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defendant's sister was married, and (4) that though fees were due from the defendant on account thereof, none were paid. The defendant did not deny that fees were payable by him to the *math* on account of the marriage; he contended only that one Gurubasaya and not the plaintiff was the *ayá* of the *math* and entitled to receive the fees on its behalf. The dispute was, therefore, confined to the consideration and decision of one question, namely, whether or not the plaintiff is the *ayá* of the *hiramath* entitled as such to receive the fees payable thereto by the defendant. This is a question of a purely civil nature, in which the right to an office and thereby to certain fees is in contest, and its decision in no way involves any interference on the part of the Court in a caste question, and this is so even if Mr. Ghanasham's contention that the caste has the right of appointing the *ayá* be assumed to be correct. We reverse the decree of the lower appellate Court and remand the appeal for a rehearing on the merits. Costs to abide the result.

Decree reversed.

APPELLATE CRIMINAL.

FULL BENCH.

Before Mr. Justice Birdwood, Mr. Justice Jardine, and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* GOVIND AND OTHERS.*

1891.
July 9.

Gambling Acts (Bombay Acts IV of 1887 and I of 1890), Sec. 12—Coins—Instrument of gaming—Meaning of the expression.

A coin is not an "instrument of gaming" within the meaning of section 12 of Bombay Act IV of 1887 as amended by Bombay Act I of 1890.

The expression "instrument of gaming," as used in section 12 of the Act of 1887, means an implement devised or intended for that purpose.

Imperatrix v. *Vithal* (I. L. R., 6 Bom., 19) followed.

THIS was an appeal by the Local Government from an order of acquittal passed by C. Dallas Brown, Third Class Magistrate at Belgaum.

* Criminal Appeal, No. 97 of 1891.

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The accused were arrested by the police for gambling in a public thoroughfare under section 12 of Bombay Act IV of 1887 as amended by Bombay Act I of 1890.

The Magistrate found that "the accused were playing a game wherein a number of coins are thrown into the air, and all that fall with a named side uppermost are won by the thrower." The instrument of gaming was thus the coin or coins that were thrown into the air. The Magistrate held, on the authority of *Imperatrix* v. *Vithal*[1], that a coin was not an instrument of gaming within the meaning of section 12 of the Bombay Gambling Act (IV of 1887). He, therefore, acquitted the accused.

Against this order of acquittal the Government of Bombay appealed to the High Court.

Shántárám Náráyan, Government Pleader, for the Crown:—The Magistrate has not noticed Bombay Act I of 1890, which amends Bombay Act IV of 1887. The expression "instrument of gaming" means any article used as a subject or means of gaming. The definition given by the Act is wide enough to include coins. The ruling in *Imperatrix* v. *Vithal*[1] is based on *Watson* v. *Martin*[2], which will not be followed in the face of recent legislation.

Vásudev G. Bhandárkar for the accused:—The act alleged against the accused does not fall within section 12 of the Bombay Gambling Act (IV of 1887) as amended by Bombay Act I of 1890. Coins are not instruments of gaming. *Watson* v. *Martin*[2] was a ruling under George IV, c. 83, s. 4. The English Legislature has expressly included the word 'coin' in the definition of the expression 'instrument of gaming'—see 31 and 32 Vict., c. 52, s. 3, and 36 and 37 Vict., c. 38, s. 3. The Indian Legislature would have also said so expressly, if it had intended that coins should be regarded as instruments of gaming. The object of Bombay Act I of 1890 was merely to prevent wagering on the rainfall. See *Bombay Government Gazette* for 1889, Part V, p. 64. In the next place, pitch and toss is not a game (*Reg.* v. *D'Connor*[3]); nor a wager. The words "or other instruments of

[1] I. L. R., 6 Bom., 19. [2] 10 Cox, C. C., 56.
[3] 15 Cox, C. C., 3.

gaming" in section 12 of the Act, being words of general import, must be construed along with "cards, dice, counters" which precede them. Penal laws should be construed strictly.

