CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Pratt.

1907. March 20.

EMPEROR *v.* KAITAN DUMING FERNAD.*

Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7 †—Gambling—Keeping a common gaming-house—Presumption under section 7 of the Act—Criminal Procedure Code (Act V of 1898), sections 65, 105.

The complainant, an Abkari Sub-Inspector, having come to know that gambling was then actually going on in the house of the accused, communicated the information to the District Magistrate, whom he met on the road. The District Magistrate desired the complainant to go and stand before the house and ordered him to enter the house and arrest the persons gambling there

* Criminal Application for Revision No. 343 of 1906.

† The Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7 run as follows :—

4. Whoever—

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming-house,

(*b*) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

(*c*) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid,

(*d*) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place,

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

5. Whoever is found in any common gaming-house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wager, stake or otherwise, shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

Any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

6. It shall be lawful for the Commissioner of Police in the City of Bombay, and elsewhere for any Magistrate of the First Class or any District Superintendent of Police or for any Assistant Superintendent empowered by Government in this behalf, upon any complaint made before him on oath, that there is reason to suspect any

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on sight of the District Magistrate's carriage at the spot. The complainant did so; and on a signal by the District Magistrate entered the house and arrested the accused with cards and money. During the trial, the District Magistrate was not examined as a witness. The trying Magistrate convicted the accused for offences under the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), applying to them the presumption arising under section 7 of the Act:

Held, reversing the conviction and sentence, that the Magistrate erred in applying to the accused the presumption arising under section 7 of the Act.

The presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) arises only where there has been an arrest and a search under section 6 of the Act.

As a First Class Magistrate has, under section 6 of the Act, power to give authority under a special warrant to a police officer of the class designated in the section to make the arrest and the search, the Legislature must be presumed

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house, room or place to be used as a common gaming-house, and upon satisfying himself after such enquiry as he may think necessary that there are good grounds for such suspicion, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector, or other superior officer of police of not less rank than a Chief Constable—

(*a*) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force if necessary, any such house, room or place, and

(*b*) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not, and

(*c*) to seize all instruments of gaming, and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and

(*d*) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and take possession of all instruments of gaming found upon such search.

7. When any cards, dice, gaming-table, counters, cloth, board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room or place is used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or police officer or by any person acting under the authority of either of them,

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to have intended that the Magistrate, First Class, should have the authority to make the arrest and the search himself, if necessary.

Where the Bombay Prevention of Gambling Act has provided for the manner or place of investigating or inquiring into any offence under it, its provisions must prevail and the Criminal Procedure Code must give way. Accordingly, no provision of the Code as to the authority empowered to issue a warrant for arrest or search, or the person to whom and the conditions under which such warrant may be issued can apply for the purposes of section 7 of the Act. The authority, the persons and the conditions must be respectively those specifically mentioned in section 6 of the Act and no other. But the special provision in section 6 would still be subject to the general provisions of sections 65 and 105 of the Code.

When a Magistrate, First Class, or other officer mentioned in section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) himself acts under its provisions, instead of acting through an officer of the particular class prescribed therein under a special warrant, he must act strictly in compliance with those provisions. The first condition necessary to make an arrest and seizure under the section legal so as to bring in the operation of section 7 is that where the Magistrate is acting on information, there must be a complaint made before him *on oath* to set him in motion. When a Magistrate, First Class, or other officer mentioned in section 6 himself does the acts specified in clauses (1) to (3) of the section instead of issuing a special warrant, he must give evidence, because he supplies the place of the warrant and the warrant is a necessary part of the evidence for the prosecution.

Where a Magistrate, First Class, himself makes an arrest and seizure under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) he must himself "enter" the "house, room or place" with the assistance of such persons as may be found necessary.

Section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) must be construed strictly because section 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases.

Imperatrix v. *Subhabhatta*[1] followed.

THIS was an application for revision under section 439 of the Criminal Procedure Code (Act V of 1898).

The accused was convicted by the First Class Magistrate of Kárwár for gaming in common gaming-house, an offence punishable under section 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), and for keeping a common gaming-house, an offence punishable under section 4 of the Act.

