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Court : Rajasthan

Decided On : Sep-14-1959

Reported in : AIR1960Raj90

Judge : D.S. Dave, J.

Acts : Rajasthan Public Gambling Ordinance, 1949 - Sections 5 and 6

Appeal No. : Criminal Ref. No. 117 of 1958

Appellant : Brijlal

Respondent : State

Advocate for Def. : Raj Narain, Asst. Govt. Adv.

Disposition : Reference rejected

Judgement :
ORDER

D.S. Dave, J.

1. This reference comes on the report of the learned Additional Sessions Judge, Sikar, dated 7-8-1958.

2. The facts giving rise to this case are that on 21-12-1957, the District Superintendent of Police, Sikar, upon credible information, came to believe that

the house of one Brijia situated in the locality called Nala Ka Bas at Sikar was used as a common gaming house and therefore he issued a warrant under Section 5 of the Rajasthan Public Gambling Ordinance, 1949 (which will hereinafter be referred as the Ordinance) and authorised the Sub Inspector of Police, Kotwali Sikar, to search the said house and arrest the persons who may be found gaming therein.

The Sub Inspector was also authorised to seize instruments of gambling, money etc. if found at the said place. Shri Rajni Prasad, Sub Inspector of Police (P. W. 2) thereupon went to the said place and he actually found 6 persons gambling with cards and money on the roof of the said house (Brijia's house). He arrested them, seized cards and money totalling Rs. 26-10-9 and, after investigation, prosecuted all of them lor offences under Sections 3 and 4 of the Ordinance. The Sub Divisional Magistrate, Sikar, convicted and sentenced all of them to pay a fine of Rs. 15/- each on 30-5-1958. Only one of the 6 accused, namely, Brijia alias Brijlal presented a revision application which was heard by the learned Additional Sessions Judge, Sikar,

It was contended by the petitioner in that court that under Section 5 of the Ordinance the District Superintendent of Police could authorise by a warrant only such an officer of the police who was not below a particular rank which the Government could fix in that behalf and that since the Government had not determined the rank of the police officer under the said section, the warrant issued and the search conducted thereunder, were illegal, and therefore the petitioner's conviction was also illegal. This argument found favour with the learned Judge and he has recommended that the petitioner's conviction should be set aside.

3. Nobody has appeared in this Court on behalf of the petitioner Brijlal. Learned Assistant Government Advocate has, on the other hand, opposed the reference. It is very candidly conceded y him that although the State Government has appointed all officers of police not below the rank of Sub Inspector for purposes of Section 5 of the Ordinance, that notification is dated 7-8-1958, while the warrant in the present case was given on 21-12-57, and therefore, it could not be said to be in accordance with law.

It is however urged by him that the mere fact that the search warrant was not legal, did not absolve the accused from the offences committed by them, and that since there is enough evidence onrecord to show that all the accused were actually found gambling, their conviction was quite correct and should not be set aside.

4. I have given due consideration to the above argument and, in my opinion, it is quite correct. I agree with the learned Additional Sessions Judge to the extent that under Section 5 of the Ordinance, the District Superintendent of Police could authorise by warrant only that officer of the police who was not below such rank as the Government was to appoint in this behalf and since the Government had not issued any notification to the effect that a Sub Inspector of Police could be authorised under the said section, the warrant issued by the District Superintendent of Police was not according to the provisions of law.

I do not, however, agree with the learned Judge that the conviction of the accused was illegal simply because the said warrant was not valid in law. To my mind, the only effect of the illegality of the said warrant was that the court could not raise a presumption against the accused under Section 6 of the Ordinance which it otherwise could if the warrant under Section 5 were according to law. There is nothing in the Ordinance to show that the court could not convict the accused if there is evidence against them to prove the offences alleged against them. It may be pointed out that a similar question arose in Empress v. Hardeo. Das, 1884 All WN 286. In that case the District Superintendent of Police. Mirzapur, had issued a warrant to the Sub Inspector under Section 5 of the Public Gambling Act, although according to law in force at the place, the warrant could not be issued to a police officer below the rank of an Inspector.

Thus, the warrant issued in that case was also illegal. The Magistrate had convicted the accused under Section 3 and his companions under Section 4 of the Public Gambling Act. The accused tiled a revision application and it was urged on his behalf that his conviction was wrong on account of illegality of the said warrant, but the learned Judges repelled that argument and dismissed the revision application. It was observed in that case that the provisions of Section 6 of the

Public Gaming Act constituted special rule of evidence as to the onus probandi in such cases and while the illegality of the warrant made that special rule inapplicable, it could not be held that there was anything in that section to render the results of a search conducted under an irregularly issued warrant inadmissible in evidence. It was further observed that in view of the provisions of Section 537 of the Criminal Procedure Code it could not be held that the irregularity in issuing the warrant vitiated the trial and rendered the conviction illegal.

5. In Emperor v. Ravalu Kesigadu, ILR 29 Mad 124 an officer who had an authority to arrest an accused within Cricle A entered Circle B and arrested the offender. The Magistrate held that the officer's power of arrest was restricted to his own circle and so he acquitted the accused. It was held that the order of acquittal was wrong and that the question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest did not affect the question whether the accused was or was not guilty of the offence with which he was charged. In In re, Nagarmal Jankiram, AIR 1941 Nag 338, the trial court had discharged tha accused on account of the absence of any warrant under Section 5 of the Public Gambling Act. It was observed that

'the Public Gambling Act contains no provision regulating the investigating, inquiring into, or trying of offences under that Act. Section 5 deals with the power to search and arrest ..... Theordinary provisions of the Cr. P. C. will therefore regulate the investigation and trial of such offences .... the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not'.

The reference was therefore accepted and the case was sent for re-trial.

6. It is clear from the view taken in the above I cases that the absence of 3 warrant or the irregularity or illegality of a warrant under Section 5 of the Ordinance would result in the non-availability of the presumption which the court-may raise under Section G of the Ordinance, but it would not affect the question whether the accused was guilty or not and thus the accused cannot be discharged or acquitted on the mere ground that the warrant under Section 5 was not in accordance with law. In H. N. Rishbud v. State of Delhi, (S) AIR 1955 SC 196, it was observed by

their Lordships of the Supreme Court that

'a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial .....If, therefore, cognizance is in fact taken,on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it, cannot be, set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled'.

The same view has been recently followed in Din Dayal Sharma v. State of U. P. AIR 1959 SC 831. The above observations were no doubt made in a case under the Prevention of Corruption Act, but the principle laid down therein gives an indirect support to the view which I have taken above.

7. I find from the perusal of the trial court's judgment that it has convicted the petitioner not on the basis of presumption under Section 6 of the Ordinance but on oral evidence of the witnesses. There is enough evidence on record to show that when the Sub Inspector searched the house, the petitioner was actually found earning with the other 5 accused. It is further proved against the petitioner that he had obtained a special amount called 'Nal' for keeping the common gaming house. It is also noteworthy that two of the accused had confessed in the trial court that they were engaged in gambling when the Sub Inspector came to the spot.

8. Under these circumstances, I see no goodground for allowing the reference and it is herebyrejected.