

to the original Court to be tried afresh. Where a suit is decided only on the strength of a finding on a point of law, and the questions of fact have not been tried or decided by reason of that finding, the suit can be deemed to have been disposed of on a preliminary point, and if that finding be set aside in appeal, it is open to the appellate Court to remand the suit under O. XLI, r. 23, of the Civil Procedure Code.

1939
 SCRAJMAL
 DEORAN
 v.
 MOTIRAM
 KALC
 Lokur J.

I, therefore, set aside the decrees of the lower Courts and remand the suit to the trial Court for disposal according to law in the light of this judgment. Both the parties will be at liberty to adduce their evidence. The respondent shall pay the appellant his costs in this Court and in the lower appellate Court, and bear his own.

Decrees set aside.

Y. V. D.

APPELLATE CRIMINAL.

*Before the Honourable Mr. R. S. Broomfield, Officiating Chief Justice, and
 Mr. Justice Sen.*

EMPEROR v. KALLAPPA GURAPPA KOTAGUNSHI AND OTHERS (ORIGINAL
 ACCUSED Nos. 1, 3, 4 AND 5).*

1939
 June 12

*The Bombay Prevention of Gambling Act (Bom. IV of 1887), s. 13—"Mere skill"—
 Interpretation—Gaming—Test—Substantial element of chance.*

The expression "mere skill" occurring in s. 13 of the Bombay Prevention of Gambling Act, 1887, means pure skill, skill and nothing else.

A game in which there is a substantial element of chance cannot be described a game of mere skill, or pure skill.

A game of cards called *pettin-ata* for money stakes is a game in which there is a substantial element of chance. Hence it is not a game of mere skill and comes within the mischief of the Bombay Prevention of Gambling Act, 1887.

Mahomed Hussein v. Emperor,⁽¹⁾ commented on.

* Criminal Appeal No. 43 of 1939.

⁽¹⁾ [1937] A. I. R. Sind 99.

1939
EMPEROR
v.
KALLAPPA
GURAPPA

CRIMINAL APPEAL against an order of acquittal made by D. C. Joshi, Sessions Judge, Dharwar, setting aside an order of conviction and sentence passed by M. M. Hyamannavar, Sub-Divisional Magistrate, Dharwar Town.

Gaming.

The Sub-Inspector of Police, Hubli Town, having received information that Kallappa (accused No. 1) used his house situate in the Ghantikeri lane as a common gaming house, lodged information before the Resident Magistrate, First Class, Hubli, and obtained from him a special warrant in order to raid the house.

On February 9, 1938, he raided the house in question, attached some playing cards and some cash, and thereafter sent a charge-sheet against the six accused.

The accused denied having committed the offence, contending that the game called *pettin-ata* which they were playing was a game of skill, that playing the game did not amount to gaming under the Act and that the complaint was filed against them out of spite.

The learned Sub-Divisional Magistrate, in the course of his judgment, observed as follows :—

“ Before concluding I may refer to another contention of the defence pleader that the *pettin* (पेट्टिन) play is one in which skill predominates so that the provisions of the Gambling Act in question do not apply under s. 13 *idem*. There is no evidence that the said play is one involving skill to a predominating degree. Moreover, he relies on a ruling of Sind High Court in *Mahomed Hasan and others v. Emperor*, [1937] A.I.R. Sind 99, which lays down that when in a game the elements of chance most strongly predominate, it cannot be a game of more skill, the test being whether it is chance or skill that predominates. Section 13 *idem* lays down that the provisions of the Act do not apply to any game of mere skill. In the case of *Rama Naraylal v. Emperor*, 15 Cr. L. J. 276, the words ‘more skill’ have been held to import the meaning ‘pure skill’. As regards the defence contention that the *panch* witness Exhibit 16 is not one belonging to the locality in question it may be said that the provisions under s. 103 of the Criminal Procedure Code do not apply to searches under s. 6 of the Gambling Act so as to vitiate the search (*vide Valvekar v. Emperor*, 33 Cr. L. J. 733 and *Emperor v. Asham*, 9 Bom. L. R. 695 etc.).”

In the result he convicted accused Nos. 1, 3, 4 and 5 and acquitted accused Nos. 2 and 6.