(1) (1895) Unrep. Cr. C. 825; Cr. R. 68 of 1895.

On the 4th August 1906, the complainant, Kashinath, an A'bkári Sub-Inspector of Kárwár, got the information that gambling was then actually going on in the house of the accused. He then noticed the District Magistrate of the place coming in a *dummy*, and he communicated to the officer the information. The District Magistrate ordered the complainant to go and stand before the gambling house and said he himself would be there. He then drove a little towards Kodibag Bundar and when the complainant reached the house in question, then his (District Magistrate's) *dummy* also came there. The complainant was ordered beforehand to enter the house and arrest the persons gaming there, at the sight of the *dummy* coming towards the spot. The complainant on his way to the house had secured the assistance of one Sawer. On a signal from the District Magistrate, the complainant and Sawer entered the house. They saw the accused and six others gaming in the house with cards and money; some cards were in the gamblers' hands and some copper coins were set on the mat. The complainant told Sawer to take possession of the cards and the cash and the complainant caught hold of some of the gamblers. They began to struggle for escape; and the complainant cried out "the accused are many and are running away." The District Magistrate, who was standing outside, said: "Catch hold of them, don't let them run away."

The complainant then lodged a complaint against the accused.

In the course of the trial, the Magistrate informed the accused's pleader that the District Magistrate would be called to give his evidence if the pleader so desired; but the pleader said that he did not wish to call the District Magistrate.

The Magistrate found the accused guilty of both the offences charged and sentenced him to pay a fine of Rs. 20 for the first offence and a fine of Rs. 10 for the second. In the course of his judgment the learned Magistrate went on to say:—

"It was the District Magistrate, whose powers are very extensive, who ordered the Sub-Inspector to enter the house and arrest the gamblers and the District Magistrate himself was present on the spot; and the circumstances,

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the evidence shows, were such that no written order could have been given at the time without giving an opportunity for the offenders to run away with impunity, and this appears to have been the cause for the District Magistrate himself to be present there during the arrests, and whose verbal orders to the complainant bear out a clear meaning not to enter the house till he saw the District Magistrate's *dumaj* coming towards the place. Practically everything important was done by the District Magistrate himself in his presence, after fully satisfying himself about the offence. So there was no necessity of a warrant under section 6 as the District Magistrate can entertain cases without complaint, and can arrest any offender in his presence, by ordering any person to effect the arrest. Here was therefore no necessity of a police officer of rank not less than a Chief Constable for entering the house and bringing the gamblers before the District Magistrate, who was standing just near the threshold of the house. Of course it would have been quite expectable of, and proper for, the police, consistent with due discharge of their duty, to have detected the offence earlier, and to have brought the offenders to justice, as it appears that the house has been in use as a common gaming-house for the last four months at least; but this want of vigilance on their part does not make the complainant's action in this case in any way illegal or improper but quite creditable to his energy and good sense."

The accused applied to the High Court under its criminal revisional jurisdiction.

S. V. Palekar, for the accused :—The proceedings taken against the accused were under a special enactment, *viz.*, the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). The Act has got a procedure peculiarly its own. The provisions of the Criminal Procedure Code (Act V of 1898) do not therefore apply; *vide* section 1, clause (2).

Section 6 of the Act empowers a First Class Magistrate to issue a warrant to any Police officer above the rank of a Chief Constable, upon a complaint made upon oath that any house is used as a common gaming-house. In this case the person who effected the arrest was not at all a Police officer nor did he make any complaint on oath before the Magistrate. The Magistrate, again, was not himself present at the place of arrest. Section 64 of the Criminal Procedure Code, 1898, has therefore no application.

If, however, it be said that the trial can be pursued under the provisions of the Criminal Procedure Code, then it should be conducted only as provided by the Code. In that event, the

prosecution must first establish that the house in question was a common gaming-house. It cannot take advantage of the presumption created by section 7 of the Bombay Prevention of Gambling Act, 1887. That presumption can arise only when there has been an arrest under section 6 of the Act.

