MAYANKUTTI v. KUNHAMMAD. — SADASIVA AYYAR, J.

In *Chowakkuran Keloth* v. *Karuvalote Parkum*(1) the provisions of section 6 of the Malabar Compensation for Tenants Improvements Act and the decision in *Vedapuratti* v. *Vallabha Valiya Raja*(2) do not seem to have been considered and brought to the attention of the Court. I do not therefore, with great respect feel bound to follow the decision in *Chowakkuran Keloth* v. *Karuvalote Parkum*(1).

S.V.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Ayling and Mr. Justice Phillips.*

1917, December, 14 and 1918, January, 8.

*Re* APPAJI AYYAR AND TWO OTHERS (ACCUSED NOS. 1 TO 3), PETITIONERS.*

*Criminal Procedure Code (Act V of 1898), sec. 517—Power under, to confiscate property produced before Court—Conviction for gambling under ss. 6 and 7 of Madras Towns' Nuisances Act (III of 1889), ss. 6 and 7—Confiscation of money not actually used for gambling but found on gambler's person, validity of.*

On a conviction for gambling under sections 6 and 7 of the Madras Towns' Nuisances Act (III of 1889), an order to confiscate money found with the gamblers can only be passed under section 517 of the Criminal Procedure Code, and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler.

*Per* AYLING, J.—Although section 517 is in its terms wide, confiscation of property "produced" before a Criminal Court is not justifiable unless it has been used for an offence, or an offence has been committed regarding it.

*Per* PHILLIPS, J.—The powers under section 517 are very large and the Magistrate's discretion is wide and the section empowers him to make such order as he thinks fit for the disposal of property "produced" before him; but the discretion must be exercised judicially and not arbitrarily.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of P. N. MUHAMMAD MIRAN, the Sub-Divisional First-class Magistrate of Gopichettipalaiyam, in Appeal No. 26 of 1917, preferred against the judgment of D. SANTHA PILLAI, the Third-class Magistrate of Satyamangalam, in Calendar Case No. 884 of 1917.

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(1) (1915) 29 I.C., 559. (2) (1902) I.L.R., 25 Mad., 300.

* Criminal Revision Case No. 558 of 1917.

Certain police officers entering a gaming house found seven or eight sovereigns on a mat on which the accused were gambling. These sovereigns suddenly disappeared somehow and a search of the second and third accused resulted in finding eight sovereigns in the mouth and three in the waist cloth of the third accused and one in the pocket of the second. The lower Courts not only convicted the accused for gambling under sections 6 and 7 of the Madras Towns' Nuisances Act (III of 1889) but also ordered the confiscation of the twelve sovereigns.

The accused preferred this Revision Petition to the High Court.

*J. C. Adam* for the petitioners.

*C. Narasimhachariyar* for *the Public Prosecutor* for the Crown.

AYLING, J. AYLING, J.—I can see no reason for interfering with the conviction in this case or with the order directing the destruction of the cards. The real difficulty is in determining whether the Magistrate had jurisdiction to pass the order confiscating the money (twelve sovereigns) found on the persons of accused Nos. 2 and 3.

The order admittedly cannot be brought under the last paragraph of section 3 of Act III of 1889, inasmuch as the conviction was not under clause (10) of the same section: and it can only be upheld if it is covered by section 517, Criminal Procedure Code, clause 1 of which runs as follows:—

"Where an inquiry or a trial in any Criminal Court is concluded the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Mr. C. Narasimhachariyar, who appeared for the Public Prosecutor, has endeavoured to support it on two grounds:—

(1) That the money was property "which has been used for the commission of an offence" i.e., gaming in a common gaming house (section 7 of Act III of 1889);

(2) that, even if it were not, the Court had jurisdiction to dispose of it by confiscation under the earlier part of the clause as "property produced before it."

