1904 MARCH 11.

APPEAL FROM ORIGINAL CIVIL.

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plaintiff-testator in 1792 did not prove the will, until the year 1802. It appears to me therefore, on the authority of these cases, which, so far as I am aware, has not been questioned, that the present suit, unless it can be regarded as one for the recovery of the moveable property deposited, which in my opinion is not its nature, is barred by limitation, and I would therefore allow the appeal, in so far as it relates to the claim for the replacement of the notes or their value. With respect to the suit in its other aspects I quite agree with the judgment of my Lord.

Attorneys for the appellant: *Morgan & Co.*

Attorneys for the respondent: *N. N. Sen & Co.*

Appeal dismissed with costs.

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31 C. 542 (=8 C. W. N. 458=1 Cr. L. J. 349.)

[542] CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Stephens.

HARI SINGH *v.* JADU NANDAN SINGH.*

[15th December, 1903 and 19th February, 1904.]

Gambling—Sham horse-racing machine—Instrument of gaming—Compound of house—Public place—Gambling Act (Bengal Act II of 1867.)

The accused played a game of sham horse-racing known as "little horses" by means of a machine.

Which horse won was a pure matter of chance.

The public staked their money on any of the horses before the machine was started.

The accused appropriated all the stakes returning four times their stakes to those who had staked their money on the winning horse.

The game was played in the compound of the Sanjoy Press consisting of an open space of land without any fence situated one cubit from the bazar.

There was no evidence that the owner ever gave or refused permission to any one to come on his compound or that any one asked his permission to do so or that any one was prevented doing so by him.

Held, the accused was rightly convicted under s. 11 of the Bengal Gambling Act, II of 1867.

The difference between gaming and betting discussed.

The Queen v. *Wellard* (1), *Turnbull* v. *Appleton* (2) *Queen-Empress* v. *Sri Lal* (3), *Khudi Sheikh* v. *The King-Emperor* (4) *Queen-Empress* v. *Narottamdas Motiram* (5) referred to.

[Ref. 39 Cal. 968=16 C. L. J. 250=16 C. W. N. 858=13 Cr. L. J. 603=16 I. C. 171; 9 N. L. R. 164=21 I. C. 910=14 Cr. L. J. 670; 9 P. R. 1905 Cr.=128 P. L. R. 1905=2 Cr. L. J. 46; 40 Mad. 556; 24 C. W. N. 44=30 C. L. J. 217=54 I. C. 822.]

RULE granted to the petitioner, Hari Singh.

[543] This was a Rule calling upon the District Magistrate of Faridpore to show cause why the conviction and sentence in the case should not be set aside on the grounds:—

(1) that the act imputed to the petitioner was not gaming within the meaning of the law;

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* Criminal Revision No. 780 of 1903, made against the order passed by Harish Chunder Roy, Deputy Magistrate of Faridpur, dated 21st of July 1903.

(1) (1884) L. R. 14 Q. B. D. 63.
(2) (1876) 45 J. P. 469.
(3) (1895) I. L. R. 17 All. 166.
(4) (1901) 6 C. W. N. 33.
(5) (1889) I. L. R. 13 Bom. 681.

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(2) that the place or occurrence according to the evidence was not a public place ;

(3) or why in the alternative the sentence should not be reduced.

The petitioner, who was the proprietor of a well-known kind of machine known as "little horses," obtained leave from the District Magistrate of Faridpore to play games of skill and not gambling games.

On the 30th May 1903 the petitioner played the game of sham horse-racing with the machine, which was in the form of a box with a handle in its side. By turning the handle six metal figures of horses with riders were made to move in concentric circles round the top of the box. As the impetus given by the turning of the handle died away, the horses gradually stopped, and the horse won which, having a flag in front of it, was nearest to the flag, when all the horses had stopped. The public were allowed to stake money on any of the six horses before the machine was set in motion. Upon the stopping of the horses the petitioner appropriated all the stakes, but returned four times their stakes to the persons, who had staked their money on the winning horse.

The game was played within the municipality of Faridpore, in the compound of the Sanjoy Press ; which consisted of an open space of land without any wall or fence, situated one cubit from the bazar. The accused played morning and evening and forty or fifty bettors came and played with him.

There was no evidence to show that the owner of the compound ever gave or refused permission to any one to come on his compound, or that any one asked for his permission to do so, or that any one was prevented from doing so by him.

On the 21st July 1903 the petitioner was convicted in a summary trial by the Deputy Magistrate of Faridpore under s. 11 of the Bengal Gambling Act II of 1867.

[544] Mr. *Jackson* (Babu *Saroda Charan Mitter*, Babu *Sasi Sikhar Bose* and Babu *Jatindra Nath Ghose* with him) for the petitioner.

