
(1992) 10 BOM CK 0052
In the Bombay High Court
Case No : Criminal W.P. No. 580 of 1988

Kumar A. Nadar

APPELLANT

Vs

V.K. Saraf, Commissioner of Police and others

RESPONDENT

Date of Decision : 22-10-1992

Acts Referred:

Bombay Police Act, 1951 — Section 2

Bombay Prevention of Gambling Act, 1887 — Section 3, 3(ii), 4(1)(a), 4(a), 5

Citation : (1993) MhLj 1538

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : S.R. Chitnis, for the Appellant; R.F. Lambay, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.L. Dudhat, J.—The petitioner in this case has filed this criminal writ petition for quashing the prosecution under sections 4(a) and 5 of the Bombay Prevention of Gambling Act, 1887, pending before the Metropolitan Magistrate, 28th Court at Esplanade, Bombay.

2. Few facts which are material to dispose of this criminal writ petition are as under:-

Petitioner in this case is the Manager of a video game parlour situated at Chembur. Petitioner is running the business under the name and style as "Good Luck Video Game Parlour". It is the case of the petitioner that the petitioner had applied for a licence under Rule 109 of the Rules for Licensing and Controlling Places of Public Amusement (other than Cinema) and Performance for Public Amusement including Melas and Tamashas, 1960. As per the said application, the licence was granted in favour of the petitioner by respondents Nos. 1 and 2 in April 1987. Under the said licence different machines were installed and played for amusement. The said machines were specified in the licence granted to the petitioner. Petitioner also obtained ticket selling licence from respondent No. 1.

The said ticket selling licence was obtained by the present petitioner for the sale of tokens on payment of cash as the machines could be operated only on inserting the tokens.

3. It is the case of the petitioner that on 23rd April 1987 in the evening the officers of respondent No. 1 came to the place where the petitioner was running video game parlour. On the said date respondent No. 1 seized five machines more particularly described in para 3 of the petition. Since, according to the petitioner, the said seizure made was illegal, the petitioner preferred Writ Petition No. 1541 of 1987 on the Original Side of the High Court and on 29th April 1987 this Court granted the rule and as an interim order directed the respondents to return to the petitioner the five video game machines seized from the petitioner. As per the aforesaid order of this High Court, the respondents returned the said machines.

4. On 30th May, 1987, respondent No. 2 raided the said premises of Good Luck Video Game Parlour and took charge of 14 machines which were the subject matter of the licence granted to the petitioner as mentioned aforesaid. It is the allegation of the petitioner that the said machines were seized by respondent No. 2 without panchanama and without any search warrant. Thereafter the petitioner was prosecuted under sections 4(a) and 5 of the Bombay Prevention of Gambling Act, which is the subject matter of challenge in this criminal writ petition.

5. The said prosecution is challenged by the petitioner on various grounds. However, according to me, the main controversy revolves around as to whether the alleged user of the machines can come within the definition of words "instrument of gambling" - under the Bombay Prevention of Gambling Act.

6. At the outset I may mention that it is an admitted position that vide Exh. "A" to the petition the petitioner obtained licence under Rule 109 of the Rules for Licensing and Controlling Places of Public Amusement (other than Cinema) and Performance for Public Amusement including Melas and Tamashas, 1960. It is also an admitted position that the said licence, which is at Exh. "A", refers to in all 17 video machines for which the licence was granted by respondent No. 1. The only point of dispute is that as per Shri Chitnis, learned counsel for the petitioner, the machines referred to as "Chance Now" and "Bigwin Joker" were the items referred to in the licence while according to Shri Lambay, learned Addl. Public Prosecutor, for the State, "Chance Now" and "Bigwin Joker" and also "Checker" are the machines which were not referred to in the licence granted to the petitioner, which is at Exh. "A". According to me, the said difference is not going to affect my decision in this matter and, therefore, this difference is inconsequential while deciding this writ petition.

