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Devi Rup and ors. Vs. the State

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Court : Himachal Pradesh

Decided On : Feb-19-1966

Reported in : AIR1967HP18,1967CriLJ376

Judge : Om Parkash, J.C.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 1(2), 5(2) and 165; ; Public Gambling Act, 1867 - Sections 5 and 6

Appeal No. : Criminal Revn. No. 22 of 1965

Appellant : Devi Rup and ors.

Respondent : The State

Advocate for Def. : Jai Chand, Govt. Adv.

Advocate for Pet/Ap. : Inder Singh, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

Om Parkash, J.C.

1. This revision-petition is directed against an order of the learned Sessions Judge, Mandi and Chamba Districts, whereby, an appeal of the petitioners, against

their conviction, for offences, under the Public Gambling Act. was dismissed. The prosecution case against the petitioners was as under:

Shri Gangbir Singh PW-2, District Superintendent of Police, Mandi District, had received credible information that Harji petitioner was using his house, situated in Mohalla Thanera, Mandi, Town, as a common flaming house. Acting on this information, Shri Gangbir Singh, along with Jagdish Chand PW-4, S. H. O., Mandi, had raided the house of Harji petitioner on the night of the 29th October, 1062, at 11.00 p.m. Amar Singh PW-2 and Tarlok Singh PW-3, two respectable persons of the locality, were also associated with the raid. The door of the house of Harji petitioner had been bolted from inside. It was got opened. The raiding party had found that Devi Rup and Dila Ram petitioners were playing cards and Harji petitioner was sitting on a cot by their side. Currency notes of the value of Rs. 365/- were found lying on the floor, under the knee of Dila Ram petitioner. On a search of the bedding, lying on the cot, on which Harji petitioner was sitting, sixteen corries, kept in an empty match-box, were recovered from underneath the pillow. Shri Gangbir Singh had taken into possession the playing cards, the currency notes and the corries.

2. On the above facts, Harji petitioner was hauled up and charge-sheeted, under Section 3, and Devi Rup and Dila Ram petitioners were hauled up and charge-sheeted, under Section 4 of the Public Gambling Act.

3. The petitioners denied the charges, levelled against them. They denied that the house of Harji petitioner was being used as a common gaming house. The petitioners pleaded that Devi Rup and Dila Ram petitioners were playing cards for passing time and not for stakes or for profit. So far as the recovery of currency notes from underneath the knee of Dila Ram petitioner was concerned, it was pleaded that Dila Ram petitioner, who was a driver of a truck, had received the amount on the basis of G.R.'s and was counting the amount at the time of the raid. The petitioners produced defence evidence.

4. The learned Magistrate held that playing cards, corries and currency notes were recovered from the house of Harji petitioner, as a result of the raid, carried out by the Superintendent of Police, on the night of the 29th October and that Devi, Rup

and Dila Ram petitioners were playing cards at that time. The learned Magistrate, further, held that the recovery of playing cards and corries, which were instruments of gaming, raised a presumption, under Section 6 of the Public Gambling Act, that the house of Harji petitioner was being used as a common gaming house and that Devi Rup and Dila Ram petitioners were present there for the purpose of gaming. The learned Magistrate was of the view that the petitioners had failed to rebut the presumption and were guilty of the offences, charged against them. Harji petitioner was convicted, under Section 3 of the Public Gambling Act and was sentenced to pay a fine of Rs. 100/-/-. Devi Rup and Dila Ram petitioners were convicted, under Section 4 of the Public Gambling Act, and each of them was sentenced to pay a fine of Rs. 50/-/-. The currency notes of the value of Rs. 365/-/-, recovered, were ordered to be confiscated to the State.

5. An appeal, by the petitioners, against their conviction and sentence, was dismissed by the learned Sessions Judge, who upheld all the findings of the learned Magistrate.

6. The petitioners have come up in revision. Many grounds had been taken up in the revision-petition. But only one ground was pressed, at the time of arguments. The ground urged, was that the lower Courts were in error in raising a presumption, under Section 6 of the Public Gambling Act, against the petitioners and in convicting them on the basis of the presumption. The contention, on behalf of the petitioners, was that before conducting the search of the house of Harji petitioner, Shri Gangbir Singh P.W. 2, the Superintendent of Police, had not recorded reasons as required by Section 165 Cr. P. C., and that the non-compliance with the provisions of that section rendered the search illegal and no presumption could be raised, under Section 6 of the Public Gambling Act, on the basis of the illegal search.

