

B. Walvekar and ors. Vs. Emperor

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Court : Kolkata

Decided On : Dec-16-1926

Reported in : AIR1926Cal966,96Ind.Cas.264

Judge : Charu Chunder Ghose and; Chotzner, JJ.

Appellant : B. Walvekar and ors.

Respondent : Emperor

Judgement :

Charu Chunder Ghose, J.

1. There are two appeals, being Appeals Nos. 714 and 715 of 1925, arising out of two prosecutions under certain sections of the Calcutta Police Act, being Bengal Act IV of 1866. The accused B. Walvekar and three others named R.N. Habib, Makbular Kahman and Gujanand are the appellants in Appeal No. 714, while the accused R. Walvekar is the sole appellant in Appeal No. 715. In the first case the accused have been convicted under Section 44 of the Calcutta Police Act and have been sentenced to pay certain fines, i.e., the accused B. Walvekar has been sentenced to pay a fine of Rs. 500 and in default to suffer rigorous imprisonment for a period of three weeks; the accused R.N. Habib has been sentenced to pay a fine of Rs. 200 and in default to suffer rigorous imprisonment for a period of three weeks; the accused Makbular Rahman and Gujanand have each been sentenced to pay a fine of Rs. 30 and in default to suffer rigorous imprisonment for a period of

three weeks. In the second case the accused R. Walvekar has been convicted under a. 44 of the said Act and has been sentenced to pay a fine of Rs. 500 and in default to suffer rigorous imprisonment for a period of three weeks.

2. The facts in the two cases are analogous and it will be convenient to dispose of the two appeals by one judgment. The accused B. Walvekar is the secretary of a club known as the New Sports Club, which has its head office at premises Nos. 4, 5 and 6, British Indian Street, and which has 11 branches in various parts of Calcutta, while of the other accused, R.N. Habib is the lessee of the said premises and Gujanand and Makbular Rahmam are employed as clerks in the said club. They were charged with being the owners, occupiers and having the use of the first floor of the said premises Nos. 4, 5 and 6, British Indian Street in Calcutta, known as the New Sports Club, knowing and wilfully permitting the same to be opened, kept or used by others as a common gaming house and assisting and conducting the business of the said common gaming house at 12-40 P.M., on the 22nd August, 1925, at the said premises. The accused E. Walvekar was charged with being the owner, occupier and promoter of a common gaming house, namely, the Aryan Sports Club, at 15-6, Zakeria Street in. Calcutta, and using and permitting the same to be used as a common gaming house for laying wagers and bets on the Poona and Calcutta Races.

3. The learned Chief Presidency Magistrate who tried these two cases found that gaming was going on at the two places mentioned above and that the said places were kept for the profit or gain of the persons using them and that as such they were common gaming houses. Both the places were raided under warrants signed by the Deputy Commissioner of Police and various articles, which, according to the learned Magistrate, were instruments of gaming were found at the said places. It was held that instruments of gaming having been found at the two places mentioned above, the presumption under Section 47 of the Calcutta Police Act arose that the said places were used as common gaming houses. The learned Magistrate further held that apart from the question of presumption under Section 47 of the Calcutta Police Act, the evidence on record pointed to the conclusion that the two places in question were carried on as common gaming houses for the purpose of profit or gain.

4. It appears from the record that a warrant was issued on the 21st August 1925 purporting to be signed by Mr. H.C. Hunt, Deputy Commissioner of Police, Calcutta, under the provisions of Section 46 of the Calcutta Police Act authorising Sub-Inspector, A. Gany, to enter into premises Nos. 4, 5 and 6, British Indian Street, and to search for all instruments of unlawful gaming which might be therein and to arrest, search and bring before him or any other Justice of the Peace the keepers of the same as also the persons there haunting, resorting and playing, to be dealt with according to law. This warrant was executed on the 22nd August 1925. The premises were raided and searched and numerous articles were seized and it is stated that as many as 29 persons were arrested and searched in the said premises. The case was thereafter proceeded with as against the appellants in the first appeal and the trial in the Police Court lasted from the 7th September to the 15th September, 1925. The warrant in question was not tendered as an Exhibit in the case till the 15th September, 1925, when the evidence had been concluded and when arguments were being addressed to the learned Chief Presidency Magistrate. It was at that stage that the warrant was tendered in evidence and was marked as Ex. 14 in the case. No witness was called to speak to it.

