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Per Curiam. The Court allows the appeal as against the respondents Nos. 1 to 6 so far as the alienation of April 11, 1877, is concerned. It records a finding on the first issue that the trial Court has jurisdiction to entertain the suit in respect of the alienation of April 11, 1877, but not in respect of the alienation of June 15, 1891. The decree of the lower Court is set aside and the suit is remanded to the lower Court for further hearing and disposal in accordance with this finding. There will be no order as to the costs of the appeal.

Decree set aside.

Y. V. D.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

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EMPEROR *v.* NATHALAL VANMALI AND OTHERS (ORIGINAL ACCUSED NO. 1 AND OTHERS—NOS. 2, 3, 4, 6, 7, 9 AND 10).*

The Bombay Prevention of Gambling Act (Bom. Act IV of 1887, as amended by Act I of 1936), ss. 6 and 7—Raid—Seizure—Instruments of gaming—Presumption—Interpretation.

In construing a section of a penal Act which casts upon the accused the burden of proving his innocence the Court must act strictly.

A reading of s. 7 of the Bombay Prevention of Gambling Act, 1887, shows that there are two events on which a presumption under that section arises. The

* Criminal Appeal No. 195 of 1938.

Section 7 runs as follows:—

"When any instrument of gaming has been seized in any house, room or place entered under section 6 or about the person of any one found therein, and in the case of any other thing so seized if the court is satisfied that the Police officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming-house and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the Magistrate or the Police Officer or by any person acting under the authority of either of them."

first event is when any instrument of gaming has been seized in the house, room or place entered under s. 6 or about the person of any person found therein. The occurrence of the second event requires two things to be proved, first that something has been seized which is other than an instrument of gaming, and secondly, that the police officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming.

Accused Nos. 1 and 2 were merchants, and partners in a certain business. At about 9 p.m. of April 18, 1936, the police raided their business premises. In the search that followed the raid, certain papers, account-books and other articles found there were attached. These accused along with others having been prosecuted for offences under ss. 4 and 5 of the Bombay Prevention of Gambling Act, 1887 :—

Held, affirming the order of acquittal, that there was nothing to show that the business carried on by the accused in respect of cotton transactions differed from that normally carried on on the Stock Exchange.

CRIMINAL APPEAL by the Government of Bombay against an order of acquittal passed by G. H. Guggali,—Sessions Judge, Ahmedabad, setting aside the order of conviction and sentence made by I. T. Almaula, City Magistrate, First Class, Ahmedabad.

Gaming.

Nathalal (accused No. 1) and Thakersi (accused No. 2) did business at Ahmedabad in a house belonging to a person called Visatlal from whom they had taken it on hire. Accused No. 3 was a servant of accused Nos. 1 and 2.

On April 18, 1936, at about 9 p.m. the police raided the house. At the time of the raid accused No. 1 was not present. Accused Nos. 2 to 10 were present, as also two boys. The persons of those present were searched. Two slips of paper (Exhibit 3-A) were attached from the coat-pocket of accused No. 3. Note-books, diaries, and loose papers were also attached from the persons of accused Nos. 4, 6, 7, 8, 9 and 10. A number of account-books and note books lying upon a desk were also attached. Accused No. 2 was at the time receiving telephone messages. A Panch took the receiver and received the telephone messages, the Sub-Inspector writing down the same.

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On June 27, 1936, the ten accused and the two boys were prosecuted: accused Nos. 1 and 2 for an offence under s. 4 of the Bombay Prevention of Gambling Act, 1887, and accused Nos. 3 to 12 for an offence under s. 5 of the Act. The complaint against the two boys was later withdrawn.

The trial Magistrate held that the accused Nos. 1 and 2 used the house in question as a common gaming house and that they had used, and had occupation of, the house. As regards the other accused, he held that the offence under s. 5 was proved against the accused other than the accused Nos. 5 and 8, holding that they were found there present for the purpose of gaming. The accused were accordingly convicted and sentenced except accused Nos. 5 and 8 who were acquitted.

On appeal, the learned Sessions Judge set aside the order of conviction and sentence, observing as follows :—