Reliance was placed on the following observations, made in, State of Rajasthan v. Rehman, AIR 1960 SC 210 :

' Section 165 of the Code lays down various steps to be followed in making a search. The recording of reasons is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches. If

that can be ignored, it cannot be said that the search is carried out in accordance with the provisions of the Code of Criminal Procedure. It would be a search made in contravention of the provisions of the Code.'

7. It was conceded, by the learned Government Advocate, that Shri Gangbir Singh P. W. 2 had not recorded reasons, as required by Section 166 Cr. P. C. But he controverted the contention of the petitioners that non-compliance with the provisions of Section 166 Cr. P. C., rendered the search illegal. The argument of the learned Government Advocate was that the search, in the instant case, was conducted under the provisions of Section 6 of the Public Gambling Act and the provisions of Section 165 Cr. P. C., do not apply to such a search.

8. In view of the contentions, raised, on behalf of the parties, the point which requires consideration is, whether Section 166 Cr. P. C. is applicable to a search, conducted under Section 5 of the Public Gambling Act.

According to Sub-section (2) of Section 1 of the Code of Criminal Procedure, nothing contained in that Code will affect any special or local law in force or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. Sub-section (1) of Section 6 of the Code prescribes that all offences under the Indian Penal Code shall be investigated and tried according to the provisions of theCode Sub-section (2) of Section 5 lays down that all offences, under any other law, shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise, dealing with such offences.

The Public Gambling Act confers a special power on certain officers to conduct search, under certain conditions. That section prescribes a special procedure for the conduct of search. Neither Section 5 nor any other section of the Public Gambling Act makes the provisions of the Code of Criminal Procedure, relating to searches, applicable to a search, conducted under Section 5 Therefore, in view of the provisions of Section 1(2) and Section 5 (2) of the Code of Criminal Procedure, the special provisions of search, contained in Section 5 of the Public Gambling

Act, will prevail over the general provisions of the Code of Criminal Procedure, relating to searches. To that extent, the provisions of the Code of Criminal Procedure must give way, vide Emperor v. Kaitan Duming Fernad, (1907) ILR 31 Bom 438 It was a case under sections 6 and 7 of the Bombay Prevention of Gambling Act Those sections were substantially analogous to Sections 5 and 6 of the Public Gambling Act. It follows that Section 165, Code of Criminal Procedure will not be applicable to a search conducted under Section 5 of the Public Gambling Act.

9. There is considerable authority, in support of the above view It was held in Khilinda Ram v. Emperor, AIR 1922 Lab 458, that Section 5 of the Public Gambling Act prescribes a special procedure for searches and that the provisions of Section 165, Code of Criminal Procedure are not applicable to searches, conducted under that section. The above Lahore case was relied upon in Rure Mal v. Emperor. AIR 1929 All 937. wherein it was held that where a warrant for search was issued under Section 5 of the Public Gambling Act, Section 103, Cr P. C., was not applicable; in Raghunath Lahanusa v. Emperor, AIR 1932 Bom 610. a case under Section 6 of the Bombay Prevention of Gambling Act, and in Re, Nimmagadda Raghavalu. AIR 1953 Mad 243. AIR 1929 All 937 was relied on. In Re Ramprasad Ganesh Prasad Tamboli. AIR 1937 Nag 251, wherein it was held that Section 103 Cr. P C., does not apply to searches made under the Public Gambling Act In Chunilal Chha-ganlal v State. AIR 1961 Guj 127 it was laid down that the provisions of Section 103. Cr. P C., are not applicable to a search, conducted under Section 6 of the Bombay Prevention of Gambling Act. As stated already, Section 6 of the Bombay Prevention of Gambling Act is substantially analogous to Section 5 of the Public Gambling Act