2. On behalf of the appellants in the first case it has been contended before us by Sir Benod Mitter that the warrant which has been marked as Ex. 14 has not been duly proved in this case, as no witness had been called to prove the same. In the second place, he argued that it has not been proved that the Deputy Commissioner of Police who signed the warrant had made due enquiry or any enquiry at all and that he had information on oath justifying the issue of such warrant. In the third place, he contended that the issue of such warrant was legal only when the issuing officer had reason to believe upon information on oath and after such enquiry as he might think it necessary to make, that the said premises were used and kept as and for a common gaming house and not merely when the issuing officer had or has cause to suspect that the said premises were so used and kept as stated in the said warrant. In the fourth place, it was argued that although Sub-Inspector, Abdul Gany, spoke to the execution of a search warrant, there is no evidence on record showing that this particular warrant which was tendered in evidence and marked as an exhibit in the concluding stages of the trial was executed as alleged by the prosecution.

3. Sir Benod Mitter argued that if the warrant, Ex. 14, goes out of the record on the ground that the mere production thereof is, in the absence of other evidence, no evidence of the validity of the same, the provisions of Section 47 of the Calcutta Police Act could not be attracted and that, therefore, the presumption that would otherwise have arisen to the effect that the said premises were used as a common gaming house could not arise in the present case. He further argued on the merit that the articles discovered at the search were not instruments of gaming and that they afforded no evidence whatsoever of any user contradicting the aims and objects of the Club as set out in the rules and regulations thereof and, secondly, that those articles could only be said to be instruments of gaming, provided it was first found as a fact that there was gaming or wagering going on in the said premises. He also argued that in order to show that there was gaming or wagering, the prosecution must prove that there was an agreement between two contracting parties dependent on the happening of an uncertain event which must result in one of such two parties losing money; whereas in the present case there was no such contract or agreement and all that could be said was that the New Sports Club acted merely as agents of the members of the Club for the purpose of transmitting their instructions to places such as Calcutta, Poona or Lucknow where race meetings were held and where gaming took place. Lastly, it was argued that there was no evidence whatsoever that any profit or gain had accrued to the person or persons owning or keeping the said premises.

4. On a full and careful consideration of the materials on record and of the arguments which have been addressed to us on both sides, I am of opinion that so far as the signature of Mr. Hunt on Ex. 14 is concerned, it was open to the Magistrate to take judicial notice of the same under Section 57, Sub-section (7) of the Indian Evidence Act, Mr. Hunt being an officer whose appointment as Deputy Commissioner of Police, Calcutta, is gazetted in the Official Gazette of the Local Government. But that is not enough; and in the circumstances disclosed on the record, I am clearly of opinion that the contents of the warrant in question have not been proved in evidence before the Magistrate.

5. A warrant such as is issued under the provisions of Section 48 of the Calcutta Police Act is not a public record and there is no presumption of any kind, attaching

to it, therefore, the contents thereof must be proved in the regular way. I hold, therefore, that it was and is incumbent upon the prosecution to prove that a warrant of this description was and is in strict compliance with the provisions of Section 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. Section 46 of the Calcutta Police Act authorises the issue of a warrant, after the preliminaries referred to above have been complied with, only when the issuing officer has reason to believe that any house, room or place is used as a common gaming house. In other words, he may then, and then only, issue his warrant authorising the Police to enter such house, room or place and take into custody all persons who are found therein and to seize all instruments of gaming, and all monies and articles reasonably suspected to have been used or intended to be used for the purpose of gaming and to search all parts of the house, room or place used as a common gaming house and to seize, etc. In the present warrant, it is stated that the issuing officer has cause to suspect that the premises in question are used and kept as and for a common gaming house. Now, the expression 'reason to believe' is entirely different from the expression 'cause to suspect.' It is obvious that the former connotes a great deal more than is conveyed by the latter. The Police may have cause to suspect that a certain house or place is used as a common gaming house, but the officer who issues the warrant has to bring his judicial mind to bear upon the question and he can only issue the warrant contemplated under Section 46 of the Act, if in his opinion there is reason to believe that a certain house or place is used as a common gaminghouse. The form of the present warrant, therefore, is in my opinion not authorised by the provisions of Section 46 of the Act and it is, therefore, not valid thereunder. Search warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place, it is common learning that they are only to be granted in the cases expressly authorised by law and not generally in such cases until it has been shown before a responsible officer on oath that a crime has been committed and that the officer has reason to believe that the offender or the property which is the subject or the instrument of the crime is

concealed in some specified house or place. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is 'reason to believe' as required by Section 46 of the Calcutta Police Act that a house, room or place is used as a common gaming house. In my opinion suspicion itself is no ground whatsoever for the issue of a warrant of this description. Search warrants are always open to very serious objections and I repeat that very great particularity is justly required by law in cases where they are authorised, before the privacy of a man's premises is allowed to be invaded by the minister of the law. The learned Magistrate seems to think that Section 114, illustration (e) of the Indian Evidence Act covers this case and that we may presume that official and judicial acts have been regularly performed, i.e., that the acts necessary before issue of a warrant of this description were properly performed. This argument, as I understand it, has been employed for the purpose of doing away with the necessity for proof of compliance of the preliminaries referred to above, namely, 'information on oath' and of 'due enquiry' before issue of warrant. Having regard, however, to what I have already held about the validity of the warrant, Section 114, illustration (e) of the Indian Evidence Act cannot in my opinion be relied upon in the case. The meaning of that provision is that if an official act is proved to have been done, it will be presumed to have been regularly done. In other words, as has been laid down by Mr. Justice Mitter, where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. See *Ashanullah v. Trilochan Bagchi* 13 C. 197 ; 6 Ind. Dec. (N.S.) 630. There are various other authorities to this effect and in my opinion unless the law expressly says that no proof shall be required, evidence ought to be required in every case of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. In the view which I have taken, it is unnecessary for me to deal with Sir B.C. Mitter's fourth contention noticed above.