* * * * *

"The nature of the business alleged to be transacted in this place is explained by two witnesses Jesubhai Girdherlal and Parshottam Kanji, Exhibits 5 and 6 in their examination-in-chief. It is alleged that gambling in American futures *ank-faraks* and *sattu* transactions of a wagering character was done there. Gambling in American futures is said to be briefly as follows. Rates of cotton in the New York market are cabled every day to Bombay and from Bombay to Ahmedabad. Gamblers speculate on what the rate will be on the next day and gamble on it. For instance, if the rate to-day is 11-68 cents per pound of cotton, the gambler may think that the rate will go down by 3 cents. So he will offer a bet on — 3. If to-morrow's rate is 11-65 he wins; otherwise he loses. He may think that the rate will go up by 3 cents and offer a bet on + 3. If to-morrow's rate is 11-71, he wins; otherwise he loses. For different numbers there are different amounts of bets. For instance according to Parshottam for Nos. 1 to 7, the bet is 12½ annas per unit; for 8 to 9 it is 10 annas; for 11 to 15 it is 7 annas; the amount of bet goes on decreasing till it is half an anna per unit. The unit is 1,000 pice. If a gambler bets on No. + 5 for 10 units he will have to pay 10 × 12½ annas, i.e., Rs. 7-13-0 as stake money. If to-morrow the market rate rises by 5 cents, he wins 1,000 × 10 pice, i.e., Rs. 156-4-0. That is gambling in American futures. Sometimes gambling is done on the last digit only of the difference between the closing figure of rates of two days irrespective of the rise or fall. If the number betted on

comes, the gambler gets 8 times the amount of the bet. That is said to be gambling *ank-faraks* in American futures.

* * * * *

Here in the present case the evidence is that the accused have no godown; no delivery is proved in any instance. Further there is the worthless and unreliable evidence of witnesses like Jesu and Parshottam who say that *satta* transactions of a wagering character are done by the accused. Even they turn round and say that they have no personal knowledge. In not even one instance out of hundreds of transactions done by the accused is there evidence to show that the parties did not intend to take or give delivery of goods. It is not possible to hold on such materials that the transactions are of a wagering character. Further Exhibit 3-A—the bigger slip—shows that the transactions are not automatically closed on any day—but are carried forward. That would raise a presumption against the transactions being of a wagering character. *Vide Emp. v. Thawarmal Rupchand*, 31 B. L. R. 158. His Lordship Justice Baker observed in the abovementioned case 'I must however say that from the date of the resolution regarding carrying over contracts coming into force the matters bear a different aspect and from that date the operations of the association would be *prima facie*—legitimate unless it was shown that the resolution was camouflage and not intended to be acted upon.' "

* * * * *

The Government of Bombay appealed.

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

G. N. Thakor, with *Jhaveri & Co.* and *V. N. Chhatrapati*, for accused Nos. 1 to 4, 6 and 7.

B. G. Thakor, for accused No. 7.

M. H. Vakil, for accused No. 9.

V. N. Chhatrapati, (appointed), for accused No. 10.

BEAUMONT C. J. This is an appeal by the Government of Bombay against the acquittal of the accused in appeal by the Sessions Judge of Ahmedabad of offences under ss. 4 and 5 of the Bombay Prevention of Gambling Act, 1887, for which they had been convicted and sentenced by the trial Magistrate.

Accused Nos. 1 and 2 are partners in business. Accused No. 3 is their servant, and the other accused are constituents.

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On April 18, 1936, the police raided the business premises of accused Nos. 1 and 2, which premises are situate opposite the American Cotton Exchange of Ahmedabad. In the raid certain books and documents were seized, and it is suggested that those books and documents are instruments of gaming, and, therefore, since the raid took place under s. 6 of the Act, a presumption arises under s. 7 that the premises raided were used as a common gaming-house. The documents seized, however, are not on the face of them instruments of gaming, and the learned Government Pleader, therefore, relies particularly on the words which were added to s. 7 by an amendment in 1936.

Section 7, as amended, provides that in certain events the house, room or place raided under s. 6 shall be presumed to be used as a common gaming-house until the contrary is proved. Now, there are two events, as I read the section, on which that presumption arises. The first event is when any instrument of gaming has been seized in the house, room or place entered under s. 6 or about the person of any one found therein. There is no particular difficulty in determining when that event occurs. All that the Court has to do is to see whether the documents and things found in the house raided fall within the definition of "instruments of gaming". If they do, then the presumption arises. The other event is more difficult to determine. It is worded in this way: "And in the case of any other thing so seized" —(that must mean any thing other than an instrument of gaming)—"if the Court is satisfied that the police officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming", then the seizure leads to the presumption. So that the occurrence of that event requires two things to be proved, first, that something has been seized, which is other than an instrument of gaming, and, secondly, that the police-officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming. When

