RADHA-KRISHNA v. SUBRAYA.

WALLIS, C.J. AND PHILLIPS, J.

If the signature, as distinct from the mark of the testatrix, is taken to have been affixed by Doraiswami Aiyangar in her presence and by her direction, the will fails for want of due attestation, as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark, or have seen some *other* person sign the will in the presence and by direction of the testator. The language of the section is perfectly plain, and it is unnecessary to refer to decided cases to show that the person who signed by direction of the testator cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1916. July 14.

THE KING-EMPEROR, APPELLANT,

v.

MUSA AND ANOTHER, ACCUSED.*

Madras Towns Nuisance Act (III of 1889), sec. 3 (10)—"Gaming" and "public place," meaning of.

The accused in this case held for stakes a game called "Ring" in an open space in the compound of a Hindu temple. In convicting the accused under section 3 (10) of the Madras Towns Nuisance Act (III of 1889) on the grounds that the place was a public place and the game was a game within the meaning of the above section as it was played for stakes,

Held: (*a*) "Gaming," generally and in section 3 (10) means "playing for stakes;"

(*b*) a public place is one where the public go whether they have a right to or not; it is sufficient to constitute a place a public one even if only a section of the general public such as Hindus have a right to go to it;

and (*c*) The character of the game as one of skill or chance is not material under the section

Hari Singh v. *Jadu Nandan Singh* (1904) I.L.R., 31 Calc., 542, followed.

APPEALS under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the abovenamed accused

* Criminal Appeals Nos. 658 and 659 of 1915.

by A. SAMUEL PILLAI, the President of the Bench of Magistrates of Coimbatore, in Summary Cases Nos. 957 and 958 of 1915.

The accused who was the proprietor of a game called "Ring play" conducted it in an open space within the compound of a Hindu temple in the town of Coimbatore at a festival held therein; and on a prosecution for gaming he was acquitted of the charge of gaming in a public place, an offence punishable under section 3 (10) of the Madras Towns Nuisance Act by the Bench of Magistrates of the town of Coimbatore on the grounds that the game was mainly one of skill and not of chance and that the place was not a public place. The Public Prosecutor thereupon preferred this appeal to the High Court.

The game was played as follows :—On a flat or slanting table covered with a cloth coins such as a rupee, half rupee, quarter rupee and two-anna pieces are pasted at some distance from each other. Players wishing to secure one or other of these coins are to buy rings from the proprietor of the game at three pies a ring and if any ring thrown by a player from a distance of about three yards from the table encircles any coin, the coin is won.

C. Sidney Smith for the *Public Prosecutor* for the Crown. The accused was not represented.

OLDFIELD, J.—The accused have been acquitted on a charge of an offence punishable under section 3 (10), Act III of 1889, because the lower Court was not satisfied on two points, that (1) the game was a game of chance, not skill and (2) it was being played in a place of public resort. OLDFIELD, J.

As regards the second point, the lower Court was moved by the fact that only a section of the general public, the Hindu community, has a right to go to the place and that others can go there only with the permission of the Dharmakartha of the adjoining temple. It is in evidence that the place, a small open space, is in no way closed by gates or otherwise; and there is no evidence that the Dharmakartha's alleged right of exclusion is ever exercised. The definition of a public place as one where

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Section 3 of Madras Towns Nuisance Act III of 1889 runs as follows :—

Whoever in any public street, road, thoroughfare or place of public resort commits any of the following offences shall be liable on conviction to fine not exceeding fifty rupees or to imprisonment of either description not exceeding eight days.

(10) "Whoever is found gaming with cards, dice, counters, money or other instruments of gaming or publicly fighting cocks or taking part in such gaming or cock-fighting."

KING-EMPEROR v. MUSA.

OLDFIELD, J.

the public go, whether they have a right to or not, in *R.* v. *Wellard*(1) has been adopted in this country. *Hari Singh* v. *Jadu Nandan Singh*(2). In accordance with it, the lower Court's decision on this point cannot be sustained.

The description of the game played given in the lower Court's judgment is not demurred to by the Public Prosecutor or the accused, who unfortunately is not represented. There is then the finding that the game is one of skill, since the only element of chance in it is constituted by the possibility, which enters into almost all games, that an unskilful player may occasionally be successful. Such a finding was no doubt treated as decisive in accused's favour in *Hari Singh* v. *King-Emperor*(3). But those proceedings were under Bengal Act II of 1867, by section 10 of which games of mere skill are excepted from the general prohibition; and it is therefore unnecessary to consider the validity of the further distinction drawn in *Ram Newaz Lal* v. *Emperor*(4) that the skill in question is that of two competing parties, not, as here, that employed by the competitors against the accused, by whom the game was carried on. The real objection to this part of the lower Court's decision is that the character of the game as one of skill or chance is not material under Act III of 1889, with which we are concerned.

Section 3 (10) of that Act under which these proceedings are taken renders liable any person found in a public place "gaming with instruments of gaming"; and the question is what "gaming" includes. It has not been shown that the expression can be interpreted, simply etymologically, as equivalent to "playing a game." In the Imperial Dictionary, it is defined as "to use cards or other instruments according to rules with a view to win money or other things waged upon the issue of the contest"; and in Murray's Dictionary (1901), as the action of "playing at games for stakes." It is clear from these citations that the existence of a stake, not the character of the game as one of skill or chance, is regarded as constituting the distinction between playing a game and gaming. And this is supported by legal authority. No doubt Wharton's Law Lexicon defines "gaming" as the act or practice of playing and following any game, particularly those of chance; and in

(1) (1884) 14 L.R., Q.B.D., 63.
(2) (1904) I.L.R., 31 Calc., 542.
(3) (1907) 6 C.L.J., 708.
(4) (1914) 23 I.C., 484.