The *Government Pleader*, for the Crown:—The section of the Criminal Procedure Code, applicable to this case, is section 65 rather than section 64. The District Magistrate is empowered by section 190 (*c*) to take cognizance of an offence upon information received from any person other than a Police officer. This power includes the power to issue a warrant for the arrest of the alleged offender. Section 65 empowers the Magistrate to order the arrest in his presence of such offenders. It makes a written warrant unnecessary.

In this case, the District Magistrate did receive information and it was perfectly open to him to order an arrest under the joint operation of sections 190 (*c*) and 65.

S. V. Palekar was heard in reply.

CHANDAVARKAR, J.—The petitioners, seven in number, have been convicted by the First Class Magistrate at Kárwár of the offence of gaming in a common gaming house under s. 5 of Bombay Act IV of 1887. The first petitioner has also been convicted of the offence of keeping a common gaming house under s. 4 of the Act. The legality of the conviction is questioned before us on the ground that the Magistrate has erred in applying the provisions of s. 7 of the Act by presuming at the outset the guilt of the petitioners and throwing on them the onus of proving their innocence.

The facts, which have been found by the Magistrate and which are material for the purposes of the ground on which we are asked to quash the convictions, are briefly these:—

One Kashinath Laxman, A'bkári Sub-Inspector, Kárwár, having met the District Magistrate of that place driving in a *dumny* on the Kodibág Road, informed the said Magistrate that gambling was then going on in the house of Kaitan D. Fernad, petitioner No. 1. The District Magistrate desired Kashinath to go and stand before the house and said that he would himself be

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there within a short time. Kashinath was at the same time ordered by the Magistrate to enter the house and arrest the persons gambling on sight of the District Magistrate's *dummy* coming towards the spot. Kashinath accordingly went and stood near the house, having in the meantime secured the assistance of one Sawer, an Abkári Constable. Immediately after that the District Magistrate's *dummy* arrived, and on a signal by him to the two persons to enter the house, they entered and the petitioners were arrested with cards and money. The petitioners tried to effect an escape, but the District Magistrate, who was standing outside, said: "Catch hold of them."

Upon these facts, the Magistrate, before whom the petitioners were tried, has held that under s. 7 of the Bombay Act No. IV of 1887 it was for them to prove that they were not guilty of the offences charged.

The presumption under s. 7 arises only where there has been an arrest and a search under s. 6 of the Act, which provides that it shall be lawful for any Magistrate of the First Class, "upon any complaint made before him on oath that there is reason to suspect any house, room, or place to be used as a common gaming house, and upon satisfying himself after such enquiry as he may think necessary that there are good grounds for such suspicion, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector or other superior officer of Police of not less rank than a Chief Constable" to enter and arrest and seize all instruments of gaming.

In the present case there was no such warrant, but it is contended, and we think rightly, that, as under s. 6 the District Magistrate as a Magistrate, First Class, had power to give authority under a special warrant to a Police officer of the class designated in the section to make the arrest and the search, the Legislature must be presumed to have intended that the Magistrate, First Class, should have authority to make the arrest and the search himself, if necessary. The action of the District Magistrate is one falling within the principle of the legal maxim that "whatever a man *sui juris* may do of himself, he may do by another," and its correlative that "what is done by another

is to be deemed done by the party himself, *qui per alium facit per seipsum facere videtur.*" When the Legislature empowers an officer to delegate an authority to do a certain act to another person, it necessarily implies that the original authority to do such act is fully and completely in the officer himself, but that it is necessary for the exigencies of business that it should be done in the majority of cases by persons acting under authority derived from him. This principle is adopted by the Legislature in ss. 65 and 105 of the Code of Criminal Procedure. Section 65 authorises a Magistrate to make an arrest himself or direct an arrest in his presence in cases in which "he is competent at the time and in the circumstances to issue a warrant." And s. 105 of the Code provides similarly for a search by him or in his presence. It is urged, however, by the learned Pleader of the petitioners, that these two sections of the Criminal Procedure Code have no application to the Bombay Gaming Act by virtue of cl. (2) of s. 5 of that Code. But all that the said clause enacts is that the provisions of the Code shall apply not only to the investigation, inquiry, and trial of offences under the Indian Penal Code, but also to offences under any other law, "subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." Where the Gaming Act has provided for the manner or place of investigating or inquiring into any offence under it, its provisions must prevail and the Criminal Procedure Code must give way. Accordingly, no provision of the Code as to the authority empowered to issue a warrant for arrest or search, or the persons to whom and the conditions under which such warrant may be issued can apply for the purposes of s. 7 of the Gaming Act. The authority, the persons and the conditions, must be respectively those specifically mentioned in s. 6 of the Act and no other. But otherwise the special provision in s. 6 would still be subject to the general provisions of ss. 65 and 105 of the Code.

