

(1980) 09 MP CK 0053

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 220 of 1979

Harbanslal Premnath

APPELLANT

Vs

State of M.P. and another

RESPONDENT

Date of Decision : 25-09-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1980) MPLJ 714

Hon'ble Judges : K.K. Dube, J;A.R. Navkar, J

Bench : Division Bench

Advocate : J.P. Gupta, for the Appellant; M.A. Shah, Deputy Government Advocate for State, for the Respondent

Judgement

A.R. Navkar, J.

By this petition under Article 226 of the Constitution of India, the petitioner wants that the order passed by Shri V.R. Kapoor, Collector and District Magistrate, Shivpuri, dated 29-9-1979, be quashed, because it violates the fundamental rights given to the petitioner for doing his business and also because it suffers from lack of legal authority in Shri VK. Kapoor to pass such an order.

The facts giving rise to this petition are that the petitioner organises a game of skill known as "Five Dart Game" (a game of throwing darts). The game is played in the following manner, as mentioned in A. P. Mathur's Commentaries on Gambling Acts in India--revised and edited by Shri K. K. Malik--Second Edition--1973:

In this game a board with a number of squares in six colours is kept leaning against the wall. On a table near it is placed a board showing the same six colours. If a person places money on any of those colours on the table, he would be given three darts. If he throws the darts and strikes the colour on which he has placed his money he would be given twice the amount staked by him on the

colour. Others also can take part in the game with him. They are said to be "side--betting." Before the dart throwing, they have to place their money on any colour other than the colour already chosen by him. If he throws the dart on any of the colours on which they have placed their money, they would be entitled to get double the amount staked. Such of them would lose their money if the dart is thrown on any colour other than the one on which they had placed their money.

But, in the petition itself, the petitioner has mentioned how the game is played. That description he has given in para 2 (b) of his petition, which runs as under:

A customer purchases a coupon of rupee one from the stall of the proprietor. This enables him to use "Five dart". The customer throws the dart on the board after declaring that he proposes to strike at a particular number. He gets 5 chances. If he succeeds once in striking at the number proposed, he gets one more coupon and if he succeeds twice, he gets two more coupons. This is a game of mere skill, as striking at a particular number depends upon the balance of hand and accuracy to strike at a particular number.

On 28-6-1979, the petitioner applied for permission to put up a stall and organise this game of skill. It is alleged that this game was organised on a private land, which the petitioner took on rent and for running this game on the land, the landlord had no objection. The District Magistrate, Shivpuri, asked for a report from the Superintendent of Police before granting permission to the petitioner for organising the said game. The permission was granted to one Ram Krishna Gupta who also was organising this type of game. On 15-9-1979, the Collector, Shivpuri gave permission to the petitioner for organising the said game. The copy of the order has been made Annexure P/3. But, by an order, which is under dispute, No. Q/95/79/9 GA/20/ Reader, dated 29-9-1979, the Collector imposed a ban on organising and conducting of the said game in Shivpuri. This is the order which the petitioner wants that it should be quashed. The grounds he has taken for quashing the order are that it is a game of mere skill and it is not prohibited under any law. The petitioner has a fundamental right to carry on his occupation or business of organising any game of skill at different places in India and by an order by an executive officer like District Magistrate, no complete ban can be imposed on the petitioner that he cannot carry or organise the business which he is doing at Shivpuri. He has further said that he is organising this game for last ten years at different places. The order is violative of Article 14 of the Constitution of India, because permission was given for organising such a game to one Ram Krishna Gupta. The third ground he has taken is that before passing order of cancelling the permission which was granted to the petitioner, the petitioner should have been heard. On this ground, it is submitted by the petitioner that a writ be issued in his favour as asked for for quashing the said order.

We were referred to the return filed by the State so as to find out whether there is a complete ban on the petitioner for organising the said game. In the return, the State has objected that the order is not justiciable before the Court of Law

and, therefore, the present petition is not maintainable. The second point, the State has urged is that this order being an executive order, the petitioner should have moved the State Government against this order as the order says that the order is passed after taking into consideration the maintenance of public peace. As the petitioner has not availed of this alternative remedy, he is not entitled to be heard under Article 226 of the Constitution of India. The third objection is that the game is purely a game of chance and if it is a game of chance, it will amount to a gambling and if it is gambling, then the District Magistrate was within his rights to pass such an order. Lastly, it is urged that the permission given to the petitioner by the District Magistrate can be cancelled at any time without any show-cause notice. Therefore, the grievance of the petitioner that he was not heard before cancelling the permission given to him, is without substance. The District Magistrate has a duty cast on him to maintain law and order and the District Magistrate can pass any order under the law for maintaining public peace and the said order is passed in public interest after considering the complaints of general public and the report sent by the Police Officer.