7. Petitioner is charged u/s 4(1)(a) of the Bombay Prevention of Gambling Act, 1887, which is as under;-

4(1) Whoever -

(a) opens, keeps or uses any house, room or place for the purpose, of a common Gaming-house,

The relevant provision under the said Act of 1887 which can be made applicable in the facts and circumstances of the present case is. section 3(ii), as section 3, clause (i) is obviously inapplicable in the present case and the present case squarely falls within clause (ii) of section 3. Clause (ii) of section 3 is as under:-

3(ii) in the case of any other form of gaming, any house, room or place whatsoever 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, room or place by way of charge for the use of such house, room or place or instrument or otherwise howsoever.

Now we have to see as to whether the Good Luck Video Game Parlour along with user of video machines comes within the ambit of section 3, clause (ii) of the Act of 1887, In order to see that this clause is made applicable in the facts and circumstances of the present case the prosecution must prove that the instruments were kept and used as instruments of gaming for profit or gain on the person owning, occupying, using or keeping video parlour.

8. In short, for applicability of clause (ii) of section 3 of the Act of 1887, following conditions must be fulfilled. First, in the parlour the instruments of gaming must be kept or used in the premises in question. Second, keeping or using of instruments aforesaid must be for profit or gain of the person owning, occupying, using or keeping such premises. Third, profit or gain may be by charge for the use of the premises or the instruments or in any manner whatsoever.

9. Instrument of gaming is defined u/s 3 as under:-

In this Act the expression "instruments of gaming" includes any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming.

So the next question is as to whether there is any material on record to show that the video machines which were found in Good Luck Parlour on the date of the raid were used or intended to be used as a subject or means of gaming.

10. "Place of public amusement" is defined u/s 2, sub-section (9) of the Bombay Police Act, 1951, which is as under:-

2.(9) "Place of public amusement" means any place where music, singing, dancing, or any diversion or game, or the means of carrying on the same is provided and to which the public are admitted either on payment of money or with the intention that money may be collected from those admitted and includes a race course, circus, theatre, music hall, billiard room, bagatelle room, gymnasium, fencing school, swimming pool or dancing hall.

11. The word "game" is neither defined in the Bombay Police Act of 1951 or Prevention of Gambling Act, 1887. Black's Law Dictionary defines "Game" as "a sport, pastime or contest. A contrivance which has for its object to furnish sport, recreation, or amusement". From the dictionary it appears that any sport, pastime or contest or any contrivance which has for its object to furnish sport, recreation or amusement.

12. The dictionary meaning given in the said dictionary of the word "Gaming" is as under:-

Gaming. The practice or act of gambling. An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute.

From the aforesaid dictionary meaning "gaming" means when two or more than two persons play together a game of chance for a stake or wager which is to become the property of the winner.

13. We have to keep before our eyes the aforesaid two definitions of "game" and "gaming" for coming to the conclusion as to whether the instruments taken in charge from the video parlour belonging to the petitioner come within the meaning of game or gaming. According to the arguments advanced by Shri Chitnis, learned counsel for the petitioner, the instruments seized by the respondents come within the meaning of "game" and not "gaming", while on the other hand, Shri Lambay, learned Addl Public Prosecutor for the respondents, contended that the instruments come within the meaning of gaming" and not game".

14. At the outset I may point out that the petitioner has obtained licence under the Bombay Police Act which is at Exh. "A" to the petition, wherein permission is granted by the respondents to the present petitioner to conduct video game parlour and in the said licence 17 different machines are referred to. Shri Chitnis, learned counsel for the petitioner, conceded that out of the machines seized by the police on the date of the raid, in respect of two machines the petitioner has not obtained licence. However, according to Shri Lambay, learned Addl. P. P. for the respondents, contended that in respect of three machines the licence was not obtained. According to me, this controversy is irrelevant, the reason being that the prosecution has not filed the case against the present petitioner for commission of breach of the conditions as laid down in the licence. The case of the prosecution is that the petitioner has committed the offences under sections 4(a) and 5 of the Bombay Prevention of Gambling Act, 1887, but in any case by and large the machines which were operated in the video parlour belonging to the petitioner were under the licence granted by respondent No. 1. If mere operation of such machines were to come within the scope of Gambling Act, then such licence would not have been given by respondent No. 1 in respect of the said machines. In view of this fact, we have only to see in this case as to whether the prosecution has got any evidence to show that in fact the petitioner

has used these instruments or machines as instruments of gaming.

