

# **BOMBAY HIGH COURT**

Emperor

Vs

Ismail Hirji

(Patkar and Wild, JJ.)

04.09.1929

## **JUDGMENT**

### **Patkar, J.**

1. In this case the Presidency Magistrate, Second Court, Bombay, has made a reference, under Section 432 of the Criminal Procedure Code, submitting for decision certain points of law arising in a case pending before him.

2. One Ibrahim Ismail made a complaint on Oath on September 27, 1928, before the Commissioner of Police, Bombay. Instead of issuing a special warrant under Section 6 of the Bombay Prevention of Gambling Act, 1887, he personally raided the premises in company with other police-officers. The Commissioner entered the main entrance and Sub-Inspector Salaskar. entered the side gate and arrested accused Nos. 2 and 3, Police Constable No. 714 C.T. arrested accused No. 4. R.B. Sabaji arrested 1929 accused No. 1 and Inspector Achrekar and Havaldar 932-K arrested accused Nos. 5, 6 and 8. Accused No. 7 was arrested by another policeman, Panchnamas were made of the articles found in the passage and on the person of the accused. Twenty-seven slips were found in the passage bearing the names of the horses, the amount of bet, win or place, and single or double. The punters got receipts for the payments made to the bookmakers in the form of printed cart chits with numbers thereon which were inserted in the slips for identification. Three cart chits were found in the passage, and four cart chit books were also found in the passages. Currency notes of the value of Rs. 145 and a moneybag dropped by accused No. 3 were found in the passage.

3. The learned Magistrate instead of making a reference- to this Court ought to have decided the points involved in this case leaving the parties aggrieved to approach this Court in case they were dissatisfied with his decision.

4. The first question referred by the learned Magistrate is, whether offences punishable under Section 4 of the Bombay Prevention of Gambling Act IV of 1887 as modified up to date are

cognizable offences in all cases. In *Emperor v. Fernad*<sup>1</sup> it was held that as a First Class Magistrate has under Section 6 of the Gambling Act IV of 1887 power to give authority, under a special warrant to certain police-officers, to make arrest and search, the Legislature must be presumed to have intended that the First Class Magistrate should have authority to make the arrest and the search himself, if necessary, according to the principle of the legal maxim that "whatever a man sui juris may do of himself, he may do by another," and its correlative that "what is done by another is to be deemed done by the party himself." In *Emperor v. Jaffur Mahomed*<sup>2</sup> the learned Judges were not prepared to base their judgment upon a view of Section 6 contrary to the view taken in Fernad's case. In *Emperor v. Abasbhai*<sup>3</sup> it was held by Marten and Madgavkar JJ, following the decision in *Queen-Empress v. Deodhar Singh*<sup>4</sup> that the offences under Sections 4 and 5 were cognisable offences within the meaning of Section 4(f) of the Criminal Procedure Code, rather than non-cognizable offences under Sub-clause(n) of that section. In *Emperor v. Chandri*<sup>5</sup> it was held by Fawcett J. that there were serious limitations on the power of arrest under Section 10 of the Bombay Prevention of Prostitution Act XI of 1923, and that any case where those conditions are not complied with cannot be described as a cognizable case. Under Section 6 of the Gambling Act and on the authority of the decision in the case of Emperor v. Fernad the Commissioner of Police could arrest without a warrant, and the words "a police-officer may arrest" in Section 4(1)(f) do not mean every or any police-officer, and provided that a superior police-officer has power to arrest without a warrant, the offence is a cognizable offence. It was further held by Madgavkar J. in Emperor v. Abasbhai that the report of the police-officer could have been treated in that case as a complaint. Both the learned Judges came to the conclusion that the Magistrate had jurisdiction as the offences were cognizable, and that the case fell under Section 190(b) of the Criminal Procedure Code. The learned Magistrate ought to have followed the clear ruling of this Court in Emperor v. Abasbhai.