After seeing the objections raised by the State, we will turn to the order challenged before us. In para 4 of the order, it is stated as under:

One more fact we have to mention is that the District Magistrate, Shivpuri, on 15-9-1979, has given the permission to organise the said game to the petitioner, in which he has stated that it is a game of skill. While cancelling the permission given, by the order dated 29-9-1979, the District Magistrate has again said in his order that the permission given to the petitioner for organising the game of skill is withdrawn immediately and he is not allowed to organise the game anywhere in the city of Shivpuri. He, in the said order, has said in para 3 that for organising the game, there is no need of taking any permission, but subsequently he has withdrawn it, as stated above.

The first point, learned Deputy Government Advocate has submitted before us is that the petitioner has an alternative remedy and he should have gone against the order of the District Magistrate before the State Government. But, he failed to show us as to under what law the petitioner was competent to file an appeal or revision before the State Government. In our opinion, if as alleged by the petitioner, his fundamental right is infringed and total ban to carry on his business or trade is imposed by an executive order, he can approach this Court under Article 226 of the Constitution. We may refer to Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, in which this proposition was considered and it was held that the petitioner can come to this Court or move the Supreme Court for getting the order quashed if it infringes his fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. Therefore, we are not inclined to accept the submission that the petitioner had an alternative remedy and he should have exhausted that remedy first.

The second point is whether the game which the petitioner wanted to organise is a game of chance, or a game of skill. If the game is not a game of skill and only

a game of chance, then, it will be covered by the Public Gambling Act, 1867, as adopted by this State. We may refer to section 12 of the Act which says: "Nothing contained in the foregoing provisions of this Act shall be held to apply to any game of mere skill wherever played." So, first we have to see whether game of dart is a game of skill or not. This point came for decision in *Saligram Khetry Vs. Emperor*, . The finding given by the Magistrate in that case was to the effect that:

On a careful consideration of the nature of the game and the manner of play I am satisfied that it is a form of gaming.

This finding was attacked before the High Court and the High Court has stated that the game of dart is a game of skill. For coming to this conclusion, it is said in this Judgment as under:

Broadly speaking, with that proposition I agree. But I am bound to say that it seems a little difficult to think of any game which is absolutely devoid of all possibilities of some fortuitous element entering into the playing of it. The element of chance may be small or even infinitesimal, but in practically in all pastimes which can rightly be described as games even though they are, undoubtedly, games of skill some element of chance might creep in. I make these observations for the purpose of saying that in my opinion, it is very difficult to read the word "mere" as if it were synonymous with the word "pure" in the strict and scientific sense of the latter word. I am therefore of opinion that one must give a reasonable interpretation to the expression "mere skill" and should come to the conclusion that a game of "mere skill" should be taken to mean one in which a person playing it, as far as possible in any human affairs, has complete control over the result which he sets out to attain, provided he is sufficiently expert in performance. I agree with Mukerjee J., that having regard to the terms of section 50-A the question is no longer one as to whether the element of skill or chance predominates. The real question as I have said, is whether the result sought to be obtained can be achieved by the person seeking to attain it if he has sufficient expertness to bring it about. It is obvious that in a large number of games there is definitely an element of chance. Games which are dependent upon the throw of dice or the turn of wheel or the fall of cards, necessarily have a decided element in the playing of them which is altogether outside the control of the person playing.

In the present case it is argued on behalf of the Crown that the likelihood of the player affixing the dart on a square of the particular colour nominated by him was so remote that it became a matter of pure luck, whether the dart struck a particular colour or not. It is argued because there are a number of squares of the same colour, the player might by chance hit any individual square of the colour selected by him, although he had in fact aimed at another square of the same colour; and it is therefore said that the difficulty of hitting the precise target selected is so great that success must necessarily be dependent on what is ordinarily called a fluke. In this connexion I may observe that no one would

dispute that the game of billiards is a game of the highest possible skill and yet even in this game if a player sets out to put a ball into a particular pocket and he may by a fluke put that ball into some other pocket but he nevertheless scores his point. It seems to me therefore that any argument which is based upon the proposition, the greater the difficulty the greater the element of chance, is wholly unsound, one may equally well say, the greater the difficulty the higher the skill.

In this particular case there can be no doubt, I think, that the likelihood of success is well within the control of any particular player, provided he possesses the necessary skill. No doubt success would demand a high degree of skill or at any rate what is generally described as knack which is only another way of saying that the person playing must have an aptitude and must have a certain amount of experience and expertness in the play of the particular game. Here it is clearly possible for a person with sufficient expertness to hit any particular square or at any rate a line of squares. I say line of squares because the colours were arranged in lines drawn diagonally on the board which constituted the target. There is nothing in the playing of the game which could not be foreseen and anticipated. The players in the game so far as any outside circumstance or fortuitous factors are concerned, are masters of the situation. If one seeks a criterion upon the question whether the game is one of mere skill or not, I think one can only say that the real test is: Is there any external thing or fortuitous circumstance which may interpose between the action of the player and the result to be attained, and are the media, or instruments of the operation all ascertained the moment the game begins. As I have already said it is undoubtedly the case that in this particular game there was a possibility and indeed probability that a player might be unwillingly successful by hitting a line of the colour selected other than the particular line which he intended or was supposed to aim at. But on the other hand as I have already said it was undoubtedly possible for the person with the requisite skill to hit the actual point on the target selected by him beforehand. Accordingly giving the words "mere skill", a reasonable construction and not interpreting the qualifying adjective, the word "mere" as if it meant pure in the sense in which that word might be used in a scientific experiment. I come to the conclusion that this case falls within the proviso of section 50-A.

