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Court : Mumbai

Decided On : Aug-11-1989

Reported in : 1990(3)BomCR50; 1990CriLJ685

Judge : Kamat, J.

Acts : Goa, Daman and Diu Public Gambling Act, 1976 - Sections 3 and 4; Bombay Abkari Act, 1878 - Sections 43; Bombay Abkari (Amendment) Act, 1947; Indian Penal Code (IPC), 1860 - Sections 302; Bombay Prevention of Gambling Act, 1987 - Sections 4 and 5; Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 - Sections 10, 11, 12 and 13

Appeal No. : Criminal Revn. Appln. No. 21 of 1989

Appellant : Bhalchandra Anant Mayekar and Others

Respondent : State

Judgement :

1. The petitioners along with one Vinayak Krishna Mandrekar were tried for an offence falling under Section 3 of the Goa, Daman and Diu Public Gambling Act, 1976, for short the Act. However, by the Order dated 8th February 1989, the trial Magistrate while acquitting Vinayak Krishna Mandrekar convicted the petitioners and sentenced them to undergo one month of simple imprisonment and to pay a fine of Rs. 200/-, in default to undergo 8 days of simple imprisonment. The Magistrate held that he was bound to impose a substantive sentence of

imprisonment and also a fine on the grounds that Section 3 of the Act is mandatory and leaves no scope for discretion.

2. The appeal taken by the petitioners before the Sessions Court was dismissed as the learned Sessions Judge took the same view that Section 3 of the Act leaves no scope for discretion and that on conviction the accused shall have to be sentenced to imprisonment and also to a fine. This has now become the subject matter of dispute in this revision application.

3. Mr. G. D. Kirtani, learned counsel appearing for the petitioner, in his foremost submission has now urged that Section 3 of the Act, insofar as the imposition of penalty viz., substantive imprisonment and fine is concerned, is not mandatory and, on the contrary, it is discretionary. Such interpretation, according to him, is consistent and also meets the requirement of law. Insofar as the proviso is concerned, according to him, if the Magistrate, having regard to the facts of the case, desires to impose substantive imprisonment and/or fine or both, then the discretion is, in such event, limited to what is laid down in predicates I, II and III of the proviso, namely, the first, second, third and subsequent offences. In support of the interpretation that Sec. 3 is not mandatory but that, on the contrary, it is discretionary, the learned counsel for the petitioners has relied upon the decision of the Full Bench of this High Court in Emperor v. Peter D'Souza reported in AIR 1949 Bom 41 : 50 Cri LJ 137. Sec. 43 of the Bombay Abkari Act (5 of 1878) came up for interpretation. Since the matter posed some difficulty, a reference was made to the Full Bench. On the construction of Section 43 of the Abkari Act the Full Bench ruled that no mandate can be read in that Section for a Court to impose a penalty of substantive imprisonment at the same time impose a fine and in that view of the matter it was held to be discretionary.

4. Learned Public Prosecutor, Shri Bhobe, vehemently urged before me that S. 3 of the Act leaves no scope for discretion and further, that it is an absolute obligation to impose both, the penalty of substantive imprisonment as also a fine, more particularly having regard to the expression 'and also' and further aided by the proviso, which categorizes the first, second, third and subsequent offences.

5. In view of the insistence on the part of the learned Public Prosecutor, it is necessary to go in more detail of the authorities cited on behalf of the petitioners. Before, however, I do that, I will advantageously set out Sec. 3 of the Gambling Act 1976, which reads thus :-

'3. Punishment for keeping common gaming-house - whoever -

(a) opens, keeps or uses any house, room or place for the purpose of a common gaming-house,

(b) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

(c) has the care or management of, or in any manner assists in conducting the business of, any such house, room of place opened, occupied, kept or used for the purpose aforesaid,

(d) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place,

Shall be punishable with imprisonment for a term which may extend to two years and also with fine which may extend to two thousand five hundred rupees :

Provided that -

(i) for the first offence, such imprisonment shall not be less than one month and the fine shall not be less than two hundred rupees,

(ii) for the second offence, such imprisonment shall not be less than three months and the fine shall not be less than three hundred rupees, and

(iii) for the third or subsequent offence, such imprisonment shall not be less than six months and the fine shall not be less than five hundred rupees.'

6. I will have, therefore seen that whoever contravenes the provisions of the Act in the matter of keeping common gaming-house, he shall be punished with

imprisonment for a term which may extend to two years and also with fine which may extend to Rs. 2500/-. What poses difficulty to a great extent as contended by the learned Public Prosecutor are the expressions 'shall be punishable' and 'and also with fine'.

7. Coming back to the Full Bench authority in Emperor v. Peter D'Souza (1949) Cri LJ 137 it may not be necessary to set out facts as the matter strictly rests on interpretation of Section 43 of the Abkari Act. That Section be extracted to show as to how it was interpreted. Section 43 of the Abkari Act had been amended by the amending Act 1947. Section 43 before its amendment read thus (Para 1) :-

'Shall, on conviction, be punished for each such offence with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.'