5. It is urged, however, on behalf of the accused that the remarks of Chandavarkar J. in Fernad's case were obiter, and that, according to the definition of a cognizable offence in Section 4(1)(f) of the Criminal Procedure Code, the offences under Sections 4 and 5 of the Gambling Act would not be cognizable offences as a police-officer could not arrest in accordance with the second schedule of the Criminal Procedure Code or under any law for the time being in force, without a warrant. It is further urged that in Schedule II, relating to offences under other laws, an offence punishable with imprisonment for less than one year or with fine only is a non-cognizable offence, and under Section 6 of the Gambling Act no express power is given to the Commissioner of Police to arrest or to make the search himself as is conferred by Section 6 of the Bengal Public Gambling Act II of 1867, and that the case of Queen-Empress v. Deodhar Singh, followed in Emperor Abasbhai, is based on Section 5 of the Bengal Act. Section 6 of the Gambling Act is correctly interpreted by the decisions referred to above which are no less

binding on us than on the Magistrate. The words "under any law for the time being in force" in Section 4(f), Criminal Procedure Code, are, however, in my opinion, wide enough to include an express or implied provision of any law or enactment and would cover the application of the maxims *qui facit per alium facit per se* (whatever a man may do of himself, he may do by another) and *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) to any provision of any enactment, in order to arrive at the true intention of the enactment. Though the Act was amended several times' since the decision in Fernad's case, the Legislature has not expressed its true intention to be otherwise than that determined by judicial decisions. It is to be presumed that there is no intention to prevent the application of such maxims unless there is something in the language or in the object of the statute to the contrary. See Maxwell on the Interpretation of Statutes, 6th Edition, page 134.

6. The second question is, whether the arrests are illegal. It is contended that the arrests are illegal on the following grounds: (1) that there was no complaint on oath, (2) that the passage is not "a place" within the meaning of Section 6 of the Gambling Act, (8) that the Commissioner did not satisfy himself that there were good grounds for the suspicion, and (4) that the Commissioner could not authorise the constables to arrest, and the arrests by Sub-Inspector Salaskar were not in the actual presence of the Commissioner.

7. The first point arising for decision is, whether Exhibit A is a legal complaint on oath before the Commissioner of Police. According to the decision in *Emperor v. Tribhovan Motiram*<sup>6</sup>, the Commissioner of Police was competent to administer an oath to Ibrahim Ismail under Section 6 of the Gambling Act. It is urged, however, that though the word "complaint" in Section 6 is not to be understood in a technical sense, Ibrahim who made the complaint to secure a reward cannot be considered to be a person who had any grievance, and therefore was not competent to make a complaint. Section 6 does not impose any limitation on the power of any person to make a complaint on oath to the Commissioner of Police. In *In re Ganesh Narayan Sathe*<sup>7</sup> it was held that as a general rule any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. The objection, therefore, raised on this point on behalf of the accused is, in my opinion, without substance.

8. The second question arising for decision is, whether the passage is a "place" within the meaning of Section 6 of the Gambling Act. In *Emperor v. Jusub Allyi*<sup>8</sup> it was held by Batty J. that the machwa must be considered to have been a place within the meaning of Section 4 rather than of Section 12, being more of the nature of a house or room than of a place *eiusdem generis* with a street or thoroughfare. In *Emperor v. Fattoo Mahomed*<sup>9</sup> a small open space surrounded by houses on all sides and accessible only by a narrow lane was held to be a place within the

meaning of Section 4 of the Gambling Act as being appropriated for the business of betting. There appears to be no conflict in the decisions in Jusub Ally's case and Fattoo Mahomed's case to justify a reference on this point. In *Powell v. Kempton Park Racecourse Company*<sup>10</sup> Lord James of Hereford held (p. 194) :Speaking in general terms, whilst the place mentioned in the Act must be to some extent ejusdem generis with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word 'place'. There must be a defined area so marked out that it can be found and recognised as 'the place' where the business is carried on and wherein the bettor can be found.

9. In *Eastwood v. Miller*<sup>11</sup> it was held that an enclosed area, though uncovered, might as well be "a place" within the Act as a place either covered with canvas as a tent or a light structure as a building. It is a question of fact in each case whether the business of betting is localized so that people may fairly resort to the place where it is carried on. I may also refer in this connection to the case of *Brown v. Patch* (1899) 1 Q.B. 892. It would be for the Magistrate to consider on the evidence whether the passages are "a place" within the meaning of the Act. Having regard to the decision in *Emperor v. Fattoo Mahomed*<sup>12</sup> there appears to be no ground for any doubt justifying a reference on this point by the Magistrate.

10. The third point is, whether the Commissioner satisfied himself that there were good grounds for the suspicion that any place is used as a common gaming house. It is a question of fact which the Magistrate has to decide on the evidence in the case and is not a question of law which should have been referred by him to this Court.

11. The fourth point is, whether the arrests by the constables or by Sub-Inspector Salaskar are illegal. Under Section 6 of the Gambling Act, the Commissioner of Police has the power to give authority, by special warrant under his hand, to any Inspector, or other superior officer of Police, of not less rank than a Sub-Inspector.