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these two things are proved, then the Court must presume that the house, which has been entered, was used as a common gaming-house until the contrary is proved. But obviously if the only evidence of the house being used as a common gaming-house lies in the seizure in the house of something which is in fact not an instrument of gaming, although the police-officer had reasonable grounds for suspecting that it was an instrument of gaming, then there is no evidence of such user and the presumption is rebutted. It seems to me that the presumption arising in the second event specified in s. 7 must always be still-born because it is rebutted by proof of the very event which gives it birth, namely, seizure of something other than an instrument of gaming. The learned Government Pleader says that that construction reduces the amendment of the Act to a nullity, and that what the section really means is that where there is found in a raid an instrument of gaming, or something which is reasonably suspected to be an instrument of gaming, though it cannot be definitely proved to be so, then the presumption arises, and the burden is thrown upon the accused to prove that the suspected thing is not an instrument of gaming. That, no doubt, would be a reasonable construction to be placed upon the section, if the language so permitted. But in construing a section of a penal Act, which casts upon the accused the burden of proving his innocence, the Court must act strictly, and it seems to me that it is impossible, reading the language of the section according to its ordinary and natural meaning, to give to the section the meaning for which the learned Government Pleader contends. I think that what I have called the second event can only arise, on the language used, when it is proved that the thing which was found in the house raided was not an instrument of gaming; and, as I have pointed out, directly you prove that, you destroy the evidential value of the thing found. So that, in my opinion, in this case in order to bring into play the presumption

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under s. 7 it must be proved that the things seized in the raid were instruments of gaming.

One document, which was seized, and which was very much relied upon, is Exhibit 3-A, which consisted of two documents. The first one is a short document, containing certain figures, which in themselves are unintelligible. Two witnesses were called,—exhibit 5 and exhibit 6—, who purported to explain what that document means. Generally speaking, I think it is not permissible to call a witness to explain to the Court what a document means, unless such a witness is an expert under the Evidence Act. It is for the Court to ascertain what the document means, though no doubt a witness may suggest methods by which an intelligent meaning can be given to the instrument. However, the criticism mainly relied upon against both these witnesses is that they are obviously very unreliable. Their names were not mentioned in the complaint, and they were not called as witnesses until many months after the raid. In examination-in-chief they gave evidence, which no doubt supported the prosecution case, because they said that they had entered into purely gambling transactions in American futures, but in cross-examination they went back upon their evidence entirely. The prosecution theory is that the witnesses had been got at by the accused, who are said to be wealthy persons. On the other hand, the theory of the accused is that the witnesses had been got at in the first instance by the police, and it was only in cross-examination that they repented of their ways and told the truth. At any rate, witnesses of that nature, who are brought forward after a considerable interval of time, cannot be relied upon very far, and I think the learned Sessions Judge was right in saying that their evidence could not be accepted as sufficient to found a conviction.

Apart from that evidence, there is really no evidence of pure gambling in American futures. There is a great deal

of evidence that the accused were doing business in cotton, both in futures and in options, and it is suggested,—and indeed admitted—, that they never in fact gave or took delivery of any bales of cotton; but the rules of the American Cotton Exchange, which the accused say that they operate under, prohibit a transaction where no delivery is given or contemplated, and the cases show that if delivery is given or contemplated, the transaction is not a purely gambling transaction, although one knows very well that in practice in most of these cases dealing in futures and options no delivery is in point of fact ever taken or contemplated.

But the accounts of the accused, which are put in for example, of dealings by accused Nos. 1 and 2 with accused Nos. 4, 6, 7 and 9, seem to be ordinary accounts, which one would expect in dealings of this nature. They show the bales purchased and the bales sold. Sometimes the transaction is a purely future transaction, sometimes it is *teji* or *mandi*, or *teji mandi*; and where it is a case of option, the commission is shown, if no transaction resulted, that is to say if the option was not exercised. If it was exercised, the price is shown, and on the other side of the account are shown the cross contracts. There were weekly settlements, that is to say settlements before the due date under the contract, and it is suggested that as under those weekly settlements the accounts were closed, the transaction must have been pure gambling which had no relation to delivery on the due date. But as far as I can see, the accounts are only closed at the end of the week where the bales purchased and sold tally. In that event, of course, there is no question of any delivery, because the constituent has bought and sold the same number of bales, and it is only a question of paying or receiving differences. But where the bales do not tally, the outstanding bales are carried over, and, at any rate, theoretically they would go on being carried over until the due date when the transaction of sale or

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purchase would have to be put through. There is nothing, in my opinion, to show that the business carried on by these accused in respect of these cotton transactions differs from that normally carried on on the Stock Exchange.

I think, therefore, that the appeal of Government fails.

Account books, papers and things seized to be returned to the accused.

N. J. WADIA J. The case of the prosecution was that accused Nos. 1 and 2 were carrying on gambling in American futures and in *ank-farak* and *teji mandi* transactions on a large scale. That being their case, it is surprising that they should have been able to adduce so little evidence to support their allegations. In the complaint first made only three witnesses were mentioned, two of them being the police Sub-Inspector and a pancha, and the third being one Babulal, a man who had been for a short time a clerk in the office of accused Nos. 1 and 2. The evidence of these three witnesses could not possibly have established the case for the prosecution. The two witnesses on whom they principally relied, Purshottam, exhibit 6, and Jasubhai, exhibit 5, were both produced at a very late stage.