I have no doubt that the section authorizes the confiscation of property

"which has been used for the commission of an offence,"

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vide *Ramasami Aiyar* v. *Venkateswara Aiyar*(1). But are the sovereigns such property? The Sub-Magistrate who passed the order merely speaks of them as property "concerned in the case". The Subdivisional Magistrate in upholding it called them "sovereigns used for gaming"; but he does not refer to, much less discuss, the evidence to show that they were used for gaming, or consider the difference between the sovereigns found in third accused's mouth and the sovereigns found in second accused's pocket. I take it the coins can only be said to have been used for gaming if they had been actually staked.

Now as regards the eight sovereigns found in third accused's mouth, I think this can be legitimately inferred from the evidence. The place of concealment tends to indicate a guilty knowledge, and prosecution witness No. 1 deposes that, when the police party entered, seven or eight sovereigns were lying on the mat with the cards. These disappeared somehow; and it may be fairly inferred that third accused, who was one of the gamblers, snatched them up and put them in his mouth. I think the order of confiscation of the eight sovereigns found in third accused's mouth can be upheld on this ground.

The other four were found, three tied in third accused's waist cloth and one in second accused's pocket. There is nothing to indicate that these coins had been staked; and it cannot be inferred from the fact they were found in the pocket or cloth of a person engaged in gambling. *Emperor* v. *Walli Mussaji*(2) and *Emperor* v. *Tota*(3) are cases in which orders for confiscation of money in similar circumstances were set aside, because they were not covered by the terms of the Gambling Acts in force: there was apparently no suggestion in either case that any portion of section 517, Criminal Procedure Code, could be invoked in aid of the order.

Mr. Narasimha Achariyar, however, seeks to fall back on the first portion of the section, and argues that the coins were produced before the Court, and that the Court is authorized to dispose of them "as it thinks fit"—which words would, he says, include even confiscation. The section was altered in 1898 and its present wording is, no doubt, startlingly wide; but I cannot

(1) (1912) 24 M.L.J., 1. (2) (1902) I.L.R., 26 Bom., 641.
(3) (1904) I.L.R., 26 All., 270.

believe that it was intended thereby to confer on a Court the absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence. A reference to the draft bill which ended in the Code of 1898 shows that the original intention was to empower a Court to pass such order as it thought fit for the disposal of any property produced before it "the title to which is doubtful or in dispute"—which seems to indicate a provisional disposal of such property, leaving any party claiming an interest therein to seek his remedy through the usual channels against the holder. In the Select Committee the words "the title to which is doubtful or in dispute" disappeared—an omission which is not explained in the Committee's report. If the intention had been to confer such wide punitive powers as are now claimed (for confiscation implies nothing less) it is difficult to believe that no explanation would have been offered. We have not been referred to any case in which the section has been construed in such a wide sense. The judgment in *Russul Bibee* v. *Ahmed Moosajee*(1) implies no more than the limited and provisional power above indicated. The two cases already quoted—*Emperor* v. *Walli Mussaji*(2) and *Emperor* v. *Tota*(3)—are both indirectly against such a view; for in each case the order set aside could apparently have been supported in view of the law contended for on behalf of the Crown. With these may be read the order in *Ponuswami Pillai, In re*(4), which is indeed an authority to the contrary, though no doubt of an *obiter* nature and unsupported by reasons. I may also refer to the view taken by the learned Judges in *Abinash Chandra Bhattacharjee* v. *Emperor*(5), regarding the proper interpretation of the earlier portion of the section, although I am unable to follow them as regards the limitation of forfeiture of property connected with an offence.

I would set aside the order of confiseation of these four sovereigns as not warranted by section 517, Criminal Procedure Code, and direct their return to the persons from whom they were seized.

PHILLIPS, J.—The first point taken is that the finding that the house is a gaming house is based on the uncorroborated testimony of an accomplice. In the first place prosecution witness

PHILLIPS, J.

(1) (1907) I.L.R., 34 Calc., 347. (2) (1902) I.L.R., 26, Bom., 641.
(3) (1904) I.L.R., 26 All., 270. (4) (1909) 19 M.L.J.,254.
(5) (1907) I.L.R., 34 Calc., 986.