BIRDWOOD, J.:—The accused Govind Parashrám and two others were arrested by the police for the offence of playing for money with instruments of gaming in a public thoroughfare, and charged before the Magistrate, Third Class, under clause (*a*) of section 12 of the Bombay Prevention of Gambling Act, 1887. The Magistrate found that the accused were playing "a game wherein a number of coins are thrown into the air and all that fall with a named side uppermost are won by the thrower." Following the ruling in *Imperatrix* v. *Vithal*[1], which follows *Reg.* v. *Rúma*[2] and *Watson* v. *Martin*[3], the Magistrate held that coins are not instruments of gaming within the meaning of the Act, and acquitted the accused.

The Government of Bombay has appealed against the order of acquittal, mainly on the ground that the amendment of Bombay Act IV of 1887 by Bombay Act I of 1890 has been overlooked by the Magistrate, and that a coin must now be held to be an instrument of gaming within the meaning of those Acts. By the amending Act a wide meaning appears to be given to the expression "instruments of gaming," for it now includes "any article used as a subject or means of gaming," and the word "gaming," whenever it occurs, includes "wagering." But assuming that the new definition is wide enough to include "coins," when the expression is used in other sections of the Act of 1887,—as, for instance, in sections 5 and 8,—it is obvious that in section 12, under which the accused were charged, the expression "instruments of gaming" is qualified by the description "used in playing any game, not being a game of mere skill." The same qualification occurs in section 7. By section 12 a police officer is empowered to apprehend without warrant any person found playing in any public street, place, or thoroughfare for money or other valuable thing with cards, dice, counters or other instruments of gaming "used in playing any game,

(1) I. L. R., 6 Bom., 19. (2) Crim. Rul. of the 19th June, 1873.
(3) 34 L. J. M. C. 50, S. C. 11 Jur. N. S., 321.

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not being a game of mere skill." Any such person is punishable, on conviction, with fine or imprisonment to the extent prescribed by the section. The provisions of the section are not applicable to all instruments of gaming, as defined in Bombay Act I of 1890. They apply only to instruments of gaming "used in playing any game, not being a game of mere skill." The meaning of the expression "instruments of gaming" as used in a qualified sense in section 12 of the Act of 1887 must be held to have been already settled by authority. The language of section 12 is precisely the same as that of section 11 of Bombay Act III of 1866, under which the case relied on by the Magistrate was decided. In *Watson* v. *Martin* it was argued before the Court of Queen's Bench on behalf of the accused, who had been convicted under the Vagrant Act, 5 Geo. IV, c. 83, s. 4, for playing at pitch and toss with halfpence on the highway, that the phrase "instruments of gaming" in the Vagrant Act could not be strained to comprehend halfpence any more than cherry stones, and that it must be "some chattel which is primarily used for gaming purposes." This argument was evidently accepted by the Court; for, in quashing the conviction, Mellor J., observed: "If halfpence are instruments of gaming, then we all carry these dangerous instruments;" and Compton, J., said: "We certainly cannot strain the Vagrant Act to comprehend a case like this." The judgment of the Court as reported at 11 Jurist, 321, was: "We are of opinion that halfpence cannot be considered as 'instruments of gaming' within the meaning of section 4, which words seem to imply such instruments and things as are destined for the purpose of gaming." It may here be noted that the Vagrant Act of 5 Geo. IV contains no such words qualifying the expression "instruments of gaming" as are found in section 11 of the Bombay Act, 1866, and section 12 of the Act of 1887. These words expressly restrict the application of these sections to certain instruments of gaming,—that is, as we must hold, to the instruments of gaming to which section 4 of the Statute 5 Geo. IV, c. 83, was held in *Watson* v. *Martin* to be applicable; for in *Reg.* v. *Ráma et al*, it was held by West and Nánábhái, JJ., on the authority of *Watson* v. *Martin*,

(1) 10 Cox. C. C. 56.