With regard to the alleged dealings in *ank-farak*, there is no evidence at all. With regard to the gambling in American futures, the only document on which the prosecution relies is a small slip, exhibit 3-A, containing a few pencil figures. By themselves the figures are unintelligible and do not necessarily show that they relate to any illegal transactions. Accused No. 1 is the chairman of the American Cotton Exchange. He has also a cloth shop. There is nothing impossible in documents being found in his shop which might appear unintelligible to strangers, and the mere fact, therefore, that the figures on Exhibit 3-A are not easily intelligible would be no reason for suspecting

the accused. If the two witnesses on whom the prosecution rely for showing that exhibit 3-A related to dealings in American futures had been reliable, it could have been said that the prosecution had succeeded in showing that exhibit 3-A referred to dealings in American futures. But these two witnesses are obviously absolutely untrustworthy witnesses. Exhibit 5, Jasubhai, was first examined. After part of his examination-in-chief had been concluded, he disappeared and could only be produced again in Court on a warrant. He made serious allegations that the police had been bringing pressure to bear upon him to depose against the accused, and in the cross-examination he went back on everything which he had deposed against the accused in examination-in-chief, and said that what he had stated with regard to the dealings carried on by accused Nos. 1 and 2 with the other accused was not based on his own knowledge at all. When this witness failed, the prosecution produced another witness Purshottam, exhibit 6. Purshottam undoubtedly said in his examination-in-chief that he was personally acquainted with the transactions which the accused were carrying on and that those transactions were of a gambling nature. But he again in his cross-examination went back entirely on what he had stated in his examination-in-chief and disclaimed any personal knowledge with regard to the transactions carried on by accused Nos. 1 and 2. It would be impossible to convict the accused on evidence of witnesses such as these; and if the evidence of these two witnesses is disregarded, there is nothing whatever in the prosecution evidence to show that exhibit 3-A referred to any transactions of a wagering nature, or that accused Nos. 1 and 2 had anything to do with exhibit 3-A, which was found in the pocket of accused No. 3, and which may conceivably have nothing to do with the business which accused Nos. 1 and 2 were carrying on.

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A large number of account books have been produced to show that *teji mandi* transactions were carried on on the premises, that in these transactions there was absolutely no intention of either giving or taking delivery, and that the transactions were of a purely wagering nature. Here, again, the account books themselves do not necessarily suggest that the transactions were of a wagering nature. They are capable of the interpretation which, the accused urge, should be put upon them, that they were ordinary transactions carried on under the rules of the American Cotton Exchange, of which accused No. 1 was admittedly the Chairman, and were expressly carried on under the condition imposed by those rules that deliveries were to be given or taken. Accused No. 1 in his statement said that deliveries were intended to be given or taken. It is true that all the other accused in their statements have said that deliveries were not actually given or taken. But the mere fact that deliveries were never given or taken would not show that both parties to the transactions had stipulated that deliveries were never to be given or demanded. Apart from the evidence of the two witnesses whom I have referred to, and who are clearly unreliable, there is nothing to show that deliveries would not have been given even in cases where they were demanded.

The only other witness whom the prosecution examined on this point is Babulal, a clerk of accused Nos. 1 and 2, who said that the business carried on by accused No. 1 in the shop which was raided by the police was a cotton brokerage business in connection with the American Cotton Exchange. To that extent he supports the statement made by accused No. 1 that the business, which is referred to in the account books which have been produced in the case, was business done in connection with the American Cotton Exchange and under its rules. With regard to delivery all that the witness said was that he did not know if delivery of cotton was given. But that by itself would

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not be sufficient to show that both parties to the transactions in every case contemplated that delivery should neither be given or taken.

N. J. Wadia J.

The prosecution evidence fails to establish any case against the accused under s. 4 or 5. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Y. V. D.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice B. J. Wadia.

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March 20

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND BALUCHISTAN, REFEROR *v.* D. R. NAIK, ASSESSEE.*

Indian Income-tax Act (XI of 1922), ss. 9, 34, and 35—Assessment completed—Tax paid—Whether can be reopened—Income arising from property—Allowable deductions—Widow's maintenance charge on property—Whether allowable to determine taxable income.

An assessment cannot, on payment of the tax assessed, be said to have become final and conclusive if the time limited under s. 34 or 35 for altering an assessment has not expired.

The words "If for any reason the assessment is too low" in s. 34 are wide enough to cover a mistake in the assessment which has arisen by reason of a mistake of law and would enable the commissioner to reopen the assessment.

Where the income of an assessee (not being a joint Hindu family) is derived from immoveable property which is charged with the payment of maintenance allowances, although the only deductions permissible in respect of the property are those specified in s. 9 of the Income-tax Act yet in arriving at the taxable income the maintenance allowances should be deducted.

Bejoy Singh Dudhuria v. *Commissioner of Income tax*,[1] followed.

* Civil Reference No. 15 of 1938.

[1] (1933) 33 Bom. L. R. 811.