12. (a) to enter, "with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any such house, room or place, and

13. (b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not.

14. According to the authorities to which I have already referred the Commissioner of Police had the power to enter with the assistance of such persons as may be found necessary and to arrest the persons whom he found therein. It is not possible for the Commissioner of Police alone, if he intended to raid the premises, to arrest a multitude of persons. It is, therefore, provided by the

Legislature that he may enter with the assistance of such persons as may be found necessary. Mr. Salaskar in his evidence says that he was instructed to raid the premises with his men by the rear gate simultaneously with the raid from the main gate by the Commissioner of Police. The arrests, therefore, by Salaskar were under the express authority of the Commissioner of Police and in the presence of the Commissioner though not within his view. I think that the arrests by Mr. Salaskar were not illegal. It is not contended before us that arrests by any other police-officer were illegal. The point loses any importance in this case as the offences are cognizable and the Magistrate has jurisdiction to investigate the case under Section 190, Clause (b). It is not, therefore, necessary to go into the question urged by the learned Government Pleader that even on the assumption that the offences were not cognizable the Magistrate had jurisdiction to treat the report by the police-officer as a complaint under Section 190, Clause (a), according to the view of Madgavkar J, in *Emperor v. Abasbai*<sup>13</sup> and the decision in *Emperor v. Shivaswami* (1927) 29 Bom. L.B. 742.

15. The last question is, whether there was any gaming at all when the meeting was postponed. It appears from Exhibit T that the race which was to be run on September 9 was postponed to October 6. It is urged on behalf of the accused that in a wager both the parties must contemplate the determination of the future uncertain event as the sole condition of their contract, and as in the present case the future uncertain event did not happen, there was no wager, and reliance is placed on *Anson on Contract*, pages 230 and 231, and the case of *Ellesmere (Earl) v. Wallace*<sup>14</sup>. In the present case, the charge against the accused was under Clause 4 (a) and 4 (c) and not under Section 5 of the Gambling Act. The question, therefore, does not really arise in the present case. In *Halsbury's Laws of England*, Vol. XV, page 267, para. 649, it is stated as follows: A wagering contract has been described as one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of such event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake which he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.

16. A bet is defined in *Thacker v. Hardy*<sup>15</sup> and *Carlill v. Carbolic Smoke Ball Company*<sup>16</sup>. A bet need not be as regards the issue of a future uncertain event and may be upon a past event, e. g., whether a particular horse won a race in a certain year. In such a case the bet is upon the accuracy of the information, belief or memory of the parties and the event is the proof that one or the other was accurate, A person may bet against what he believes the issue will be, e. g., a man may bet against a horse which he believes will win in order to secure himself against loss in either event. In *Ellesmere (Earl) v. Wallace*<sup>17</sup> the jockey club was not interested in the result of the races and the provision relating to the prizes was in no way dependent upon the result of the races as they were to be given in any event, and the only event outstanding between the parties, viz., whether

the defendant's horse would run in the race depended solely on the volition of the defendant and not upon the determination of any future event.

17. The evidence in the present case shows that the race which was to be run on September 29 was adjourned to October 6 early in the morning, and still in the afternoon of that day bets were entered into with regard to the meeting which had already been adjourned, and the bets were to remain good for the race that was to be run on October 6. The parties did not intend either that the race should run on September 29 or that a particular horse should run that day, as the condition of the agreement, I think that even though the race was postponed the agreement to bet would be a wager and would amount to an offence under Section 5 of the Gambling Act. A question in the present case is, whether on the evidence accused No. 1 having the use of a room or place in the premises of the Akbar Manufacturing and Press Company did use the same for the purpose of a common gaming house, and accused Nos. 2 to 8 did assist accused No. 1 in conducting the business of the said common gaming house, and thereby accused No. 1 committed an offence punishable under Section 4(a) and accused Nos. 2 to 8 committed an offence punishable under Section 4(c) of Act IV of 1887, and the learned Magistrate has to find on the evidence whether the room or the place in question is a, common gaming house, That question would depend on the evidence in the case and the fact that a particular race was adjourned on September 29 to October 6 does not affect the question.

18. I would, therefore, answer the reference, on the points referred to, as stated above.

**Wild, J.**

19. This is a reference under Section 452 of the Criminal Procedure Code by the Presidency Magistrate, 2nd Court, in which he refers live questions for the opinion of this Court.

