

Emperor Vs. Savlaram Kashinath Joshi

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Court : Mumbai

Decided On : Mar-17-1947

Reported in : (1947)49BOMLR798

Judge : Leonard Stone, Kt., C.J. and Lokur, JJ.

Appeal No. : Appeal No. 221 of 1945

Appellant : Emperor

Respondent : Savlaram Kashinath Joshi

Disposition : Appeal dismissed

Judgement :

Stone C.J.

1. I have had the opportunity of reading the judgment about to be delivered by my brother Lokur J. I am in entire agreement with it and have nothing further to add.

Lokur, J.

2. This is an appeal by the Government of the Province of Bombay against the order of the Additional City Magistrate, First Class, Poona, acquitting the twelve accused who were charged under Sections 4(a) and (b) and 5 of the Bombay Prevention of Gambling Act. The Sub-Inspector of Police Mr. Gole received information that gambling was going on in Room No. 14 of House No. 672 in Budhwar Path. He obtained a special search warrant under Section 6 of the Bombay Prevention of Gambling Act, 1887, from the Deputy Superintendent of Police, Poona City Sub-Division, Mr. Crone, and raided that room on November 11, 1944. He found all the twelve accused gambling with playing cards there. He arrested them, made a panchnama and sent all the twelve accused for trial. It was conceded that accused No. 1 was the occupant of the room and was, therefore, charged under Section 4(a) and (b) of the Act, while the other eleven accused were charged under Section 5 of the Act. The learned Magistrate refused to raise a presumption under Section 7 of the Act on the ground that the warrant issued by Mr. Crone was not legal and valid for two reasons.

3. The first ground of attack on the validity of the warrant is that there is no evidence to prove that Mr. Crone, the Deputy Superintendent of Police, who issued it, was satisfied, upon any complaint made before him on oath and upon making such inquiry as he thought necessary, that there were good grounds to suspect that the said room was being used as a common gaming house. This condition precedent is laid down in the proviso to Section 6, and unless it is fulfilled, the warrant would be ultra vires. The warrant issued by Mr. Crone in this case commences with a preamble that such a complaint on oath had been made to him and that there was reason to suspect that the room of accused No. 1 was being used as a common gaming house. But the learned Magistrate says that such a statement does not prove itself and that some evidence is required to prove it. But according to ill (e) to Section 114 of the Indian Evidence Act, it is to be presumed that the officer

issuing the warrant has performed his duty correctly, and that presumption has not been rebutted in this case. In *Emperor v. Vallibhai* [1982] 34 Bom. L.R. 1447 such a presumption was raised even though the warrant had no such preamble as the warrant in the present case, and Beaumont C.J. said (p. 1448):

It is, I think, usually desirable that a warrant issued under the terms of a particular statute should show on its face that the conditions precedent required by the statute have been complied with, but it is not in my view essential that the warrant should so show. There is a presumption under Section 114, ill. (c), of the Indian Evidence Act, which enables us to presume that the officer issuing the warrant has performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence in the matter.

4. I respectfully agree with this. The same view was taken by Kuppuswamy Aiyar J. in the recent case of *In re A. Perayya* A.I.R[1946] . Mad. 465 . The warrant must, therefore, be held not to be invalid for want of evidence to prove that the requirement of the proviso to Section 6 was complied with.

5. The second objection urged against the validity of the warrant is that Mr. Crorie was not specially empowered to issue a warrant under Section 6. Prior to 1926 a warrant under Section 6 could be issued only by a Magistrate of the First Class or a District Superintendent or an Assistant Superintendent 'empowered by Government in this behalf.' By the amending Act V of 1926, the words 'Assistant or Deputy Superintendent' were substituted for the words 'Assistant Superintendent.' Then by Notification No. 8842/2, H.D., dated August 23, 1928, Assistant Superintendents and Deputy Superintendents at six specified places including the Poon City were by virtue of their office empowered to issue warrants under Section 6. Then the amending Act I of 1936 replaced the old section by an entirely new one, and the change, with which we are concerned in this appeal, was that the word 'empowered' was altered to 'specially empowered.' I do not think that any significance was intended to be attached to the change in the language. In *Emperor v. Udho* A.I.R[1943] . Sin 107 relied upon by the learned Magistrate, the expression 'specially empowered' was interpreted to mean specially empowered by name and not by virtue of his office. If so, the notification of 1928 which empowers any Assistant or Deputy Superintendent posted at the six specified places would be ultra vires, and with all respect, I do not think that the expression is intended to carry that meaning. The words are evidently taken from Sub-section (j) of Section 89 of the Criminal Procedure Code, which says:

In conferring powers under this Code the Provincial Government may, by order empower persons specially by name or in virtue of their office, or classes of offices generally by their official titles.