The point came before the Calcutta High Court in Superintendent and Remembrancer of Legal Affairs Vs. L.E. Renny and Others, and before the Madras High Court in In Re: Manavala Naidu and Others, and it has been held that the game of dart is a game of skill. But, further it is observed in these judgments that the person who is actually playing the dart game, is playing a game of skill, but the persons who are side-betting for them, the game will not be a game of skill, but it will be a game of chance. Therefore, we are of the opinion that the game of dart is a game of skill and it cannot be termed to be gambling and the Public Gambling Act will not be applicable to this game when it has been specifically excluded from its operation by section 12 of the said Act.

The next point to be decided is whether this will amount to a trade, profession or a licence. The meaning of trade, business and profession was considered by the Supreme Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, and after reading the interpretation, we are of the opinion that organising game of dart is fully covered by the word "trade". But the same judgment has stated further that there could be no trade or business in crime. But, as we have already stated above, the game of dart is not a game of chance, but a game of skill and, therefore, it is not gambling and as it is not gambling, it is not a crime. Therefore, the petitioner's organising the game of dart is a business and it is clearly covered by Article 19 (1) (g) of the Constitution.

The next point we have to see is whether the order of the District Magistrate, by which he has imposed a total ban on the organising of the game of dart in the city of Shivpuri by the petitioner will amount to a reasonable restriction or not. For submitting that the ban was reasonable and the restriction is covered under Article 19 (6) of the Constitution, the learned Deputy Government Advocate, referred us to certain sections from the Police Act. But, in our opinion, those sections have no relevance to the present case at all, because those sections refer to processions and assemblies and how they are to be convened. Article 19 (6) of the Constitution reads as under:

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,--

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Further, he has submitted that for maintaining peace in the city of Shivpuri, the District Magistrate has issued this order. But this explanation, the learned counsel for the petitioner says, is an afterthought and, therefore, it cannot be considered. For that, he has referred to *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, in which it is stated as under:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

This ruling clearly applies to the present case and the subsequent explanation given by the District Magistrate in the return is not sufficient and, therefore, we are not willing to accept that explanation.

But, the main point is that for imposing such a total ban on the activities of the petitioner, the District Magistrate must show some authority in him to pass such an order, which clearly infringes the fundamental right of the petitioner guaranteed by the Constitution. By executive action, the fundamental rights cannot be abrogated. This point was considered in *Bishan Das and Others Vs. The State of Punjab and Others*, . In para 14 of this judgment, relying on *Wazir Chand Vs. The State of Himachal Pradesh*, the Court has observed: "the State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts." We need not say it again that no rule of law or any authority in the District Magistrate was shown to us by the learned Deputy Government Advocate by which we could come to the conclusion that the District Magistrate had the sanction of law behind him when he passed the order in dispute by which the fundamental right of the petitioner was denied to him. We may mention the relevant portion in *Wazir Chand v. State of Himachal Pradesh* (supra), which is followed in the Supreme Court Judgment in *Bishan Das's case* (supra) as under:

Where the police in India seized goods in possession of the petitioner in India, at the instance of Police of Jammu and Kashmir, and the seizure was not under any authority of law, inasmuch as they were not under orders of any magistrate nor were they under any of the sections 51, 95, 98 and 165 of the Criminal Procedure Code, since no report of any offence committed by the petitioner was made to the Police in India and the Indian Police were not authorised to make any investigation and the whole affair was a hole-and-corner affair between the officers of the Kashmir Police and the Indian Police, the seizure of the goods from the possession of the petitioner amounted to an infringement of his fundamental rights both under Article 19 and Article 31 and relief should be granted to him under Article 226.

In our opinion, these observations are sufficient to quash the order of the District Magistrate, Shivpuri.

The question of reasonableness would have arisen if it would have been shown by the State that the District Magistrate had the sanction of law behind him when he passed the order, but as there is no sanction behind him of law to pass the order, we are of the opinion that the question of reasonableness need not be gone into. Even otherwise, we are of the opinion that the restriction imposed by the District Magistrate, cannot be said to be reasonable. Only because he had an apprehension that some bad element will gather where this game is organised, a total ban cannot be imposed on the petitioner for organising the said game.

The result, therefore, is that as the order cannot be supported as being reasonable, or flowing from some authority under law, we have no option, but to

quash the said order.