20. The prosecution out of which this reference arises was one under Section 4 of the Bombay Prevention of Gambling Act of 1887 and the facts are shortly these. On September 27, 1928, one Ibrahim Ismail's sworn statement was taken by the Commissioner of Police, Bombay, and he complained that the premises of the Akbar Manufacturing Co. were being used as a bucket shop or office for receiving bets on horses. On September 29, the Commissioner of Police, without issuing a warrant under Section 6 of the Bombay Prevention of Gambling Act to any other police-officer to search the premises, himself raided the premises. He entered by the front door and Sub-Inspector Salaskar entered by the rear or side door. The premises consist of buildings with two open passages at right angles one to the other. It was found that the passages were being used for the purpose of betting on horse races that were to take place that day at Poona, Arrests were made; some of the accused were arrested by Sub-Inspector Salaskar and by one of the Police Constables of his party out of sight of the Commissioner of Police and others were

arrested in his presence. It subsequently transpired that at the time of the raid the race meeting had been postponed.

21. The first question referred is, whether offences punishable under Section 4 of the Bombay Prevention of Gambling Act IV of 1887 as modified up to date are cognizable offences in all cases. The learned Magistrate appears to doubt the correctness of the ruling in *Emperor v. Abasbhai*<sup>18</sup> though he admits that he is bound to follow it. I am of opinion that it is not open to the Presidency Magistrate under Section 432 of the Criminal Procedure Code to refer a point of law which is covered by an authority binding on him nor is it clear on what ground the learned Presidency Magistrate doubts the correctness of the ruling in *Emperor v. Abasbhai*. He refers to the case of *Emperor v. Chandri*<sup>19</sup> But the facts there were completely different. In that case the arrest for an offence under the Bombay Prevention of Prostitution Act was not on a complaint or by an authorized police-officer and the arrest was, therefore, held to be illegal. Here the arrest for an offence under the Bombay Prevention of Gambling Act was by an officer (the Commissioner of Police, Bombay) who could have issued a warrant of arrest. The question really is not whether the offence in this case is a cognizable one but whether the Commissioner of Police was empowered to arrest. In *Emperor v. Fernad*<sup>20</sup> it was held that a person who is authorized to issue a warrant under Section 6 of the Bombay Prevention of Gambling Act could himself arrest without a warrant and this case was followed in *Emperor v. Jaffur Mahomed*<sup>21</sup>, and *Emperor v. Abasbhai*<sup>22</sup> The principle enunciated in the case of *Emperor v. Fernad* is a common-sense one. In the case of Magistrates it has been enacted in Section 65 of the Criminal Procedure Code that they have this power. As under the Criminal Procedure Code warrants of arrest are not issued by police-officers, it was unnecessary for the Code to make a similar provision in the case of police-officers. There would appear, therefore, to be no reason to suppose that the principle enunciated in the case of *Emperor v. Fernad* is incorrect. My answer, therefore, to the first question would be that the Commissioner of Police of Bombay was in the circumstances of this case authorized to arrest the accused.

22. The second question is, whether the arrests are illegal as there was no complaint on oath and the passage is not a "place" within the meaning of Section 6 of the Bombay Prevention of Gambling Act. With regard to the first branch of this question it is not contended by the learned Counsel for the accused that there is no statement on oath by the informer. It is, however, contended that the word "complaint" in Article 6 should bear its ordinary meaning of "information given by a person aggrieved". That, however, is not the meaning of the word "complaint" as defined in the Criminal Procedure Code, Section 4(1)(g), and as ruled in the case of *In re Ganesh Narayan Sathe*<sup>23</sup> "any person having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence." The informant in this case was not interested but it is not necessary to

suppose that the word "complaint" in Section 6 is to be given any other meaning than that which it bears in the Criminal Procedure Code, I hold then that there was a complaint on oath as required by Section 6.

