

Sindhi Lohana Chaithram

Vs

The State of Gujarat

Criminal Appeal No. 13 of 1964

(R. S. Bachawat, J. M. Shelat JJ)

31.03.1967

JUDGEMENT

BACHAWAT, J. –

The appellant and six other persons were charged under ss. 4 and 5 of the Bombay Prevention of Gambling Act, 1887. The sub-inspector of police Shri Anjaria received information that the appellant was keeping a common gaming house. He obtained a special search warrant from the Deputy Superintendent of Police, Porbandar, Shri S. M. Pandya, and raided the appellant's house in Bantwa on June 4, 1961 at 1 p.m. The raiding party found the door leading to the upper floor closed. The inmates pressed against the door from the inside and did not open it until blacksmith broke open the latch. Shri Anjaria seized torn and burnt pieces of playing cards lying on the floor of the central room, two packs of cards from a wall cabinet, some burnt cards lying on the floor and in the folds of a bed in the drawing room, four jokers and three packs of cards from trunks in the kitchen, some cash, burnt cigarette ends, bidis and matches and empty cigarette cases. All the accused were found in the upper floor. The appellant as the occupant of the house was charged under s. 4 of the Act and the other six accused were charged under s. 5 of the Act. The learned magistrate refused to raise a presumption under s. 7 of the Act on the ground that Shri Pandya was not specially empowered by the name to issue a search warrant. He acquitted all the accused. On appeal, the High Court held that Shri Pandya as the deputy superintendent of police, Porbandar was specially empowered to issue the search warrant and the prosecution was entitled to benefit of the presumption under s. 7. The High Court convicted the appellant of the offence under S. 4 of the Act and sentenced him to simple imprisonment for one month. The High Court convicted the other six accused under s. 5 of the Act and sentenced each of them to pay a fine of Rs. 200, in default simple imprisonment for one month. The present appeal was filed by the appellant by special leave.

A search warrant under s. 6(1) (i) of the Act can be issued by a "Deputy Superintendent of Police especially empowered by the State Government in this behalf". By a notification dated January 22, 1955, the Saurashtra government empowered specially certain assistant superintendents and deputy superintendents of police including the deputy superintendent of police, Porbandar Division, Porbandar, to authorise by issue of special warrants in each case to police officer not below the rank of a sub-inspector of police to do the various things necessary in order to raid a house where the police officer suspected gaming to be carried on and which house, room or place was suspected as being used as a common gaming house. The magistrate relying upon Emperor v. Udho and others, held that under s. 6, the officer must be specially empowered by name. The High Court relying on Emperor v. Savlaram Kashinath Joshi, held that an officer may be specially empowered under s. 6 either by name or in virtue of his office. It is because of the conflict of opinion between the Sind and the Bombay decisions that special leave was granted in this case.

Section 15 of the Bombay General Clauses Act 1904 shows that a person may be appointed to execute any function either by name or by virtue of office. A person may therefore be empowered by name or by virtue of his office of deputy superintendent of police to issue a special search warrant. Sec. 6 of the Bombay Prevention of Gambling Act requires that the deputy superintendent of police must be "specially empowered" to issue the warrant. In *Emperor v. Udho and others*, the expression "specially empowered" was interpreted to mean specially empowered by name and not by virtue of his office, and an authorization of "the deputy superintendent of police, Rohri" was said to be insufficient for the purposes of s. 6. This decision does not lay down the correct test. A person may be specially empowered not only by name but also by virtue of his office. In *Emperor v. Savlaram Kashinath Joshi*, it was rightly held that a notification authorizing the deputy superintendent of police of the Poona city to issue a search warrant under s. 6 specially empowered the holder of that office by virtue of his office to issue the warrant. We think that where power is conferred on a person by name or by virtue of his office, the individual designated by name or as the holder of the office for the time being is empowered specially. Judged in this test, the notification dated January 22, 1955, specially empowered Shri Pandya as the holder of the office of the deputy superintendent of police, Porbandar, to issue the search warrant under s. 6.

For the meaning of the expression "specially empowered" reference is often made to s. 39(1) of the Code of Criminal Procedure which provides "in conferring powers under this Code, the State Government may by order, empower persons specially by name or in virtue of their office or classes of officials generally by their official titles". In *Aluga Pillai v. Emperor*, it was rightly held that an authorization of the second class magistrate of Thirumangalam to try certain cases was a special empowering of the person holding that office by virtue of his office within the meaning of s. 39(1).

On the question whether a notification empowering all magistrates of a certain class to try certain cases can be said to empower specially every magistrate of that class to try those cases, there is a conflict of opinion, see *Mohammed Kasim and another v. Emperor*, *State of Mysore v. Kashambi*. On the further question whether a magistrate should be regarded as an office and not as an official for the purposes of s. 39(1) of the Code of Criminal Procedure, there is a sharp conflict of opinion, see *State v. Judhabir Chetri*, *K. N. Vijayan v. State and Polubha Vajudha and Anr. v. Tapu Ruda*. We do not express any opinion on those questions, as it is not the practice of this Court to express opinion on those questions which do not arise for decision. For the purpose of this case, it is sufficient to hold that a notification conferring power on the deputy superintendent of police of Porbandar to issue a search warrant specially empowers the holder of that office by virtue of his office to issue the warrant.

We hold that Shri Pandya as the holder of the office of the deputy superintendent of police, Porbandar was specially empowered under s. 6 of the Bombay Prevention of Gambling Act by the notification of the Saurashtra government dated January 22, 1955. It is conceded that the notification continued to be in force after the merger of Saurashtra with the State of Bombay. The seizure of instruments of gaming in the appellant's house entered under s. 6 raises a presumption under s. 7 that the house was used as a common gaming house and the persons found therein were then present for the purpose of gaming. In applying this artificial presumption the Court should act with circumspection. Playing cards may be kept and used for innocent pastimes. The presumption can be rebutted if from the prosecution evidence itself it is apparent that there was a reasonable probability of the playing cards not being kept or used as means of gaming or for the profit or gain of the occupier of the house. In the present case, the appellant could not successfully rebut the presumption. The resistance to the entry of the sub-inspector and the attempt to burn, destroy and conceal the playing cards forfeited the presumption. The explanation that the appellant had invited

friends and relatives on the occasion of his son's betrothal was not convincing. We do not find any compelling reason for interfering with the findings of fact by the High Court in this appeal under Art. 136 of the Constitution.

No prejudice was caused to the appellant by the production of the notification dated January 22, 1955 for the first time at the appellate stage. His contention in the trial court was that such a notification was not sufficient for raising the presumption under s. 7. This argument was not tenable. He had ample opportunity for rebutting the presumption arising under s. 7. Nor did he ask the High Court to give him any further opportunity for this purpose. Counsel ought to argue that the search warrant was invalid as it did not ex-facie set out the authority under which it was issued. The point was not taken either in the High Court or in the special leave petition. We therefore indicated that we will not allow the point to be raised. The High Court rightly convicted the appellant under s. 4 of the Act.

In the result, the appeal is dismissed.

G. C. Appeal dismissed.

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