

**Emperor Vs. Vithaldas Hirji**

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**SooperKanoon Citation :** [sooperkanoon.com/330911](http://sooperkanoon.com/330911)

**Court :** Mumbai

**Decided On :** Aug-08-1917

**Reported in :** AIR1917Bom200; (1917)19BOMLR830; 42Ind.Cas.920

**Judge :** Heaton and ;Shah, JJ.

**Appeal No. :** Criminal Appeal No. 134 of 1917

**Appellant :** Emperor

**Respondent :** Vithaldas Hirji

**Disposition :** Appeal dismissed

**Judgement :**

**Heaton, J.**

1. The facts established by the evidence in this case show that the accused were gambling within the second enclosure of the Bombay Race Course during the races on the 1st January 1917. Their kind of gambling was this: they set up an opposition to the totalizator, received money from persons, who bet on the horses running and promised to pay on the winner at the same rate as the totalizator. They were charged before the Bench of Honorary Presidency Magistrates at the Mazagaon Court under Section 12 of the Bombay Gambling Act (Bombay Act IV of 1887) and were acquitted. The Govern-ment of Bombay have appealed against

this acquittal and we have to determine whether on the facts found the acquittal is right or wrong. I think it is right and for reasons which I will briefly state.

2. The material part of Section 12 runs as follows-

12. A Police-officer may apprehend without warrant:-

(a) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare....

3. Now this is to my mind quite plainly in substance an enactment against playing certain kinds of games for money in certain public or quasi-public places. It is not an enactment against gambling pure and simple in such places. If it were, it would, I think, have been differently worded. On the facts established, the accused were, no doubt, gambling; they were certainly doing something for money; but they were not playing a game for money or playing with instruments used in playing a game. Betting on a horse race is not playing a game or playing with, such instruments at least as I understand the English language.

4. It is, however, argued that the Gambling Act modifies the meaning of words in this way: that as 'gaming' by the Act includes 'wagering,' therefore, (though the Act does not say so), a 'game' includes a 'wager.' In my opinion this is not so: the meaning of the word 'game' is not changed as a consequence of the change in the meaning of 'gaming'. 'Game' and 'Gaming' are different words and are now, whatever they may once have been, independent words.

5. We have spent some hours in considering the decided cases but I cannot find one which is a clear authority for the present matter. *Emperor v. Lakhamsi* I.L.R. (1904) Bom. 264 : 6 Bom. L.R. 1091 may seem to be, but in the judgment in that case there is not a word as to the difficulty which I have discussed. It is needless for me to consider whether a piece of paper recording bets is an 'instrument of gaming'. I would dismiss this appeal.

**Shah, J.**

6. In this case the three accused were charged under Section 12 of the Bombay Prevention of Gambling Act of 1887 with having been found playing for money with instruments of gaming used in playing a game in the second enclosure of the Bombay Race Course on the 1st January last. The instruments used were two slips of paper, Exhibits A and B on which the wagers were noted and the game was wagering, on horse-races. They were tried by a Bench of the Honorary Presidency Magistrates and were acquitted on the ground that the slips were not instruments of gaming within the meaning of Section 12.

7. The Government of Bombay have appealed from the order of acquittal and the learned Advocate-General has urged two-points in support of the appeal: first, that the slips of paper are instruments of gaming, and, secondly, that wagering on horse races is playing a game within the meaning of the section.

8. In connection with the first point several cases have been cited and discussed on both sides. The case of *Emperor v. Lakhamji* I.L.R. (1904) Bom. 264 : 6 Bom. L.R. 1091 is particularly relied upon on behalf of the Crown and the case of *Queen-Empress v. Govind* I.L.R. (1891) Bom. 283 is relied upon on behalf of the accused. The latter case was decided by a Full Bench. It was a case under Section 12 of the Act after the present definition of 'instruments of gaming' was enacted in 1890. All the learned Judges agreed in holding that the expression 'instruments of gaming' as used in Section 12 of the Act meant an implement devised or intended for that purpose. This decision is binding upon us. and in determining whether the papers Exhibits A and B are instruments of gaming or not the test to be applied is whether they are implements devised or intended for that purpose. The case of *Emperor v. Lakhamji* relates to the presumption under Section 7 of the Act. There is no reference to this point of the Full Bench decision either in the judgment or in the cases referred to in the judgment. Though the expression 'other instruments of gaming used in playing any game not being a game of mere skill' occurs in Sections 7 and 12, I do not think that *Lakhamji's* case can be treated as deciding that the expression 'instruments of gaming' under Section 12 when applied to slips of paper has practically the same meaning as it would have under the definition of that expression. It is possible that the learned Judges deciding that case may have taken that view of the Full Bench decision.

But I rather think that if they understood the Full Bench decision in that way, they would have said so. It is also a reasonable explanation of the absence of any reference to that decision that the learned Judges may have treated the decision as limited to cases under Section 12 of the Act. In any case it is clear that in dealing with a case under Section 12 of the Act, not only am I justified in applying but I am bound to apply the test laid down in the Full Bench decision in interpreting the expression 'instruments of gaming' with reference to the context in Section 12 of the Act. The lower Court has declined to treat these papers as implements devised or intended for gaming and in my opinion that view is correct. These papers were used merely as an aid to memory and cannot be properly treated as implements devised or intended for the purpose of gaming. Quite apart from authority I should have found it difficult to treat these papers, Exhibits A and B in this case, as instruments of gaming within the meaning of the definition of that expression. But I base my decision on the ground that the judgments in *Queen-Empress v. Govind* restrict the meaning of the expression as used in Section 12 and that the papers in question are not instruments of gaming according to that restricted meaning.

9. It is rather anomalous that the same expression in the same Act should be interpreted more strictly in one place than in another. There is some diversity of judicial opinion on the question whether such papers can be instruments of gaming within the meaning of the definition. Though it may be a question of fact in each case whether a book or a paper on which wagers are noted is an instrument of gaming, there is an underlying question of general importance in this class of cases as to whether a paper or a book used for noting wagers merely as an aid to memory or for the preservation of evidence relating to wagers can be an instrument of gaming or in other words can be held to be an article used as a subject or means of wagering. These considerations, to my mind, render it desirable that this question should be considered and decided by a Full Bench when it properly arises.

10. As to the other point I do not desire to express any definite opinion, as it is not necessary to do so. The argument on behalf of the Crown is that as under the Act the word 'gaming' includes 'wagering' the word 'game' must include 'wager'. It

seems to me that there is considerable force in this argument. It is not easy to see why 'wagering' or rather wagering on horse races is not 'playing a game.' I do not propose to pursue the point any further for the reason stated. Assuming, without deciding, that wagering on horse-races is playing a game I cannot treat the papers, Exhibits A and B, as instruments of gaming used in playing the game. i. e., in wagering within the meaning of Section 12 of the Act.

11. I agree, therefore, that the appeal should be dismissed.

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