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that a coin is not an instrument of gaming, "which means an implement devised, or intended for that purpose." This interpretation of the Act of 1866 was adopted also by Melvill and Pinhey, JJ., in *Imperatrix* v. *Vithal* (1), and must be taken to be an interpretation of the expression "instruments of gaming" as qualified by the words which follow it in section 11 of the Act of 1866. As those qualifying words are retained in the Act of 1887, we cannot give a wider meaning to the expression as used in section 12 of that Act than is consistent with the express qualifications to which it is subject, although a wider meaning may perhaps be given to it in other parts of the Act by the amending Act of 1890. The definition contained in the Act of 1890 cannot be held to affect the provisions of the Act of 1887 applicable to the present case. We must, therefore, dismiss the appeal.

JARDINE, J.:—The accused were arrested without warrant, and were charged under section 12 of Bombay Act IV of 1887 with playing for money with instruments of gaming in a public footpath. The Magistrate found that they "were playing a game wherein a number of coins are thrown into the air, and all that fall with a named side uppermost are won by the thrower." Following the decision of Melvill and Pinhey, JJ., in *Imperatrix* v. *Vithal* (1), the Magistrate held that a coin is not an instrument of gaming within the statute, and on this ground acquitted the accused. The Government of Bombay have appealed against the acquittal, and the Government Pleader contends that this decision is no longer law under the Act of 1887, because the amending Act, Bombay Act I of 1890, brings coins within the definition. In *Imperatrix* v. *Vithal* the learned Judges, Melvill and Pinhey, JJ., followed a similar decision of West and Nánábhái, JJ., in *Reg.* v. *Ráma* (2). These are constructions of the similar section of Bombay Act III of 1866. They were followed by West and Birdwood, JJ., in *Imperatrix* v. *Mahomed Ise* (3). After two arguments, in which both the Crown and the accused have been represented, I am glad, con-

(1) I. L. R., 6 Bom., 9. (2) Crim. Rul. of 19th June, 1873.
Crim. Rul. of 23rd Dec., 1886.

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sidering the general importance of the case, that we are all of opinion that the Magistrate was right in acquitting. I concur in the Magistrate's reasons. I think *Imperatrix* v. *Vithal*, which rules that "an instrument of gaming means an implement devised or intended for that purpose," is still law. The learned Judges followed *Watson* v. *Martin*[1], which declared that halfpence did not come within the meaning of the words "any table or instrument of gaming" in 5 Geo. IV, c. 83, s. 4. A few years after this decision, Parliament passed an amending Act 31 and 32 Vict. c. 52, which includes wagering in the public streets, and uses appropriate words to include coins by adding to the words above quoted, "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming." These words are repeated in the later amending Act 36 and 37 Vict., c. 38, s. 4. It is urged by Mr. Vásudev Bhandárkar, in support of the acquittal, that the Bombay Legislature having knowledge of these decisions and of the Acts of Imperial Parliament, would have used definite language specifying coins in the amending Act of 1890 if it had intended to include them as "instruments." I think this argument is entitled to much weight. The Bombay Act takes the words "wagering" and "means" found in the amending Acts of Parliament, and omits the context about coins. The inference is that the omission is intentional. Section 12, clause (*a*), itself treats money and valuables as the things played for, and cards and such like instruments as the things they play with. Besides, under an ordinary rule of construction a general word such as "instrument" or "article" following particular and specific words is presumed to be restricted to the same genus as those words, as in *Queen* v. *Silvester*[2] where the words in the Sunday Act 29 Cor. 2, c. 7, "no tradesman, artificer, workman, labourer, or other person whatsoever" were ruled not to include a farmer. I think these are sufficient reasons for upholding the acquittal. I am confirmed in this opinion by a consideration of the object of the Act of 1890 and the exact words used, on which, where they differ from those in the amending Acts of Parliament, I am of opinion that we can place different, particular, and reasonable construction. The Gambling Act must be construed

(1) 34 L. J. M. C., 50. (2) 33 L. J. M. C., 79.

