructive notice between the chit company qua the appellants in terms of Section 3 of the Transfer of Property Act 1882. Therefore any subsequent alienation by Yohannan can only be subservient to Exts.A4, A5 and A6.

17. Still further, the nature of Exts.A4, A5 and A6 cannot be disputed by the appellants at this point of time. All the defendants in the written statement were in unison as regards the nature of transaction. In fact, the defendants went to the extent of



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saying that their predecessor is entitled for equity of redemption, there by clearly admitting the fact that Exts.A4, A5 and A6 created a mortgage. Therefore, this court is inclined to hold that Ext.A4, Ext.A5, and Ext.A6 documents are nothing but a deed of simple mortgage.

Applicability of Chit Funds Act 1982.

18. This question assumes significance in the context of this case especially since the appellants contend that the plaintiff in Ext.A9 suit by a chit company registered under the Chit Funds Act, 1982 before Bangalore and therefore, the provisions of the Act must be applied with full vigour. The contentions as regards applicability of the Act is multifarious.

- a) the suit is barred under Section 64
- b) the assignees of the property must be made a party
- c) suit filed in the Sub Court, Paravoor, is not maintainable.

19. Before going into the question whether the suit is maintainable at all or not, one needs to consider whether the Act itself is applicable to the State of Kerala or not. Though the Act came into force in the year 1982, it was not notified till 30.04.2012.



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20. What is the position of a chit subscribed prior to 30-4-2012 came for consideration before the Division Bench in **Hi-Line Kuries Pvt. Ltd. v. Sukheesh** [2022(3) KLT 159]. It was held that, the provisions of Section 64(1) of the Chit Funds Act have no application to any chit started in the State of Kerala before the commencement of the Chit Funds Act that is 30.04.2012.

21. In the light of the decision of the Division Bench, it is concluded that the provisions of Section 64 of the Chit Funds Act is not attracted in the present case and consequently the jurisdiction of the Civil Court is not ousted.

Whether the subsequent assignee should be made a party to suit by the Chit Company?.

22. The issue becomes academic in the sense that once it is concluded that Chit Funds Act 1982 does not apply, the consequence should follow and the appellant cannot contend that they are necessary parties to Ext.A9 suit.

23. The issue could also be considered in the context of the Transfer of Property Act, 1882. Once it is concluded that Exts.A4, A5 & A6 are nothing but a simple mortgage, the further question is



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whether the mortgagee is bound by the subsequent assignment by the mortgagor.

24. One cannot but notice the fact that 'once a mortgage is always a mortgage' principle applies with all vigor in the facts of the case. In terms of Section 58 of the Transfer of Property Act 1882, the mortgagee is not bound by the transfer effected by the mortgagor and such transfer is not binding upon him unless it is done with the junction of the mortgagee.

Whether OS No 251/1987 is properly framed or does it offend Order 34 Rule 2 of Code of Civil Procedure, 1908.

25. On a close reading of the plaint in OS No.251 of 1987 shows that it is nothing but a suit for recovery of money charged on the property. The charge is claimed based on Exts.A4, A5 & A6 which is an agreement creating a simple mortgage. However, Shri.G.Sreekumar(chelur), learned counsel appearing for appellants in R.S.A Nos.1097/2013 and 1100/2013 pointed out that since OS No 257/1987 does not meet the requirement of Order 34 Rule 1 of CPC, the decree passed is a nullity.

Order 34 Rule 1 CPC reads as under;



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ORDER XXXIV
SUITS RELATING TO MORTGAGES OF IMMOVABLE
PROPERTY

1. **Parties to suits for foreclosure , sale and redemption-**
Subject to the provisions of this Code, all parties having an interest either in the mortgage- security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation- A pusine mortgagee may sue for foreclosure or for sale without making prior mortgagee a party to the suit: and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgagee.

26. Reliance is placed on the above provision to contend that since the appellants are assignees pending mortgage, they ought to have been made a party and in their absence the decree passed in OS No 257/1987 is inexecutable.