10. The learned counsel for the petitioners placed reliance on State v. Sujan Singh, AIR 1954 J and K 28 and In re Nagarmal Jankiram. AIR 1941 Nag 338, in support of his contention that the provisions of the Code of Criminal Procedure, relating to searches, are applicable to a search, conducted under Section 5 of the Public Gambling Act. The Jammu and Kashmir authority, no doubt, supports the contention of the learned counsel. It was held, in that case, that Section 108, Code of Criminal Procedure was applicable to a search conducted under Section 5 of

the Jammu and Kashmir Gambling Act, which was substantially the same as Section 5 of the Public Gambling Act! The judgment does not make any reference to the decisions of the other High Courts, in which the contrary view was taken. AIR 1941 Nag 338 does not lay down that a search under Section 5, Public Gambling Act, will be governed by the provisions of the Code of Criminal Procedure, relating to searches.

11. It is clear that judicial opinion is practically unanimous that the provisions of Section 165, Code of Criminal Procedure are not applicable to a search, conducted under Section 5, Public Gambling Act. The failure to record reasons, by Shri Gangbir Singh P. W. 2, before conducting search, under that section did not vitiate the search. The observations of their Lordships, made in AIR 1960 SC 210, supra, relied upon by the learned counsel for the petitioners, will not be applicable to the present case as Section 165, Code of Criminal Procedure did not apply to the case. The observations were made in a case, under the Central Excises and Salt Tax Act and the Rules framed thereunder. Section 18 of that Act specifically provided that all searches under the Act or the Rules made thereunder shall be carried out in accordance with the provisions of the Code of Criminal Procedure, relating to searches. As already discussed, there is no such provision in the Public Gambling Act.

12. The search, conducted by Shri Gangbir Singh P. W. 2, under Section 5, Public Gambling Act, was valid and a presumption, under Section 6 of the Act, could legitimately be raised on the basis of the search. Playing cards and corries were recovered as a result of the search. They were instruments of gaming The finding of the instruments of gaming in the house of Harji petitioner gave rise, under Section 6 of the Public Gambling Act, to the presumption that the house was being used as a common gaming house and that Devi Rup and Dila Ram petitioners, who were found playing cards, were present in the house for the purpose of gaming. The burden of rebutting the presumption was on the petitioners. If unrebutted by defence evidence or the circumstances of the case, conviction could be based on the unrebutted presumption.

13. The defence evidence produced by the petitioners, did not rebut the presumption. The defence evidence related to the plea of Dila Ram petitioner that the currency notes of the value of Rs. 365 represented the amount received by him on the basis of G. R.'s. In the first place, there was no evidence that he had received Rs 365 on the basis of G. R.'s on the 29th October All what the witnesses stated was that Dila Ram had taken his truck to Jahuon the 29th October and to Gohar on the 28th October. None of the witnesses stated that Dila Ram had received the sum of Rs. 365 on the 28th or 29th. In the second place, even if it be assumed that Dila Ram had received the amount of Rs. 365, on the basis of G. R.'s, there was nothing to prevent him from gambling with it. The plea of Dila Ram petitioner that he was simply counting the money at the time of raid appears to be improbable. Dila Ram did not assign any reason as to the need of counting money at the house of a third person at an odd hour of the night.

14. The circumstances of the case tended to strengthen the presumption. Devi Rup and Dila Ram petitioners were actually playing-cards when the house was raided. A sum of Rs. 365, in currency notes, was lying on the floor, under the knee of Dila Ram petitioner. Sixteen corries, recovered, had been kept in an empty match-box, under the pillow. The petitioners did not furnish any explanation about the aforesaid sixteen corries.

15. The authorities AIR 1953 Mad 243 supra, and Mani Ram v. State, AIR 1954 Punj 164, cited by the learned counsel for the petitioners, are distinguishable on facts. In the peculiar circumstances of those cases, it was held that the presumption, raised under Section 6, Public Gambling Act stood rebutted. The main circumstances which had weighed with their Lordships, in coming to the above conclusion, was that the occasions for gambling were festival days on which people indulged in a great deal of gambling on account of some religious beliefs, and not necessarily, for profit. The circumstances, present in those cases, were lacking in the instant case.

16. It follows that the learned Magistrate was right in raising the presumption, against the petitioners, under Section 6 of the Public Gambling Act, and as the presumption remained unrebutted, in convicting the petitioners for the offences

charged against them.

17. No other point was urged in the revision petition. It is dismissed.

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