The amendment altered the penal provision of Section 43 which reads as follows (Para 1) :-

'Shall, on conviction, be punishable for the first offence with imprisonment for a term which may extend to six months and with fine which may extend to Rs. 1000/-.'

It was contended by the Government Pleader in the case that the word 'or' in the unamended Section having been replaced by the word 'and' in the amended Section the sentence is made cumulative or in other words obligatory upon the Court to impose upon the accused both the sentence of imprisonment and the sentence of fine. The Full Bench noted that with change from 'or' to 'and', another expression, namely, 'punished' had also undergone a change substituted by 'punishable'. Now on an interpretation of the amended Section the Full Court answered that expression 'punishable' imports discretion and, therefore, no case of absolute obligation can be read in that Section to make it incumbent upon the Magistrate to impose the cumulative sentence of imprisonment and also the fine. An analogous provision with regard to the punishment found in Section 302 of the Indian Penal Code was looked into in the matter of aiding the interpretation of the section. The expression 'and shall also be liable to fine' appearing in Section 302

of the Indian Penal Code is held to be discretionary thereby leaving the discretion to the Court to inflict or not a fine though it is mandatory to award either a sentence of death or life imprisonment to an accused.

8. Another matter directly arose of consideration in more recent years in the case of State v. Namgonda Jayagonda Patil reported in : AIR1964 Bom5 . Y. V. Chandrachud, J., as he then was, was called upon to interpret somewhat similar Section of the Bombay Prevention of Gambling Act (4 of 1987). The trial Magistrate came to a conclusion that it was not desirable to impose a sentence of imprisonment for the first offence and, therefore, merely imposed a fine of Rs. 300/- under Section 4 of the Gambling Act. The State preferred a revision application which came up before the Additional Sessions Judge, Kolhapur, who, on hearing the parties made a reference to the High Court that what was decided by the learned Magistrate was not a good law more particularly in view of the amended Sections 4 and 5 of the Bombay Prevention of Gambling Act, which, according to the learned Additional Sessions Judge, made it obligatory upon the Court to pass sentence imprisonment even in cases where an accused committed an offence for the first time, the imposition of fine notwithstanding.

9. Sections 4 and 5 of the Bombay Act read as follows :-

'S. 4. whoever keeps ... a common gaming house ... shall, on conviction, be punishable with imprisonment which may extend to six months and with fine;

Provided that :

(a) For a first offence such imprisonment shall not be less than one month and fine shall not be less than two hundred rupees.

S. 5. Whoever is found in any common gaming house ... shall, on conviction, be punishable with imprisonment which may extend to six months and with fine;

Provided that :

(a) For a first offence such imprisonment shall not be less then one month and fine shall not be less than two hundred rupees.'

What falls for consideration and interpretation is the expression 'shall on conviction be punishable with imprisonment which may extend to 6 months and with fine'. Turning to S. 302 of the I.P.C. inasmuch as the word 'punished' is not found but instead the word 'punishable' occurring therein the learned Judge, as he then was, held that Sections 4 and 5 of the Bombay Prevention of Gambling Act is not mandatory in nature in imposing cumulative sentences.

10. Mr. Kirtani, therefore, now contends that inasmuch as S. 3 of the Goa, Daman and Diu Public Gambling Act, 1976 contains the expression 'shall be punishable with imprisonment for a term which may extend to two years and also with fine which may extend to Rs. 2500/-', that there is no absolute obligation upon a Court to award both substantive imprisonment and a fine also. Had the Section contained the expression 'shall be punished' then the story would be different contends Mr. Kirtani.

11. Mr. Bhobe indeed argued that neither in the Abkari Act nor in the Bombay Prevention of Gambling Act the expression 'and also' is found. He, therefore, says that the crucial words for interpretation in reading an absolute mandate in S. 3 of the Goa Gambling Act is the expression 'and also' and, therefore, it makes a world of difference. The words 'and also' must be read 'in addition' says Mr. Bhobe. He thereby suggests that the fine must be in addition to the imposition of substantive imprisonment. He now seeks to make a distinction in the words used in S. 302 of the I.P.C. which says 'whoever commits murder shall be punished with death or imprisonment for life and shall be also liable to find.' Mr. Bhobe does not quarrel that the Courts from time and again have construed the expression 'and shall also be liable to fine' to be discretionary and not mandatory once the Court convicts an offender and imposes either the penalty of death or the penalty of imprisonment for life. But, however, it is his contention that such construction of the Section cannot be presently imported for the purpose of construing the S. 3 of the Goa Gambling Act for the simple reason that a Court convicting an offender under S. 302 has no option but to award a sentence of death or imprisonment for life. The first part being mandatory, Mr. Bhobe urged, that the payment of fine is held to be discretionary. It may be necessary to look into a more recent authority on the subject.