strictly, because it interferes with the liberty of the subject (*Bows* [v. *Fenwick*[1]) and because in some of its provisions it shifts the burden of proof on to the accused. Moreover, if the words are ambiguously and obscurely worded, the interpretation is ever in favour of the subject (*Hubbard* v. *Johnston*[2]). This ancient beneficial rule, moreover, precluded the Courts and Magistrates from usurping the powers of the Legislature. Let us consider next how the law stood in 1887 and how it was amended in 1890. The clause of the earlier Act which we have to interpret stood as follows:—"Section 12.—A police officer may apprehend without warrant (*a*) any person found playing for money or other valuable thing with cards, dice, counters, or other instruments of gaming, used in playing any game, not being a game of mere skill, in any public street, place, or thoroughfare." The amending Act says: "The word 'gaming' wherever it occurs shall include wagering." "The expression 'instruments of gaming' includes any article used as a subject or means of gaming." It is argued that the coins used are "instruments of wagering." But against this argument I would follow *Imperatrix* v. *Vithal*, which applies *mutatis mutandis*, the maxim "*generi per speciem derogatur*" being the principle of that decision. The meaning of the word "game" in the Act of 1887 has not been extended by the amending Act. So it is still necessary for a conviction under section 12, clause (*a*), to show that the article, whether used as a subject or a means, was "used in playing any game not being a game of mere skill." There is no definition of "instruments" in the Act, and as the Act is of a highly penal character, we ought in construing it to be guided very much by the decisions. I refer particularly to *Queen-Empress* v. *Narottamdás*[3] and to a decision very much considered in that case—I mean *Tollett* v. *Thomas*[4], where the meaning of the words "instrument of wagering or gaming" and its connection with the subject of a game of chance were much considered by a Court composed of Cockburn, C.J., Blackburn, Mellor, and Lush, JJ. The amending Act was passed soon after the decision of this

(1) L. R., 9 C. P., 339.

(2) 3 Taunton, pp. 220, 221, expounded in I. L. R., 14 Bom., at p. 189.

(3) I. L. R., 13 Bom., 681. (4) L. R., 6 Q. B., 514.

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Court in *Queen-Empress* v. *Narottamdás*, and doubtless with reference to that decision. I think with Mr. Vásudev that the main object of the amendments was to include wagering, a very great extension of criminal legislation, as, before this Act received the Governor-General's assent, betting was not criminal in India. Now where the Act of 1890 departs from the phraseology of the English Acts, and includes "any article used as a subject or means of gaming," while "gaming" shall include wagering, I think we ought to see whether the real meaning was, as I think, to make it more easy to obtain convictions in cases of wagering at common betting houses and such places. It is difficult to suppose that the words "subject" and "means" apply commonly to games. In possible cases they may, but neither in common nor legal language do we speak of the subject and means of a game, or draw any distinction between these two things in cricket, or dominoes, or cock-fighting or the other games named in the Acts. But we do speak of the subject of a bet or wager, and we find in the decisions that in wagering cases the Courts have had very carefully to consider the legality or illegality of "means" used to stimulate the betting or decide the bet, mechanical contrivances like the rain-gauge in *Queen-Empress* v. *Narottamdás Motirám*, the pari-mutuel machine in *Tollet* v. *Thomas*, and the scientific instruments used in *Hampdon* v. *Walsh*[1]. In *Tollet* v. *Thomas* the learned Judges follow the statute in treating the "instrument or means" as practically the same thing. The inclusion of the new term "subject" appears to me intended to override some of the difficulties with which those learned Judges had to deal in interpreting the Act of Parliament. But, whatever the word "subject" as distinct from "means" may intend in the Bombay Act of 1890, I think there would be no difficulty in holding that the contrivances used, (as in the Bombay case the rain-gauge, in the English case the pari-mutuel machine), are instruments or means of wagering, it being proved that they have no other use. So, perhaps, might the special table provided for the game called baccarat in *Jenks* v. *Turpin* [2]. Thus I would give considerable effect to the amending Act, as it