the Indian cases already referred to and in English cases decided under 36 and 37 Vict., cap. 38, section 3, for instance *Redgeway* v. *Famdale*(1) the presence of an element of chance was treated as material. But that was because of the explicit reference to it or to skill in the statutes in question. The English cases, moreover, such as *Fielding* v. *Turner*(2) which were decided under 17 and 18 Vict., cap. 38, section 4, do not assist us, because they deal with "unlawful gaming." We have, however, an Indian case—*Ram Pratap Nemani* v. *Emperor*(3)—in which the meaning of "gaming" pure and simple was in question, its definition as "playing at any game for money, which is staked on the result of the game, i.e., which is to be lost or won according to the success or failure of the person, who has staked. So also in *Hari Singh* v. *Jadu Nandan Singh*(4) where the distinction between gaming and betting was in question and the game had been held to be one of chance, STEPHEN, J., incidentally distinguished "gaming" from mere card playing or racing according as they were or were not accompanied by stakes or betting on the result. I respectfully adopt the view taken in these cases.

The fact that accused paid the players after they had been successful, and did not stake before they played, cannot affect his responsibility, since he induced them to play on an implicit understanding that he would pay, if he lost. I must accordingly hold that he was found "gaming" and convict him of an offence punishable under section 3 (10) of Act III of 1889. The Public Prosecutor does not press for a substantial sentence. Accused will pay a fine of Re. 1 or will, in default, suffer one day's simple imprisonment.

SADASIVA AYYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother though I add a few observations on the points raised in the case and especially with reference to the character of an ordinary Hindu temple; section 3, clause (10) of the Madras Towns Nuisances Act III, of 1889 provides penalties for "gaming with cards, dice, counters, money or other instruments of gaming in any public street, road, thoroughfare or place of public resort."

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(1) (1892) 2 Q.B., 309. (2) (1903) 1 K.B., 866.

(3) (1912) I.L.R., 39 Calc., 968. (4) (1904) I.L.R., 31 Calc., 542.

KING-EMPEROR v. MUSA.

SADASIVA AYYAR, J.

In Webster's Dictionary revised in 1864, I find "game (*v.i.*)" is given three meanings: (1) "To play at any sport or diversion, (2) to play for a stake or prize; to use cards, dice, billiards or other instruments, according to certain rules with a view to win money or thing waged upon the issue of the context; (3) to practise playing for money or some other stake; to gamble." If the first definition is taken then "gaming" need not involve the idea of any stake or prize. But the English language is not a stationary language, and according to Murray's Dictionary, the word "game" when used as a verb seems always to involve the idea of the winning or the losing of a stake or prize as the result of the game. I therefore take it that the word "gaming" in Act III of 1889 is used in the sense of playing a game for a stake or a prize or for money or other thing waged upon the issue of the game.

Another question is whether the word 'game' and its verbal grammatical forms necessarily involve the idea of chance wholly or to a larger extent than skill. I do not think that the question of chance or skill enters into the connotation of the verb.

As regards *Emperor* v. *Ahmad Khan*(1), *Hari Singh* v. *King-Emperor*(2) and similar cases, they seem to turn upon the language of Acts from the operation of whose provisions games of "mere skill" are excluded. Hence they throw no useful light on the meaning of the word "gaming."

In the present case, the game in question is a modification of what is called the "ring game" and, as I said above, it is immaterial whether the game is a game of mere skill or whether it is a game of combined skill and chance whichever predominating. Games of mere chance are comparatively very few, even in a throw of dice long practice might probably introduce an element of skill. I am inclined to think on the evidence in this case that the game in question is more a game of chance than of skill.

As regards the nature of the place, where the game in dispute was carried on, that is, whether it was a place of public resort, that phrase occurs also in the Madras City Police Act III of 1888 and it was held in *Crown Prosecutor* v. *Moonoosamy*(3) that a licensed arrack shop is a place of public resort. And it has

(1) (1912) I.L.R., 34 All., 96. (2) (1907) 6 C.L.J., 708.
(3) (1910) I.L.R., 33 Mad., 83.

been also decided that an open space to which the public has easy access is a "public place" within the meaning of section 159 of the Indian Penal Code: see *Hari Singh* v. *Jadu Nandan Singh*(1). In *High Court Proceedings No.* 1140, *dated 5th August* 1879(2), the entrance to a Hindu temple was decided to be a public place. I shall assume that the place in dispute in this case is part of the compound of a Hindu temple, and not part of the street. Even so, I think it is a place of public resort though other religionists might be excluded from its precincts, just as a mosque can be called a place of public worship though only Mussalmans are allowed to enter it to pray therein. It is not necessary, I think, that every member of the public should have a right of access to a place in order to make it a place of public resort. Most Hindu public temples do not allow entrance to members of the depressed classes, but they do not in my opinion fall out of the category of public places and do not become private buildings on that account.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1916. February 9 and 23, July 1, 19, 20 and 21 and August 7.

VENKATA CHETTY (PLAINTIFF), APPELLANT,

v.

AIYANNA GOUNDAN (DEFENDANT), RESPONDENT.*

Evidence Act (I of 1872), *sec.* 116—*Estoppel—Landlord and tenant—Tenant not let into possession by the landlord—Whether estopped from denying the landlord's title to the property.*

Held by the Full Bench (SESHAGIRI AYYAR and PHILLIPS, JJ., ABDUR RAHIM, Offg. C J., dissenting), that a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.

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(1) (1904) I.L.R., 31 Calc., 542. (2) (1879) 1 Weir, 68.

* Second Appeal No. 2177 of 1914 (F.B.).