15. For this purpose the prosecution is relying on the panchanama dated 30th May 1988 which is at Exh. "C". Therefore, the next question is, even taking this panchanama which is at Exh. "C" dated 30th May, 1988, as factually correct, whether it can be said on the basis of this evidence that the machines or the instruments in the parlour were used for gaming purpose, that is whether these instruments or machines were used as a game of chance, stake or wager which is to become the property of the winner and after going through the said panchanama I am of the opinion that it cannot be said on the basis of this panchanama that the petitioner used these instruments or machines as a game of chance or stake or wager which was to become the property of the winner.

16. The only reference in the said whole panchanama. which is at Exh, "C", to the user of these instruments or machines is as under:-

Police questioned the bogus customer and other players, then they replied that they all had deposited various amounts with the manager for playing on the machines but they had never won so far.

Both Shri Lambay for the respondents and Shri Chitnis for the petitioner relied on the aforesaid portion of the panchanama to reiterate their claims. According to Shri Lambay, the aforesaid statements made by the bogus customers as well as the other players show that they were playing on the machines but they had not won. That means, according to Shri Lambay, as per the statements of these witnesses chance of winning the stake can be contemplated. With respect, I cannot accept the argument of Shri Lambay. The witnesses have stated that they were playing on the machines but they had not won so far. The word used "winning" does not necessarily connote the meaning that they have not won money. Winning may be with reference to the skill in operation of the machines or instruments. Admittedly, as per the panchanama bogus customers have paid a payment and obtained tokens for playing on the machines. If there would have been evidence that after operating the machines whatever tokens left with them were exchanged with the money at the counter, then in that event Shri Lambay would have been justified in advancing his argument to the effect that the machines were used as instruments of gaming. However, there is no evidence whatsoever to that effect. In view of this clear position, taking whatever evidence gathered by the prosecution and treating it as a gospel truth, the case of the prosecution in respect of the machines in question cannot come within the definition of "instruments of gaming".

17. As per the ratio decided by the Supreme Court in Jagat Singh Kishor Singh Darbar and Others Vs. State of Gujarat, , for Applicability of clause (ii) of section 3 of the Act of 1887, following conditions have to be fulfilled:

- (1) Instruments of gaming must be kept or used in the premises in question.
- (2) The keeping or using of the instruments aforesaid must be for the profit or

gain of the person owning, occupying, using or keeping such premises, and

(3) Such profit or gain may be by way of charge for the use of the premises or of instruments or in any other manner whatsoever.

Out of these three vital ingredients, after taking into consideration all the statements and the panchanama relied on by the respondents, since there is no evidence whatsoever on record to show that the customers including the bogus customers were allowed to use the machines for the game of chance or some stake or wager so as to become the property of the winner, even taking all the evidence at the highest there is nothing on record to show that the machines used by the customers in the parlour were the instruments of gaming kept or used in the premises and that the machines were kept and were used for profit or gain of the person owning, occupying, using or keeping such premises.

18. Since the statement and the panchanama taken together do not supply first two vital ingredients as laid down by the Supreme Court in the aforesaid decision, according to me, the proceedings against the petitioner are liable to be quashed.

19. Criminal writ petition is allowed. Proceedings against the petitioner are quashed. In view of the aforesaid order, the bail bond given by the petitioner as well as given by the petitioner for the release of the machines stand cancelled. Respondents Nos. 1 to 3 are further directed to return to the petitioner all the property taken in charge at the time of the raid belonging to the petitioner as per the panchanama. Rule is made absolute in terms of prayer clause (a).

However, rule granted by this Court at the time of admission in respect of prayer clause (d) is discharged as not pressed by the petitioner.