12. S. 13 of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 for short M.Z.I. Act came for interpretation before me in several matters. S. 13 of the M.Z.I. Act provides that when any person is convicted for an offence under Sections 10, 11 or 12 thereof the fishing vessel used in connection with the commission of the said offences shall also be liable to confiscation. The Metropolitan Magistrate having convicted the foreign Commanders of the fishing vessels had not made the order of confiscation of the vessels holding that S. 13 is discretionary and there was no absolute obligation of confiscation. Having regard to several other provisions of the Act, the policy, intent and will of the Legislature discernible from object and scheme of the M.Z.I. Act a mandate was read in S. 13 and, accordingly, the expression 'shall also be liable to confiscation' was held to be mandatory. The matters were taken before the Supreme Court. However, Supreme Court accepted the interpretation of this Court and confiscation was upheld. This judgment of the Supreme Court is reported in : 1988 CriLJ855 .

13. Placing reliance on paragraph 25 of this report Mr. Bhobe, learned Public Prosecutor, urged that in matters of interpretation of statutes, it is necessary to ascertain the will and policy of the legislature as discernible from the object and scheme of the Act and what is more the language used in it. According to him a deterrent punishment has been deliberately provided with a view to curb the gambling activities and, therefore, the expression 'and also' has been used in Sections 3 and 4 of the Act so that whosoever is found to have contravened the provisions of Sections 3 and 4 is bound to be sentenced to substantive imprisonment and also to pay a fine and this is also necessary, according to him, to curb the menace.

14. He now falls upon the provision to S. 3 and say that the very fact that a minimum and maximum is provided for the first, second and third offence is also suggestive of the fact that no offender can be let out either with the substantive imprisonment and/or with the find but with both. According to him the substantive imprisonment must also follow the first offence, otherwise, according to him, the words 'and also' will be redundant.

15. The learned Public Prosecutor would be otherwise right. The word of difference in the punishing Section of the Goa Gambling Act lies in the expression 'punishable'. This expression contradistinguished from the expression 'punished' makes Sections 3 and 4 of the Act of 1976 discretionary. I have already made abundant reference to the Full Bench decision AIR 1949 Bom 41 : 1950 Cri LJ 137 as also the letter decision of Chandrachud, J., as he then was, in : AIR1964 Bom5 and I do not think any further elaboration is necessary. In this context the words 'and also' does not make any difference.

16. In the authority of Chern Taong Shang v. Commander S. D. Naijal : 1988 CriLJ855 (supra) the Supreme Court has reiterated that the word 'liable' occurring in many statutes is no doubt held to be not conveying a sense of absolute obligation but merely importing discretion and even where the word used in 'shall' in several statutes. Supreme Court again looked up to S. 302 of the I.P.C. and reiterated that the expression 'shall be also liable to fine' does no convey a mandate but leaves in to the discretion of the Court convicting an offender to impose or not a fine. I am, therefore, unable to accept the interpretation of the learned Public Prosecutor, Sections 3 and 4 of the Act will have to be read as discretionary and the expression 'and also' cannot be read 'in addition' an a mandate. It is, therefore, open to a Magistrate either to award substantive imprisonment or impose a fine or both. Insofar as the proviso is concerned if the Magistrate chooses to award substantive imprisonment or fine, then, depending upon the first, second, third and subsequent offences, it cannot be less than the minimum provided in the proviso. I again derive support for this proposition from the authority of : AIR1964 Bom5 .

17. It can be no doubt argued and as indeed done by the learned Public Prosecutor that the Magistrate awarded a substantive imprisonment of one month simple imprisonment and also awarded a fine of Rs. 200/-. Mr. Bhobe now says the same having been upheld by the Sessions Court this requires no interference at the hands of this Court because in Section 3 of the Act it is possible to award cumulative sentences. I, however, agree with the letter part of the submission of the learned Public Prosecutor but not the first. The Magistrate awarded imprisonment and fine feeling himself bound to do so by misconstruction of

Sections 3 to be mandatory and similar is the case with the learned Sessions Judge. If the trial Court and the Sessions Court were to hold as I do, that S. 3 is not mandatory but leaves discretion to the Court, perhaps the story might have been different.

18. There is, however, no past history insofar as the petitioners are concerned. This is their first offence at least which has come to the surface. The offence was committed on the premises of a gada. It was the case of the prosecution that gada belonged to the original accused No. 1 Vinayak Mandrakar, who is acquitted by the Magistrate on the grounds that he was not present when raid was made nor prosecution brought cogent evidence that gada belonged to him. That gada belonged to the petitioners is not the case of the prosecution. This being the case, in my view, the sentence of substantive imprisonment is not called for. Several more submissions were made before me on merits. On seeing that I am not inclined to accept any of them finally the learned counsel for the petitioners has given them up. In my view, therefore, the circumstances of this case will meet the ends of justice to award a sentence of fine upon each of the petitioners while maintaining their conviction under Section 3. The imprisonment of one month of simple imprisonment is set aside and the petitioners are instead directed to pay a fine of Rs. 1000/- each. To that extent the orders of the two Court below stand modified. Fine to be paid within 4 weeks from today before the Court of the Magistrate. Revision application partly allowed and to that extent rule made accordingly. Bail bonds shall stand canceled no sooner the fines are paid.

19. Revision partly allowed.

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