When, however, a Magistrate, First Class, or other officer mentioned in s. 6 of the Act himself acts under its provisions, instead of acting through an officer of the particular class prescribed therein under a special warrant, he must act strictly

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in compliance with those provisions. The first condition necessary to make an arrest and seizure under the section legal so as to bring in the operation of s. 7 is that, where the Magistrate is acting on information, there must be a complaint made before him *on oath* to set him in motion. There is nothing on the record of this case to show that there was any such complaint. The District Magistrate is not examined. When a Magistrate, First Class, or other officer mentioned in s. 6 himself does the acts specified in cls. 1 to 3 of the section, instead of issuing a special warrant, he must give evidence, because he supplies the place of the warrant and the warrant is a necessary part of the evidence for the prosecution. See *Queen* v. *Subsookh* (1). From the judgment under revision we gather that the Magistrate who tried this case asked the petitioners' Pleader whether he would like the District Magistrate called for examination, and the pleader replied "No". But the Pleader's negative answer must be construed in favour of the accused. He did not desire the District Magistrate to be called, because the evidence of the latter was not necessary for his purpose. If the District Magistrate were not called, it was so much the better for his clients, because in that case there would be no proof that the District Magistrate had acted upon such a complaint as s. 6 requires and it was for the prosecution to adduce such proof. Then again, where a Magistrate, First Class, himself makes an arrest and seizure under s. 6 of the Act, he must himself "enter" the "house, room, or place," with, of course, the assistance of such persons as may be found necessary. Here the finding of the Court below is that the District Magistrate (Mr. Panse) did not enter the house but stood outside; and it was the complainant Kashinath and his comrade Sawer, who, on a signal given by the District Magistrate, entered, arrested some of the petitioners and seized "the cards and the dice." Section 6 must be construed strictly, because s. 7 gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases. See *Imperatrix* v. *Subhabhatta* (2).

(1) (1870) 2 N.-W. P. H. C. R. 476.

(2) (1895) Cr. R. No. 68 of 1895; Unrep. Cr. C. 825.

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We must, for these reasons, quash the convictions and sentences and direct the fines, if paid, to be refunded to the petitioners. It follows that the order of compensation passed by the Magistrate falls to the ground, so also all other orders passed by the Magistrate relating to the property seized in connection with the case.

Convictions and sentences set aside.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

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March 21.

BAI SHRI VAKTUBA (ORIGINAL DEFENDANT 1), APPLICANT, *v.* AGARSANGJI RAISANGJI (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), ss. 206 and 622—Judgment—Decree—Addition to the decree not warranted by the judgment—Jurisdiction—Revision.

Proceedings under s. 206 of the Civil Procedure Code (Act XIV of 1882) terminate in an order, and such an order can be dealt with in revision under s. 622 of the Civil Procedure Code (Act XIV of 1882).

The order under s. 206 of the Civil Procedure Code (Act XIV of 1882) is beyond jurisdiction if it makes an addition to the decree not warranted by the judgment.

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order passed by Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad, on an application for the amendment of a decree.

The plaintiff brought a suit in the Court of the First Class Subordinate Judge of Ahmedabad against defendant 1, Bai Shri Vaktuba, and her minor son Ranjitsingji, defendant 2, for a declaration that defendant 2 was a spurious and illegitimate child and was not born to the plaintiff. He also prayed for an injunction.

* Application No. 303 of 1906 under extraordinary jurisdiction.