The act imputed to the petitioner does not come under the Bengal Gambling Act of 1867 as amended by Bengal Act III of 1897. The word gambling has not been defined in either of those Acts. S. 4, sub-s. 2 of the latter Act only lays down that gaming shall include rain-gambling. What occurred in the present case was not gambling, but a betting on the horses. Betting is not illegal. There is a great difference between betting and gambling. *Queen-Empress* v. *Narottamdas Motiram* (1). When this case was decided the law as to gambling was the same in Bengal as it was in Bombay under the Bombay Prevention of Gambling Act IV of 1887. Since the Bombay Act of 1887 the law regarding gambling in Bombay has undergone a change and the Bombay Act I of 1890 was passed amending the Act of 1887, which lays down that the word gaming shall include wagering.

In Bengal however no such change has taken place. Bengal Act II of 1867 was amended by Bengal Act III of 1897 with regard to rain-gambling only. So that it would appear that, although the Legislature was aware that wagering had been included in the definition of gaming in Bombay, it intentionally omitted to make any such alteration in the law in Bengal. According to the law in *Queen-Empress* v. *Narottamdas Motiram* (1) there must be a game before there can be any gaming ; and to constitute a game, there must be a contest and an active participation

(1) (1889) I. L. R. 13 Bom. 681.

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of certain persons is also necessary. Here there was no contest, the bettors were not players, but only onlookers who staked money. It was a betting on a certain contingency. What the petitioner did was betting and not gambling and he therefore cannot be convicted under the Gambling Act.

The place where the offence was alleged to have been committed was the compound of the Sanjoy Press, the private property of the owner of the press. It cannot be said to be a public place. *Khudi Sheikh* v. *The King-Emperor* (1).

[545] GHOSE AND STEPHEN, JJ. The petitioner in this case has been convicted of the offence of playing for money with an instrument of gaming in a puplic place under section 2 of Act II of 1867 of the Bengal Government. This Court granted a Rule to show cause why the conviction and sentence should not be set aside on the grounds:—

(1) that the act imputed to the petitioner is not gaming within the meaning of the law, and

(2) that the place of occurrence is not a public place within the meaning of the Act.

The facts in the case are simple. The accused is the proprietor of a machine for which there is no particular name, unless it is "little horses," but which is of a well-known kind. It is not necessary to describe the machine in detail, but it is sufficient to say that by turning a handle in the side of a box, six metal figures of horses and riders are made to move in concentric circles round the top of the box. They stop gradually as the impetus given by turning the handle dies away, and that horse wins which, having a flag in front of him, is nearest to it, when all the horses have stopped. The public were allowed to stake money on any of the six horses before the machine was set in motion. The accused apparently pocketed all the stakes, returning four times their stakes to persons, who had staked their money on the winning horse.

The place, where the offence in the present case is alleged to have been committed, is described by Ram Nath Ghose, the husband of the woman to whom it belongs, as the compound of the Sanjoy Press. It is an open space of land situated one cubit from the bazar, its boundaries are not stated, but it appears not to be divided by any wall or fence from the bazar. Ram Nath tells us that the place is a public place, though he also states that "no one has had access to the place except with any permission." He also tells us that the accused played morning and evening and that 40 or 50 bettors came and played. Two other witnesses, one of them a constable, described the place, where the instrument was used as the bazar. Ram Nath did not say whether he ever gave or refused permission to any one to come on his compound, nor is there any evidence that any one asked for his permission to do so, or that any one was prevented doing so by him.

[546] The two questions we have to decide on these facts are (1) Is the machine we have described an instrument of gaming? (2) Was the place where it was used a public place?

Taking the second point first a general description of a public place is to be found in *The Queen* v. *Wellard* (2), decided under 14 and 15 Vict., c. 100, s. 29, dealing with indecent exposure of the person, where Grove, J. says "a public place is a place where the public go, no matter whether they have a right to go or not." A very similar ruling is to be

(1) (1901) 6 C. W. N. 33. (2) (1884) L. R. 14 Q. B. D. 63, 66.