(1) 1 Q. B. D., 189. (2) L. R., 13 Q. B. D., 524.

brings common betting houses within the statute, and I notice that what the prosecuting authorities object to in these cases is the mechanical contrivance of the article and the wager; they do not quarrel with what people often call the "subject" of the wager, which was, I suppose, in *Queen-Empress* v. *Narottamdás Motirám*(1) the skies, in *Tollet* v. *Thomas* the racing horses, and in *Hampdon* v. *Walsh* the planet Earth, the wager being whether the earth is round. The word "subject" as used in the Act of 1890 refers to something tangible, some article, and is not equivalent to the phrase "subject-matter of the wager" employed by Cockburn, C.J., in *Hampdon* v. *Walsh* at p. 192. For reasons similar to those given earlier in this judgment, I think "subject" is not intended to include the stakes or the money risked; if the Legislature had so intended it, it would have said so. *Combes* v. *Dibble*(2) illustrates the difficulty of so extending the meaning, and when dealing with stakes the Legislature used definite words, *e. g.*, in section 30 of the Indian Contract Act and section 1 of Bombay Act III of 1865. In sections 5 and 9 of the Gambling Act, moreover, money, wager, or stake are discriminated; and to include the money or stake would give a dangerous extension to the rule of evidence enacted in section 7. The limiting construction I would place on the word "article" as subordinate to the including word "instrument" under the rule of *ejusdem generis* reconciles section 8 and the last clause of section 12: thus the Magistrate cannot, on conviction, destroy the money. It also avoids the inconvenience of seizing the earth or the skies or the race horses or the surgical instruments when they have been the subject of wagers. While I think my interpretation of the language will carry out the real meaning of the Legislature and avoid absurdities and undue interference, I am not sanguine that this construction will prevent the occurrence of mistakes in applying this Gambling Act to a very large and new class of cases. Where so perplexing a word as "subject" is used without explanation, misconstructions are likely to occur; and more especially in the Courts of Magistrates who have to depend on vernacular translations of the statutes. The difficulty is increased by the use

(1) I. L. Bom., 681. (2) L. R., 1 Ex., 2

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of what Sir M.R. Westropp calls the inconclusive verb "includes" (*Balvantrav* v. *Parshotam*[1]) and the absence of definition. There may, too, for anything that I know, be cases, where, as contended by the Government Pleader in this, there is an identity of subject and means. Supposing there is a wager, whether a certain man will, within a given time, die after, or recover from, a certain operation to be performed by a certain surgeon with a given instrument. Here a Court would be puzzled to decide what was "subject" and what was "means." But the patient and surgeon would both go out, not being instruments or articles; as also the stakes, the result, and the declaration thereof; so, too, the surgical instrument as being such and not a thing devised for gaming or wagering. There would probably be no conviction. But it might be otherwise if a special machine like the pari-mutuel were used in the transaction. In dismissing the appeal for the above reasons, I would inform the Magistrate that this case, being a summons case, should have been tried under chapter 20 of the Code of Criminal Procedure; and also remark that it is not lawful under section 12 of the Gambling Act for a police officer to arrest without warrant the persons he finds playing, unless they are playing for money or other valuable thing. I find nothing in the evidence to show that there was any playing for money, and on that ground also I am of opinion that we cannot interfere with the acquittal.