23. As regards the second branch of the question whether these passages constitute a "place" within the meaning of Section 6 of the Bombay Prevention of Gambling Act, the facts of the present case are very similar to those of the case of *Emperor v. Fattoo Mahomed (1913) 1. L.K. 37 Bom., 651, s. c. 15 Bom. L.R. 689.(Supra)* There it was held that a small area limited by metes and bounds, surrounded on all sides by buildings, and appropriated for the business of betting by the accused as a lessee was a place within the meaning of Section 4. Here the passages are surrounded by buildings and are closed at night by doors. It is true that the accused have not leased the passages for their business but they have appropriated them for the business by using them. In this way the business of betting has been localised and it would seem that this localisation converts the passages into a place as held in the case just cited. In the Bombay Prevention of Gambling Act, Section 3, "common gaming" house is defined as a house, room or place in which instruments of gaming are kept, etc., and it is clear from the ruling just cited that the common factor in the expressions "house, room or place" is not that they are roofed over but that they are sufficiently definite. In this case as the passages are limited by the buildings and doors, it would appear that they are a place within the meaning of Sections 3, 4, and 6 of the Bombay Prevention of Gambling Act.

24. The third question is, whether the Commissioner satisfied himself that there were good grounds for the suspicion of the complainant. As this is altogether a question of fact, I would leave it to the learned Presidency Magistrate to decide.

25. The fourth question is, whether the arrests by constables or by Sub-Inspector Salaskar are illegal. As to this it may be presumed that, before the raid, orders were given by the Commissioner of Police to Sub-Inspector Salaskar to arrest those who might be found in the passages, It may be that the arrests were not made within sight of the Commissioner of Police but they can be considered in the circumstances to have been made in his presence. It can hardly be urged that in a case like this where a number of persons are to be dealt with, the person authorized to arrest must personally make the arrest in each case. If the, arrest is made in his presence and on his order it is certainly sufficient in accordance with the maxim *qui facit per alium, facit per se*. I would, therefore, hold that the arrests by the constables and by Sub-Inspector Salaskar are not illegal.

26. The last question is, whether there is any gaming at all when the meeting was postponed. It is argued that as it was understood by the bettors on the horses and the accused that the bets were with respect to races which were to take place that afternoon at Poona and at the time when the

bets were made the races had been postponed there was no gaming in this case, that is to Bay, there was no wagering or betting. No authority has been cited for the proposition that if one or both parties are under a misapprehension as to the subject of the wager or bet there is no wager or bet made. All that the wagers in a case like this demand is that they should be paid an amount of money if the horse selected by them wins or is placed at the race in which the horse is to run. When they have made their bet and it has been accepted by the taker the transaction is a complete wager or bet. It may be that "in a case like the present where the race meeting is postponed or cancelled the person who has paid his money would be entitled to get the money back, but, in my opinion, it cannot be said that the bet has not been made. Similarly, the abetment of an offence is under the Indian Penal Code punishable whether the offence abetted is or is not committed. I am, therefore, of opinion that the fact that the race meeting was in this case postponed does not mean that there was no gaming.

#### Cases Referred.

- 1(1907) 1. L.B. 31 Bom. 438, a. o. 9 Bom L.R. 696
- 2(1912) I.L.R. 37 Bom. 402, s.c. 15 Bom. L.R. 106
- 3(1925) I.L.R. 50 Bom. 344, s.c. 28 Bom. L.R. 272
- 4 (1899) I.L.R. 27 Cal. 144
- 5(1924) I.L.R. 49 Bom. 212, 221, s.c. 26 Bom. L.R. 1225
- 6(1928) 31 Bom. L.R. 53, 56, 60
- 7(1889) I.L.R. 13 Bom. 600
- 8(1905) I.L.R. 29 Bom. 386, 391, s.c. 7 Bom. L.R. 333
- 9(1913) I.L.R. 37 Bom. 651, s.c. 15 Bom. L.R. 689
- 10(1899) A.C. 143
- 11(1874) L.R. 9 Q.B. 440
- 12(1913) I.L.R. 37 Bom. 651, s.c. 15 Bom. L.R. 689
- 13(1915) I.L.R. 80 Bom. 344, s.c. 28 Bom. L.R. 272
- 14(1929) 2 Ch. 1, 26
- 15(1878) 4 Q.B.D. 685
- 16(1892) 2 Q.B. 484, 490
- 17(1928) 2 Ch. 1
- 18(1925) I.L.R. 50 Bom. 344, s.c. 28 Bom. L.R. 272
- 19(1924) I.L.R. 49 Bom. 212, S.C. 26 Bom. L.R. 1225
- 20(1907) I.L.R. 31 Bom. 438, s. c. 9 Bom. L.R. 695
- 21(1912) I.L. R 37 Bom. 1402, S.C. 15 Bom. L.R. 106
- 22(1825) I.L.R. 50 Bom. 344, s. c. 28 Bom. L.R. 278
- 23(1889) I.L.R. 13 Bom. 600