6. It follows from what has been stated above that the warrant, such as was issued in this case, is one which is not authorised by s. 46 of the Act and that being so, the presumption that would otherwise have arisen under Section 47 of the Act cannot

arise in this case and that, therefore, the prosecution must fall back upon Section 44 of the Act for the purpose of proving that the premises in question were kept and used as a common gaming house. On behalf of the prosecution it is urged that on the materials on record it is abundantly clear that gaming within the meaning of the Calcutta Police Act was going on at the premises in question, that instruments of gaming were found in the premises and that the premises were a common gaming house kept or used for profit or gain within the meaning of the said Act. Further, it has been argued that having regard to the rules and regulations of the Club, there can be no doubt whatsoever that wagering or betting upon horse races was carried on at the said premises. In order to understand the precise significance of the last argument, it is necessary to set out some of the rules and regulations of the Club. The following are the material rules:

(1) Aims and objects: The Club is started in the year 1922 with a view to conduct by establishing and maintaining a Club for pure sportsmen for the accommodation 'only' of members thereof.

(2) For the express purpose of saving time and useless and unnecessary cost to the members, to receive and arrange to carry to the enclosure specified amounts paid to the Secretary by the members to back on such horses as may be stated and named by them in their forms of application (or request) and to back on such horses in race enclosure and to inform to the members the results and pay their dues.

(3) That no game of chance for any bet or for money or any kind of gambling will be allowed to be played at the head-quarters or at the branches of the Club by any member or anybody; that no illegal wagering will in any case be allowed in the premises of the Club; any member carrying on such prohibitive and illegal practice will be instantly struck off the rolls. No complaints will then be attended to.

(4) That breach of above rules will meet with instant dismember ship.

(5) That a member is entitled to go to any of these branches as may suit his convenience and no additional fee will be charged to him for the same.

(6) Members will have to submit in their own handwriting the authorisation letter, (i.e., the 'original form' with the names of the different plates or races and the numbers and names of the horses in them). The said 'authorisation letter' will be original copy which will remain with the Secretary of the Club (as an important document) for reference, and guidance, should any disputes and differences arise.

(7) Members will be charged a commission of Re. 1 per cent, on the net pro-fit accruing from their bet-money and rupees two per cent, for races other than Calcutta.

(8) The forms shall be clearly and legibly written in 'ink' by members. The members are responsible for scratched forms. The members are warned that their original (application) form of betting will be accepted at their own risks and the clerk accepting them is not at all expected to go through all their forms.

(9) In doublings and treblings, etc., the amount put in the win and place columns will be backed on the horses running first and then on the next and so on, win and place respectively.

(10) In doublings and treblings, more than one horse in each race will not be allowed. If the names of the horses entered in more than one race or plate are not mentioned, and if any two amongst, them happen to run together, the bet will be considered in valid and the original betting amount on it will be returned.

(11) Only doublings and treblings will be accepted. If at all quadruplings and so on are accepted, and if they bring out huge amounts, their payments will be strictly subject to proper limitations decided only by the Secretary. In all such cases, members will have to abide by the decision of the Secretary, whose decision will be final and, therefore, binding on the members.

7. I am satisfied on a close inspection of the numerous articles which were seized by the Police at the premises in question and made exhibits in this case and on a minute examination of the said rules and regulations of the New Sports Club that there is abundant evidence on record showing that the premises in question were kept, used and conducted as a common gaming house. On the materials before

me there can be no pretence whatsoever for the suggestion that the authorities of the Club acted as the agents of the members thereof and what they did, came within the exception to the definition of gaming in the Calcutta Police Act. Enough has been shown on the record to show that betting or wagering was going on in the premises between the appellants who opened, kept and conducted the premises and the members of the Club. There is also abundant evidence to show that large sums of money 'must have been or were paid by the members of the Club to the appellants and that the appellants kept and conducted the premises in question for purposes of profit or gain. I am not unmindful of the cases to which Sir Benod Mitter drew attention for the purpose of inducing us to infer that the appellants were merely acting as agents on behalf of their principals ; the evidence, however, is of such a character that this contention must be negatived. Indeed the evidence is of a compelling character and it shows that the betting, such as it was, was with the people who ran the Club.