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No. 2 is hardly an accomplice in the offence charged, although he may have frequented the house for gambling on previous occasions, and secondly the evidence of prosecution witness No. 1 is corroborative in that it shows that some nine persons of different castes were gambling together. Our interference in the concurrent finding of two Courts is not called for on this ground.

The second point is that the order to confiscate the cards and sovereigns is not legal. The Sub-Magistrate does not state under what provision of law he passed the order, but inasmuch as the confiscations were under sections 6 and 7 of Act III of 1889 the order cannot have been passed under section 3 of that Act, and the presumption being that the Sub-Magistrate acted according to law the order must have been passed under section 517, Criminal Procedure Code, the section relied on by the Sub-divisional Magistrate. The question then is whether the order is a legal order; and the cases quoted for petitioners, i.e., *Emperor* v. *Walli Mussaji*(1) and *Emperor* v. *Tota*(2) are not very much to the point as they relate to the provisions of special acts, and not to section 517, Criminal Procedure Code.

The powers under the section are very large, and the Magistrate's discretion under it is wide, for he can make such order "as he thinks fit" for the disposal of any property produced before him; vide *Russul Bibee* v. *Ahmed Moosajee*(3). Such discretion must, I take it, be exercised judicially, and if it has been so exercised, I do not think that we should interfere in revision, especially when the order has been confirmed by an Appellate Court. In the present case prosecution witness No. 1 says, that he saw sovereigns being used for gambling, and when accused Nos. 1 to 3 were arrested eight sovereigns were found in third accused's mouth, three in a towel or handkerchief tucked into his waist, and one in second accused's pocket. Under section 3 of Act III of 1889 money employed or displayed for the purpose of gaming is liable to forfeiture, and consequently an order under section 517, Criminal Procedure Code, for the confiscation of money employed or displayed for the purpose of gaming would be a legal order, for it would be an order passed on the lines of a statutory provision for similar cases, and could not be deemed to be an arbitrary

(1) (1902) I.L.R., 26 Bom., 641. (2) (1904) I.L.R., 26 All., 270.
(3) (1907) I.L.R., 34 Calc., 347.

exercise of discretion. In this case, however, there is no definite proof that these particular sovereigns were employed or displayed for the purpose of gambling, but in view of the fact that sovereigns had been used for gaming and had been seen on the mat used by the gamblers, it is not an unreasonable presumption that the sovereigns found on accused Nos. 2 and 3 were some of those sovereigns. The eight sovereigns in the third accused's mouth can hardly be said to have been carried by him in this way in the ordinary course of business ; and a very natural inference would be that he had snatched up the coins from the mat and concealed them in his mouth, and the inference is all the stronger from the fact that he had three other sovereigns tied up in a cloth at his waist. The inference as to these latter and the one sovereign found with second accused that they were being employed for gaming is much weaker, but there is the circumstance that accused Nos. 2 and 3 have not explained their possession on any other hypothesis. The evidence of defence witness No. 1 is incredible and if, believed, would merely show that first accused was going to give him 12 sovereigns the following day to convert into jewellery. In a case under the Madras City Police Act III of 1888, *Queen-Empress* v. *Bhashyam Chetti*(1), it was held that the Magistrate was not required to hold an enquiry as to whether the money ordered to be forfeited had been used for gaming, that it was sufficient that the money, etc., had been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him. If money were found in a gambler's purse and there were no circumstances to suggest that it had been employed for gaming, it would certainly be unreasonable to order its confiscation, but in this case there are circumstances from which the inference can be drawn that the sovereigns had been employed for gaming. As regards eight of them the inference is very strong, but the inference as regards the other four is much weaker, and while I am doubtful whether it can be said that the Magistrates have exercised their discretion in an arbitrary manner as regards these four sovereigns, and that, I take it, would be the only ground for interference by this Court in a case of revision, I am not prepared to differ from my learned brother's opinion and agree in the order proposed.

N.R.

(1) (1896) I.L.R., 19 Mad., 209.