27. This court, finds itself unable to subscribe to the above argument for multiple reasons. The essential difference in a suit under Order 34 Rule 1 of CPC and a suit for recovery of money charged on the property is that no personal decree can be claimed in a suit under Order 34 Rule 1 of CPC unless the mortgagor by covenant binds himself to pay the mortgage money. Moreover, in order to maintain a suit under Order 34 Rule 1 of CPC, amount should be advanced by the mortgagee in pursuance to the mortgage. Normally in such a case, no personal decree can be



claimed. Whereas, in a suit for recovery of money charged on the mortgage, the creditor is entitled to ask for a personal decree as well as a charged decree. A perusal of Ext.A10 decree shows that the chit company was granted a personal decree as well as a charged decree. That apart, the larger question to be considered is whether the mortgagee is bound by the subsequent transfer by the mortgagor. Only if he is bound by the subsequent transfer, he need to implead the subsequent assignee.

28. As stated above, character of Exts.A4 to A6 is nothing but a simple mortgage governed by Section 58(a) of the Transfer of Property Act 1882. The essential characteristic of a simple mortgage are twofold. i) the personal obligation and ii) the property. Thus, once a mortgage is created, the right of the mortgagee to recover his mortgage money cannot be defeated by the mortgagor by alienating the property. The mortgagor is thus disabled from encumbering the property without the junction of the mortgagee and if he does, the same is not binding on the mortgagee and he is entitled to ignore the transfer and proceed to enforce his mortgage in accordance with law and in which case,



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the subsequent transferee is bound by the decree passed in the suit to enforce the mortgage.

29. Therefore, it is concluded that the OS No 257/1987 is not hit by provisions of Order 34 Rule 1 and the decree passed in the suit cannot be held to be a nullity and the provisions of Order 34 Rule 2 of CPC does not apply to a suit for recovery of money charged on the mortgage.

Whether there is any executable decree in respect of plaint schedule property.

30. Shri.G.Sreekumar (Chelur) the learned counsel for the appellants in R.S.A Nos.1097/2013 and 1100/2013 asserted that there is no decree against 23.47 Ares of land. According to the learned counsel, the plaintiff in OS No.251/1987 had sought for amendment of the plaint schedule and the same was granted. However, when the decree was drawn, the same was not in tune with the amended plaint schedule.

31. It is pertinent to mention that originally OS No.251/1987 contained 5 items of property. Later by filing IA No.1315/1988, the plaintiff sought for deleting the 5th item in the plaint schedule consisting of 35.21 Ares. It has come out in evidence that the



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plaintiff therein had released the mortgage in respect of 35.21 Ares and hence the claim was relinquished. When the suit was decreed on 10.06.1988, the decree was granted in respect of schedule 1 to 3 and 5 properties. While drawing up the decree, the extent of 35.21 Ares was included as 4th item. At any rate, it is beyond dispute that the plaint schedule consisting of 23.47 Ares was included as item no 2 in the decree schedule . Moreover, it is too late for the appellants to raise a contention regarding the executability of the decree in O.S No.251/1987. At any rate, going by Ext.A12 delivery report, it is clear that, the Amin in execution of judgment and decree in O.S No.251/1987 delivered the plaint schedule property to the chitty company, which is endorsed by the judgment debtors. Therefore, if as a matter of fact, the judgment debtors did not have a case that there was no decree against the plaint schedule property, this Court fails to comprehend as to how the said contention could be sustained at the hands of the subsequent assignees.

Conclusion.

32. As a result of the above discussions, this Court finds that the substantial questions of law framed in the memorandum



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of appeal are required to be answered against the appellants as follows:-

(a) The property sold in auction arising out of the execution proceedings in O.S No.251/1987 and the property claimed by defendants 3 and 4 are one the same, which is explicitly evident from Ext.A11 auction certificate and from Ext.A12 delivery report.

(b) The auction purchaser in OS No 251/1987 had obtained delivery of the property and Ext.A12 report shows that the delivery of the property has been effected.

(c) O.S No.251/1987 is not a suit, which is to be brought within the purview of Order 34 Rule 1 of the Code of Civil Procedure. Ext.A9 suit is only a suit for recovery of money charged on the mortgagee, and therefore provisions of Order 34 is not applicable.

Consequently, finding that the appeals sans merit, the same are dismissed. The respondents will be entitled to cost through out the proceedings.

Sd/-

**EASWARAN S.
JUDGE**

AMR