1904 MAY 13. JUNE 3.

PRIVY COUNCIL.

31 C. 901=8 C. W. N. 271=31 I. A. 195=6 Bom. L. R. 741=1. A. L. J. 420.

Chintamoni's purchase he voluntarily gave up possession to Chintamoni. On the other hand, another defendant, Godai Pal, defendant No. 32, alleges in his written statement in the present suit that he purchased Notobur's *dur-mokurrari* rights on the 7th of March 1895 by a registered deed of private sale and that he has been holding the same, since that time, as the rightful owner and possessor thereof. The question, if there is a question, seems to be one between co-defendants, which cannot properly be dealt with in the present suit.

[909] Their Lodships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first three respondents: *Watkins & Lempriere.*

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31 C. 910 (=3. C. W. N. 592.)

[910] CRIMINAL REFERENCE.

Before Mr. Justice Ghose.

DURGA PRASAD KALWAR *v.* EMPEROR.*

[19th February 1904.]

Gambling—Public place—Osara or verandah—Gambling Act, II (B.C.) of 1867, *s.* 11.

The accused were convicted under s. 11 of the Gambling Act, II (*B. C.*) of 1867, of gambling in a public place. The place where the gambling was held was an *osara* or verandah, which was enclosed on all sides, but having doors opening towards the road and having a platform between the *osara* and the road.

It was a part of a building which was the private property of certain individuals, and was used during the day as a shop; but not so in the night. The gambling in question took place after midnight.

Held, setting aside the convictions, that the *osara* was not a public place within the meaning of s. 11 of the Gambling Act.

[Ref. 10 Cr. L. J. 16, 30. Bom. 348.]

RULE granted to the petitioners, Durga Prasad Kalwar and others.

This was a Rule calling upon the District Magistrate of Saran to show cause why the conviction and sentence in the case should not be set aside upon the ground that the shop in which the gambling took place was not a public place within the meaning of s. 11 of the Gambling Act.

The petitioners were arrested at the shop of one Mohavir Sah, where it was alleged they had been gambling. The place where the gambling was held was an *osara* or verandah, enclosed on all sides, but having doors opening towards the road, and a platform between it and the road. The *osara* was a part of a building, which was the private property of certain persons. It was used [911] during the day as a shop, but not so at night. The gambling took place after midnight. Some of the petitioners were standing on the roadside looking at the game that was going on inside, while others were among those who were standing inside the *osara*. The petitioners were convicted on the 19th December 1903, by the Joint-Magistrate of Saran under s. 11 of the Gambling Act and fined.

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* Criminal Revision No. 63 of 1904 made against the order passed by J. F. Graham, Joint-Magistrate of Saran, dated the 19th of December 1903.

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Mr. *Jackson* (Babu *Dwarka Nath Mitra* with him) for the petitioners.

Babu *Dhirendra Lal Kastgir* for the Crown.

GHOSE, J. The petitioners in this case have been convicted under s. 11 of the Bengal Gambling Act, and sentenced to a fine. The question raised before me is whether the place where the gambling took place is a public place within the meaning of the said section. It appears, upon the map filed in this case as also upon the evidence, that the place there the gambling was held is an *osara*, which is enclosed on all sides, there being, however, doors opening towards the road, and there being what is called a platform between the said *osara* and the road. The place in question is a part of a building, which is the private property of certain individuals. It is used during the day as a shop, but not so in the night; and the gambling in question took place after midnight, on a certain day. It appears that people were standing on the roadside and looking at the game that was going on inside the room. Some of these people, and others, who were standing inside the *osara*, were arrested; and they have all been found guilty of the offence of gambling.

I do not understand how the persons who were standing on the roadside and looking at the game, but were arrested, could be convicted, there being no distinct evidence proving that they took any real part in the gaming. However that may be, having regard to the evidence as to the place were the gambling actually took place, I am unable to find that it is a public place within the meaning of section 11 of the Gambling Act. **[912]** [See two cases of this Court, References No. 24 (1) and 25 (2) of 1894 and the case of *Khudi Sheikh* v. *The King Emperor* (3).] I

(1) See foot-note.
(2) Unreported Reference No. 25 of 1894.
(3) (1902) 6 C. W. N. 33.