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found in *Turnbull* v. *Appleton* (1) decided under 36 and 37 Vict., c. 38, s. 3, a similar section to the present, where a field maintained for the benefit of the colliers of a Colliery Company, to which strangers were admitted, was held to be a public place. The Indian authorities on the subject seem to be fewer than might be expected, but in *Queen-Empress* v. *Sri Lal* (2), it was held that a *Chabutra*, which was private property adjoining a public thoroughfare, and was not a place to which the public had a right of access nor a place to which the public were used to have access, nor were ever permitted to have access, was not a public place. This Court has considered the meaning of the term public place as used in this section in the case of *Khudi Sheikh* v. *The King-Emperor* (3) and two unreported cases; references Nos. 24 and 25 of 1894. In the first mentioned case the place where the gambling took place was situated in the compound of a Thakoorbari surrounded by a pucca wall, and was held not to be a public place. In the latter cases a verandah alongside a public road was held not to be a public place, though it was possible to enter it from the street. All these cases seem to us to be consistent with one another as also consistent with the idea that the place may be a public place, though it is the private property of an individual. Where a place is in any way dedicated to the use of the public, it is of course a public place. But where it is owned privately, and no such dedication has taken place, the question whether it is a public place seems to depend on the character of the place itself and the use actually made of it. Whereas in the present case the place is an open piece of ground [547] the presumption that it is a public place is naturally more easily created than where, as in the cases we have referred to, it is a building, or is surrounded by a wall. We therefore hold that the act complained of was done in a public place.

We have next to consider whether the machine used in the present case was an instrument of gaming. We cannot conceive that it can be anything else. In the first place we have no doubt, differing therein from the learned Magistrate, that the event betted on is a matter of more chance and not at all of skill. For one thing, as the accused worked the machine, if the result was not a matter of chance, the machine was an instrument of cheating, of which there is no evidence, and which we ought not to assume. But the result to be obtained by turning the handle is apart from fraud, plainly too much a matter of change for any question of skill to come in.

We have been much pressed with the case of *Queen-Empress* v. *Narottamdas Motiram* (4) where rain betting was held not to be gaming, because there was no contest and consequently no game. The event betted on was the amount of rain that fell during the monsoon, in other words, an operation of nature and not a contest among men. We fail to see how this ruling can support the argument advanced by the petitioner. In fact in our judgment it seems to be an authority to the contrary effect. The progress of metal figures round the top of a box is certainly not an operation of nature, taken by itself it is perhaps hardly a contest, but when money is staked on the various figures it would seem, according to a passage in the judgment of Scott, J., where he refers to roulette, that a contest arises between the keeper of the machine and the person, who stakes the money.

(1) (1876) 45 J. P. 469.
(2) (1895) I. L. R. 17 All. 166.
(3) (1901) 6 C. W. N. 33.
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We find therefore that the machine is an instrument of gaming and, as we find both points against the petitioner, we hold that this Rule must be discharged.

STEPHEN, J. The judgment just delivered, sufficiently supports the conclusion at which this Court has arrived. But I [548] feel myself bound to express doubts, which I feel, as to the soundness of the judgment in the case of *Queen-Empress* v. *Narottamdas Motiram* (1), to which we have referred. The matter is of some importance because for reasons we have indicated the English law on the subject of gaming does not seem to be applicable to India, and the Bombay case is, I believe, the only one decided in India, which deals with the meaning of gaming. The Gaming Act is concerned only with gaming, and has nothing to do with betting or wagering, which may be considered synonymous terms. What is the difference between gaming and betting? The Bombay case apparently regards gaming as betting on the result of a game, which is also a contest. The distinction between the two things is based on the scientific or historical meanings of gaming as given in standard works, to which the very high authority of Murray's Dictionary may now be added. But it seems to me to raise difficult questions as to the meaning of "game" or "contest," which can only be decided by a highly artificial use of language. I believe that a more satisfactory distinction, that is one that is plainer and more easy of application, is to be found by considering the popular rather than the scientific use of the word. I suggest that the difference between gaming and betting depends on the nature of the event, on which the bet is made. If the event is brought about solely for the purpose of being betted about, betting on it is gaming, otherwise it is not. Ordinary marine insurance is merely betting against the happening of certain events. In practice it is very difficult to distinguish it, in a legal point of view, from betting on the result of a cricket match or horse-race. A certain kind of marine insurance is in fact a well-known form of what is popularly described as gambling. On the other hand dicing, to take an old fashioned example, is a wholly insignificant act, if it is not done for the purpose of betting on the result. If I may descend to modern examples of those games of cards, to whose names we are accustomed in legal literature, I should say that playing at poker where stakes are essential, is gaming, and that playing at bridge, where stakes, though usual, are not essential, is not. If horse-racing degenerates into nothing, but an occasion for betting, it becomes gaming and the race-horses probably become instruments [549] of gaming. Apart from legislation rain-gambling is gaming, if a complete apparatus is used for the purpose, otherwise it is not. This distinction seems to me to be plain and easy of application. It is impossible to attach legal meanings to common words which are in complete accordance with their common use, when that use is indefinite, especially when the word is generally used to express disapprobation or the reverse. But I believe the meaning I propose to attach to the term gaming to be as near to its popular use as it is possible to go.

(1) (1889) I. L. R. 18 Bom, 681.