PARSONS, J.:— After full consideration I am also of opinion that the appeal should be dismissed. The point is whether a coin, such as a silver rupee piece, is an "instrument of gaming" within the meaning of section 12 (*a*) of the Bombay Prevention of Gambling Act, IV of 1887, as amended by Bombay Act I of 1890. This Court by several decisions (Criminal Ruling, 19th June, 1873; *Ib.* 17th November, 1881, S. C., I. L. R., 6 Bom., 19) ruled that a coin was not an instrument of gaming within the meaning of section 11 of Bombay Act III of 1866, and though there has been no decision reported, the same would undoubtedly have been ruled under section 12 of Bombay Act IV of 1887, since the language of these sections in the two Acts is precisely the same. Bombay Act I of 1890 has, however, inserted in the Act of 1887 the following definition of instruments of gaming:—"In this Act

(1) 9 Bom. H. C. Rep., 99, at pp. 106, 107.

the expression 'instruments of gaming' includes any article used as a subject or means of gaming." Assuming that the word "used" means "actually used"—which is a strong assumption to make in favour of the appellant, and one apparently opposed to the above rulings—there can be no doubt that the words "any article" are wide enough to include coins, so that coins if used as a subject or means of gaming, would under this definition be "instruments of gaming," but the doubt is whether the definition is intended to apply universally throughout the Act. It is enacted that the definition of the word "gaming" shall include wagering *whenever it occurs in the Act*. The omission of any such provision in the definition of "instruments of gaming" would show that that definition was not intended to apply wherever the expression "instrument of gaming" occurred. Again, it is generally expressly stated in an Act, and, when not so stated, as here, it is an ordinary rule of construction that the definitions contained in an Act are to be applied only when there is nothing repugnant in the subject or context. If the new definition of the expression "instruments of gaming" is inserted in section 12 (*a*) of Bombay Act IV of 1887, the result is that to constitute an article an instrument of gaming within the section it will be essential that it shall possess two qualifications: first, under Bombay Act I of 1890 it must be used as a subject or means of gaming; second, under section 12 of Bombay Act IV of 1887 as judicially construed, it must be devised or intended to be used in playing some game not being a game of mere skill. These two essential qualifications, if not actually repugnant the one to the other, are quite inconsistent, and the second so overrules the first as practically to leave the meaning of the expression "instruments of gaming" as it occurs in section 12 (*a*) of Bombay Act IV of 1887 precisely the same as it was before Act I of 1890 was passed. This, in my opinion, will be the case wherever in the Act of 1887 instruments of gaming are by express words restricted to those instruments that are used in playing any game. It is only where there is no such restriction, where the expression "instruments of gaming" occurs alone and unqualified, as it does for instance in section 3 and section 5, that the new definition can be held applicable and

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given full force and effect to. I am fortified in this opinion by the fact that, although it has been settled law since the year 1873 that coins are not "instruments of gaming used in playing any game," no alteration of the law in this respect was made by the Legislature even when it passed Bombay Act IV of 1887. Had there been any after intention to include coins among instruments of gaming so as to make gaming with them punishable, the obvious way to have carried out that intention would have been to insert the word "coin" in section 12 of the Act. The same result might have been attained if on the insertion of the new definition of the expression "instruments of gaming" the restricting words "used in playing any game not being a game of mere skill" had been repealed in section 12 and the other sections in which these words occur. Bombay Act I of 1890, however, does neither of these things. The sole professed object with which it was passed was to include "wagering" within the prohibitions of the Prevention of Gambling Act in consequence of the decision of this Court in the case of *Queen-Empress* v. *Narottamdás Motirám*[1]. The Act was not intended to make any change in the law as to the nature of the instruments of gaming referred to in section 12 of Bombay Act IV of 1887, and I am of opinion that it has made none.

Appeal dismissed.

(1) I. L. R., 13 Bom., 681.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. *July* 9.

CHINTA'MAN DA'MODAR AGA SHE, (ORIGINAL DEFENDANT), APPELLANT, *v.* BA'LSHA'STRI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Execution—Decree—Partition decree—Obstruction—Limitation—Darkhást presented in 1890, *in legal continuance of a darkhást of* 1882.

A *darkhást* is not necessarily cancelled by being taken off the file. Its effect must be determined by the special circumstances of each case.

A. obtained a decree for partition in 1881, and on the 11th March, 1882 presented a *darkhást* for complete execution of the decree. Having attempted to take possession of a moiety of a house to which he was entitled under the decree,

* Second Appeal, No. 89 of 1891.