8. In this view of the matter and after giving full weight to Ex. 12 on which much stress was laid by Sir Benod Mitter, I am constrained to hold that the appellants in the first case have been properly convicted under Section 44 of the Calcutta Police Act. I see no reason whatsoever to interfere with the sentences inflicted on them.

9. As regards the appellant in the second appeal, the facts are identical, but in this case the warrant has been proved in this sense, namely, that the signature of the issuing officer has been duly proved. The warrant in other respects is open to the same objections on account of lack of proof of the compliance of the preliminaries necessary to the issue of the warrant and on account of its invalidity as having been issued on the existence of 'cause for suspicion,' I see no reason, however, on the merits to interfere with the conviction of and the sentence passed on the appellant.

10. The result, therefore, is that both the appeals are dismissed.

Chotzner, J.

11. I have had the advantage of reading the judgment of my learned brother and fully agree with the decision at which he has arrived, but as the questions involved

in these appeals are apparently of first impression and of considerable public importance, I think that I may perhaps add a few words to what he has said.

12. The appellants in Appeal No. 714 were charged with conducting the 'New Sports Club' at premises Nos. 4, 5 and 6r British Indian Street as a common gaming house, while the appellant in Appeal No. 715 was similarly charged in respect of the 'Aryan Sports Club' at 15/6, Zakaria Street.

13. Searches were held on both premises, the one in execution of a regular warrant, the other in execution of a warrant which has not been regularly proved. My learned brother has dealt very fully with the effect of that, and I would merely point out that the printed form of the warrant which says 'there is cause to suspect' is not in conformity with Section 46 of the Calcutta Police Act which requires the Commissioner of Police to have 'reason to believe' that a place is used as a common gaming house before issuing his warrant.

14. As a result of the searches, a large quantity of articles were found which have been held by the learned Magistrate to be 'instruments of gaming' within the meaning of Section 2 of Calcutta Police Act as amended by Bengal Act IV of 1913. I have examined some of these for myself; they include for instance a black board on which the results of particular races with the odds are to be inscribed, betting slips on which the names of horses to be backed with the amounts to be invested are shown, telegrams from distant race-courses showing the results of races with the odds paid by the totalisator, and a large quantity of blank betting and other forms, showing that the volume of business was considerable. Now it is plain that the presence of these particular articles can be explained on no other supposition than that they were used and intended to be used, for the purpose of facilitating betting on horseraces. A 'common gaming house' is denned in Section 2 of the Statute as being 'any house...in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house;' and 'gaming' in the same section 'includes wagering or betting' except wagering or betting upon a horse race, when such wagering or betting takes place,

(a) on the day on. which such race is run, and

(b) in an enclosure which the stewards controlling such race have, with the sanction of the Local Government, set apart for the purpose.

15. It is not disputed that the appellants were occupying the premises raided and that the betting transactions did not come within the exceptions named. The only question, therefore, that remains' is whether the appellants were using the premises for profit or gain. It has been contended that both the premises were 'Clubs' and that the appellants were merely agents, working on the narrow basis of a 1 per cent, commission on winning bets at the local races and 2 per cent, on foreign races supplemented by the rupee entrance fee paid by new members. There is no evidence to show that these places were 'Clubs' in the ordinary acceptance, of the term: The book of rules (Ex. B) has no list of members, no officials except the Secretary (the appellant B. Walvekar) and no statement of what qualifications are required to make a person eligible for membership. This applies equally to the book of rules of the Aryan Sports Club. On the other hand, the prosecution evidence is clear that anyone could go into the house at any time and have a bet without being a member at all. Obviously, therefore, these places are not genuine Clubs and the term 'Club' has merely been adopted as a disguise for an illegal gaming house.

16. The suggestion made on behalf of the appellants that they are merely agents and not unlicensed bookmakers is disproved by their own rules. I would refer to Rule 18 on page 24 of Ex. B. This reads as follows: 'Only, doublings and treblings will be accepted. If at all quadruplings and so on are accepted and if they bring out huge amounts, then payments will be strictly subject to proper limitations decided only by the Secretary. In all such cases members will have to abide by the decision of the Secretary whose decision will be final and, therefore, binding on the members.'

17. Now if the appellants were merely agents employed for the purpose of transmitting bets to be placed on the totalisator, it would be to their - interest to encourage and not to discourage quadrupling, because their commission would be proportionately higher in the event of a quadruple bet succeeding. But the fact that quadrupling is as a general rule prohibited and if accepted at all is made subject to

the discretion of the Secretary to pay (which, if the result involved 'huge amounts,' he might evidently refuse to do) places it beyond doubt that it was the appellants who were themselves taking the bets for their own profit and gain.

18. That being so, they have been justly convicted and their appeals must be dismissed.

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