On appeal, the learned Sessions Judge reversed the convictions and sentences, observing as follows :—

“We can therefore take it that the details of the game as given by the witness are correct. From this it is clear that the game is not a game of mere chance as thought by the learned Magistrate but that it is a game of skill. An element of chance is certainly there in any of the players getting good cards. But this is so in every game of cards. The learned Pleader for the appellants relies on *Mahomed Hassan and others v. Emperor*, [1937] A.I.R. Sind 99. The following proposition has been laid down in this case. ‘No game can be a game of skill alone, and in any game in which even great skill is required, chance must play a certain part. Even a skilled player in a game of mere skill may be lucky or unlucky, so that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision the relative proportion of chance to skill when deciding whether a game is a game of mere skill within the provisions of s. 13 of the Act. When in a game the elements of chance most strongly preponderate, it cannot be a game of mere skill’. This authority is pertinently in point. The present game called *pettina-ata* which was being played by the accused requires an amount of skill. A player who is not skilful enough may not succeed even if he gets the best cards, while a skilful player may succeed even if he does not get the best card. The result depends on the skill displayed by him in manipulating his cards. The game is just like auction or contract bridge played in respectable clubs. Bridge is played with stakes in such clubs, and in case we were to hold that even in the case of bridge the chance of a particular player getting good cards is the decisive fact or we have to say that gambling is going on even in such clubs. Considering these circumstances I am satisfied that the game indulged in by the accused was a game of skill within the rule laid down in the Sind case quoted above. Such a game is protected by the provisions of s. 13 of the Bombay Prevention of Gambling Act. I therefore do not think that the accused were gambling as found by the learned Magistrate.”

The Government of Bombay appealed.

R. A. Jahagirdar, Government Pleader, for the Crown.

S. A. Desai, with *G. A. Desai*, for all the accused.

G. R. Madbhavi, for accused No. 1 only.

BROOMFIELD AG. C. J. The accused in this case were charged with offences under ss. 4 and 5 of the Bombay Prevention of Gambling Act, 1887, and were convicted and ordered to pay fines of varying amount. On appeal, the Sessions Judge of Dharwar set aside the convictions and

1930

EMPEROR

v.

KALLAPPA
GURAPPABroomfield
Ag. C. J.

acquitted the accused. The Government of Bombay has now appealed against the order of acquittal.

The facts need only be mentioned very briefly. The Police Sub-Inspector of Hubli, having received information that accused No. 1 was using his house at Hubli as a common gaming house, obtained a special warrant from the Magistrate and searched the house on February 9, 1938. At the time of the raid seven persons were found sitting in the room and playing a game of cards called *pettin-ata* for money stakes. One of the seven persons absconded, and of the six who were charged in the case, one, accused No. 2, was examined as a witness. The Magistrate acquitted accused No. 6, and convicted Nos. 1, 3, 4 and 5.

The only point that was argued in the appeal before the Sessions Judge was whether this game *pettin-ata* is a gambling game or not. The game has been thus described by accused No. 2 who, as I say, was examined as a witness in the case, and who gave a demonstration of the game before the Magistrate and the Sessions Judge. The game is played by four or six persons, each player being dealt eight cards. After the cards are dealt the players make a call in turn contracting to make so many tricks. The maker of the highest call declares the trump suit. Each of the players contributes a certain stake, usually one anna, to the pool. If the player who makes the highest call makes the number of tricks he contracts to make, he takes the amount of the pool; but if he fails he has to contribute an equal amount to the pool. So that after the hand is played, if the highest bidder is unsuccessful, the pool is doubled. The game consists of three deals. If in the third hand the highest bidder is successful he takes the whole of the pool; if he fails the pool is divided equally among all the players including the unsuccessful final bidder.

The view taken by the learned Sessions Judge is that it cannot be regarded as a game of mere chance, and that

1939
 EMPEROR
 v.
 KALLAPPA
 GURAPPA
 Broomfield
 Ag. C. J.

there is an element of skill in it. That is perfectly true, but unfortunately, it is not the point which arises on the construction of the Act. Section 13, which is the important section, says that nothing in this Act shall be held to apply to any game of mere skill wherever played. "Mere skill" means pure skill, skill and nothing else. It is sufficiently obvious, we think, without reference to any authorities that a game in which there is a substantial element of chance cannot be described as a game of mere skill or pure skill. The game, which has been described in this case, is similar to the well-known game of Nap. It is a rather elaborate form of Nap, having some similarity no doubt to contract bridge. I should say myself that there is far more chance than skill in the game. But, in any case, it cannot possibly be denied that there is a very substantial element of chance in it. That being so, it is not a game of mere skill, and comes within the mischief of the Bombay Prevention of Gambling Act.