6. This throws a flood of light on what is meant by 'specially empowering' persons. It emphasizes the distinction between 'specially empowering' and 'generally empowering'. When a class of officials is invested with powers to try certain offences or to do certain functions, it would appear that they are 'generally empowered', but if any persons are so empowered by name or in virtue of their offices, they are said to be 'specially empowered.' This distinction was clearly pointed out in *Mahomed Kasim v. Emperor* (1915) 16 Cr. L.J. 268 where Section 3 of the Opium Act, 1878, had to be interpreted. In the present case although Mr. Crone was not empowered by name, yet he was empowered in virtue of holding a particular office namely that of the Deputy Superintendent of Police, Poona City.

7. In the Sind case cited above, David C.J. observed that the words 'specially empowered' implied the exercise by Government of a certain selection or discrimination as regards an individual on whom the special power was to be conferred, and that to authorise the Deputy Superintendent of a particular place; whoever he might be, however numerous the successors to that office might be, would be to go against the principle of selection embodied in the section and 'to be something in the form or nature of a general and not a special power.' I respectfully think that when a particular place was selected by Governor, it is conceivable that Government intended to post there only such Assistant or Deputy Superintendent as was competent to exercise the power under Section 6 of the Act. This would be covered by the words 'in virtue of their office' used in Section 39 of the Criminal Procedure Code. This construction of the words 'specially empowered' was

adopted in *Algal Phial v. Emperor* A.I.R[1924] . Mad. 256 . In that case a notification of Government empowered the second class Magistrates mentioned therein by virtue of their office to try cases under the Opium Act, and it was held that the second class Magistrates at those specified places were 'specially empowered.'"within the' meaning of Section 3 of the Act.

8. Moreover Section 15 of the Bombay General Clauses Act, 1904, provides:

Where, by any Bombay Act, a power to appoint any person to fill any office, or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office.

9. This shows that Government can appoint any Assistant or Deputy Superintendent to exercise the function of issuing a warrant under Section 6 of the Bombay Prevention of Gambling Act, not only by name but also by virtue of office.

10. Mr. Desai for the accused pointed out that the notification of Government was issued in 1928, but by the substitution of a new Section 6 by Bombay Act I of 1986 the old section was virtually repealed and a new section took its place, yet no similar notification was issued under the new section. But under Section 25 of the Bombay General Clauses Act, 1904, the notification issued under the old section shall.

so far as it is not inconsistent with the provisions re-enacted, continues in force, and be deemed to have been made or issued under the provisions so re-enacted.

11. It follows, therefore, that the notification of 1928, which contains nothing inconsistent with the new Section 6 of the Act, is still in force, and Mr. Crone, holding the office of the Deputy Superintendent of Police, Poona City, must be held to have been 'specially empowered' to issue warrants under that section. The warrant issued by him was, therefore, legal and valid.

12. The room of accused No. 1 having been searched in execution of that warrant, the provisions of Section 7 of the Act are applicable, but before a presumption that the room was used as a common gaming house can be raised under that section, it must be proved that instruments of gaming were found there when the raiding party entered the room. The evidence on that point is far from satisfactory. The Sub-Inspector says that as soon as accused No. 1 saw his party approaching, accused No. 1 closed the door of the room from inside and bolted it, and that it had to be opened by force. The panch Sakharam says that the door had to be knocked for five or ten minutes before it was opened. In his cross-examination he says that he and others entered the room 10 or 15 minutes after their presence was suspected by the inmates of the room. If so, this interval was more than enough for them to conceal the instruments of gaming, if any, and keep up an innocent appearance. Yet, according to the panchnama, when the raiding party entered the room all the twelve accused were discovered 'sitting round on a carpet, and gambling at playing cards,' and some of them threw the cards and the money on the tin sheet outside the window and also in various places inside the room, and that every one of the twelve accused had various sums of money 'lying in front of each one of them on the carpet at the place where they were sitting.' It is impossible to believe that the accused would have allowed such a scene to present itself to the raiding party, when they had ten or fifteen minutes to hide away all the incriminating articles before the party entered the room. Either the panchnama is false, or if it is true, the very boldness with which the accused were playing shows that they were not gambling but were engaged in an innocent game of cards, and the presumption arising under Section 7 is thereby rebutted. The learned Magistrate does not believe that the cards and the money were lying in the way described in the panchnama. I do not think that there is any reason to take a different view. On this ground the acquittal of the accused must be upheld, and the appeal dismissed.