CRIMINAL REFERENCE.*

EMPRESS v. RAGHOONANDAN SINGH & OTHERS.

The order of Reference by H. W. Gordon, Sessions Judge of Saran, was as follows:—

Under s. 438, Act X of 1882, I herewith transmit the record of the case noted on the margin to be laid before the High Court with the following report.

1st. The petitioners, twelve in number, have been tried summarily by the Deputy Magistrate of Chapra, and convicted of an offence punishable under s. 11 of Act II of 1867 (B.C.), that is to say of gambling in a public place, and sentenced each to pay a fine of Rs. 10, or in default to undergo two weeks' rigorous imprisonment. It is said the petitioners were gambling with shells on the occasion of the Dewali festival in a verandah (*osara*) belonging to one Babu Lal, and situated alongside the public road.

2nd. I recommend that the convictions and sentences be set aside and that the fines or any portion of them, if realized, be refunded.

3rd. I am of opinion that the whole order is bad in law.

4th. It appears to me that the verandah is not a public place within the meaning of s. 11 of Act II of 1867 (B.C.). The Deputy Magistrate in his explanation says that by public place is meant a "place to which the public have access," and that as the verandah was open towards the road, a person could step into it and therefore it was a public place and accessible to the public. This view is I think not correct. This particular verandah may be literally accessible to the public in the sense that there was no physical

* Criminal Reference No. 24 of 1894.

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31 C. 910=8 C. W. N. 592.

accordingly set aside the conviction and sentence [913] and make this Rule absolute. The fine, if paid, will be refunded.

Rule made absolute.

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31 C. 914 (=9 C W. N. 49.)

[914] PRIVY COUNCIL.

[*On appeal from the High Court at Fort William in Bengal.*]

KALI DAS CHUCKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY.*
[11th, 17th May and 2nd June, 1904.]

Will—Validity of will—Proof in common form—Probate, delay in taking out—Application for revocation—Will in solemn form—Onus of proof of—Probate and Administration Act (V of 1881) *s.* 50 "*Just Cause.*"

A will was executed the day before the death of the testator in 1878, and probate was obtained in 1884 in common form with issue of citations.

On an application made in 1896 by the appellants for revocation of probate on the ground that the will was not genuine, the District Judge placed the onus on the respondents to prove the will, and, holding that the evidence was unreliable and insufficient, granted the application for revocation.

The High Court reversed that order, being of opinion that, if the application were regarded as one to obtain proof of the will in solemn form it was without precedent after so long an interval from the date of probate. That the appellants should at least have shewn when they became aware of the probate, and that, considering the difficulty of proving the will in solemn form after the long time that had elapsed, there was sufficient evidence of its due execution. Also that, if the application was one under s. 50 of the Probate and Administration Act (V of 1881), in which case it was doubtful whether the burden of proof was not on the appellants to show that the will was fictitious, no "just cause" had been shown for revoking the probate.

Held on the evidence that under the circumstances of the case there was no ground for differing from the decision of the High Court.

[Ref. 51 I. C. 561.]

APPEAL from a judgment and decree (4th July 1898) of the High Court at Calcutta reversing an order (3rd June 1897) of the District Judge of Rajshahye, which granted an application by petition to revoke probate of a will.

The petitioners for revocation of the will appealed to His Majesty in Council.

The will in question was alleged to have been executed by one Khetter Nath Chuckerbutty on 28th May 1878. He died on 29th [915] May 1878, leaving a widow Mrinmoyi, a minor son Shib Nath

* *Present* :—Lord Macnaghten, Lord Lindley, and Sir Arthur Wilson.

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obstruction to a person desirous of stepping on to it, but at the same time the public have no right to enter the verandah of a private person. It might as well be contended that any person might step into another person's house because the door opening on to the road was left open. The house would then be physically accessible to the public, but the public would have no right to walk into the house, and supposing that the house was not used as a "common gaming-house" as defined in s. 1 of the Act, gambling in it would not in my opinion amount to an offence under s. 11. In the present case it is not alleged that the verandah was being used as a common gaming-house

For the above reasons I think the Deputy Magistrate's order is bad in law.

O'KINEALY AND HILL, JJ. We set aside the convictions and sentences in this case for the reasons given by the Sessions Judge, and direct that the fines, if paid, be returned.