The learned Sessions Judge appears to have relied on some observations of the learned Judicial Commissioner of Sind in *Mahomed Hussein v. Emperor*.⁽¹⁾ The Court was there dealing with a game called Corinthian bagatelle, not a card game, and the observation of the learned Judicial Commissioner, on which the Sessions Judge relied, was as follows (p. 99) :—

" . . . no game can be a game of skill alone, that in any game in which even great skill is required, chance must play a certain part, and we think there is force in this argument. Even a skilled player in a game of mere skill may be lucky or unlucky, so that we think that even in a game of mere skill chance must play its part. But we do not think that it is necessary to decide in terms of mathematical precision the relative proportion of chance to skill when deciding whether a game is a game of mere skill within the provisions of s. 13. We are satisfied in this particular case that it cannot be said that the game before us is a game of mere skill, because it is quite clear to us that the elements of chance most strongly preponderate. We think, therefore, on the point that the game is a game of mere skill."

It is not very clear, I think, that the learned Judge meant to lay down the proposition that the question

⁽¹⁾ [1937] A. I. R. Sind 99.

1939
 EMPEROR
 v.
 KALLAPPA
 GURAPPA

Broomfield
 Ag. C. J.

whether a game is a gambling game or not depends on whether chance or skill preponderates in it. But, if that is the meaning of the observations cited, we can only say respectfully, but emphatically, that we do not agree.

It has been pointed out in *Emperor v. Arjun Singh*⁽¹⁾ and *King-Emperor v. Musa*⁽²⁾ that, under the provisions of the gambling law as they formerly stood before amendment, the question whether skill or chance predominates in a game was of importance. As the Act now stands and in particular in view of the provisions of s. 13 it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a game of mere skill, that is to say, a game in which there is no element of chance at all. Of course, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. But that is not the case with the game with which we are concerned here.

The learned Sessions Judge has observed, in the course of his judgment that the game is just like auction or contract bridge played in respectable clubs. He has, however, omitted to observe two very important distinctions. The first is, that in the case of a club it is not usual for a charge to be made for the profit and benefit of the owner or occupier of the premises. In the present case it is proved that all those participating in the game pay four annas for the benefit of accused No. 1, the owner of the premises. The other point is that in the case of a club the place is not open to any member of the public, but only to members of the club and perhaps their guests. The facts here clearly bring the case within the definition of a common gaming house in s. 4.

Mr. Desai, who appears for the accused, took exception to the Magistrate's order for confiscation of a sum of Rs. 48

⁽¹⁾ (1929) 57 Cal. 520.

⁽²⁾ (1916) 40 Mad. 556.

which appears to have been found lying on the carpet round which the accused were sitting. He says that the prosecution have not shown the connection between this money and the gambling. The point does not appear to have been taken before the Sessions Judge, and in any case, we think, there is no substance in it. As the accused were playing cards for money and this money was lying on the carpet on which they were playing, the connection between the money and the gambling is sufficiently obvious. We think the convictions of the accused were right, and the Sessions Judge was not justified in interfering.

We, therefore, set aside the order of acquittal passed by the Sessions Judge, and restore the convictions and sentences of all the accused.

Order set aside.

Y. V. D.

APPELLATE CIVIL.

Before Mr. Justice Lokur.

THE SURAT BOROUGH MUNICIPALITY, SURAT (ORIGINAL DEFENDANT),
 APPELLANT v. SARIFA KARUNNISSA BEGUM SAHER, WIFE OF SAYED
 MUSTAFA SAHEB EDROOS (ORIGINAL PLAINTIFF), RESPONDENT.*

1939
 April 5

*Bombay Municipal Boroughs Act (Bom. Act XVIII of 1925), ss. 104, 105, 203—
 Municipal taxes—Part of claim time-barred—Owner's protest—Distress warrant—
 Payment under protest—Suit for refund—Owner not entitled to recover.*

Section 203 of the Bombay Municipal Boroughs Act, 1925, provides an alternative procedure for the recovery of taxes by suit, as is clear from the marginal note. To such a suit the provisions of the Indian Limitation Act would apply.

But no bar of limitation applies to a Municipality exercising its special powers under ss. 104 and 105 of the Act.

In 1934, a Municipality sent the owner of a certain house a bill for the payment of money in respect of certain municipal taxes including arrears for the year 1923.

*Second Appeal No. 685 of 1937 (with Second Appeal No. 686 of 1937).