

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 3740 OF 2017

- 1] Kundalik S/o Shivaji Kolekar
Age:30 Years, Occ.: Private Service
R/o at post Kilaj, Tq. Tuljapur,
Dist.Osmanabad.
- 2] Virbhadra S/o Bhujangayya Swami
Age 60 years, Occu.Pensioner
R/o Matruchhaya Nivas,
Mahatma Gandhi Nagar,
Tq.Dist.Osmanabad .. APPLICANTS

VERSUS

- 1] The State of Maharashtra
(Through Police Station
Officer, Kalamb Police Station
Osmanabad .. RESPONDENT

Mr.N.C.Swami, Advocate for applicants.
Mr.A.R.Kale, APP for Respondent.

**CORAM : S.S.SHINDE &
MANGESH S. PATIL, JJ.**

**RESERVED ON : 31/10/ 2017.
PRONOUNCED ON :10/11/2017.**

JUDGMENT (PER MANGESH S. PATIL,J.) :

Rule. Rule is made returnable forthwith. Heard finally
with the consent of the parties.

- 2] In this application invoking the powers of this Court under

Section 482 of Cr.P.C., the applicants are seeking quashing of FIR No.163/2017 dated 28/6/2017 registered at Kalamb Police Station, Dist.Osmanabad for the offence punishable under Section 188 of IPC and for the offences punishable under Sections 4 and 5 of the Bombay Prevention of Gambling Act, 1887 (hereinafter referred to as the said Act for short).

3] On a tip-off, received by investigation branch at Osmanabad on 27/6/2017 raid was conducted by police party on an establishment by name Sairam Video Game Parlour being run in a shop at Sunil Market in Kalamb town. It is alleged that the applicant no.1 was present there. It was found that the Video parlour was being used as a Gaming House. It was also found that the licence for running the Video Parlour had also expired on 31/12/2016. Since it was revealed that the Video Parlour was owned by applicant no.2, both the applicants were alleged to have committed offence of keeping a Gaming House and were found there for the purpose of gaming and accordingly FIR has been lodged.

4] According to the learned advocate for the applicants, even by taking the contents of the FIR at their face value, all the ingredients for the offences are not made out. Applying the principles laid down by Supreme Court in the case of State of Haryana V/s Bhajanlal; AIR 1992 S.C. 604, the FIR is liable to be quashed. There is no order for the breach of which the applicants could have been charged for the offence punishable u/s 188 of IPC. Besides, by virtue of the mandate of Section 195 of Cr.P.C., it is only public servant concerned or some other public servant to whom he is administratively subordinate only are authorised to lodge a complaint without which no Court can take cognizance for the breach of any order promulgated by such public servant for the offences punishable

under Sections 172 to 188 of IPC. Thus according to the learned Advocate for the applicants, the FIR is also liable to be quashed on this ground as well. The learned Advocate also relied upon a judgment of the Division Bench of this Court in the case of Jaywant Balkrishna Sail and others Versus State of Maharashtra and others; (2012(3)) Mh.L.J. (Cri) 428 as well as the judgment of the learned Single Judge of this Court in the case of K.L.Mansukhani Versus Senior Inspector of Police and others; 1999 (101 (2)) Bom.Law Reporter 811 in Criminal Writ Petition No.700,1098 and 1313 of 1998 decided on 30/1/1999.

5] The learned APP opposed the application by contending that the very fact that the applicant had obtained a licence which stood expired presupposes that the applicant no.2 has been well aware that he could not have continued to run the Video Palour without getting the licence renewed. Thus according to the learned APP, the applicants cannot be allowed to turn around and contend now that no such licence was required. The learned APP also submitted that the applicants were running the Video Palour for playing different games which were not in fact approved of in the licence issued in favour of the applicant no.2. According to the learned APP since the investigation is going on, it cannot be stalled abruptly and the application be rejected.

6] Since the FIR refers to the offences punishable under Sections 4 and 5 of the Bombay Prevention of Gambling Act, it is necessary to reproduce the provisions for ascertaining the exact ingredients of the offences, However, simultaneously one also needs to refer to the definition of 'Gaming' and 'Common Gaming House' contained in Section 3 of the said Act. These provisions read as under :

Section 3 :

In this Act “ gaming” includes wagering or betting except wagering or being upon a horse-race, or dog race when such wagering or betting takes place-

- (a) on the day on which such race is to run, and
 - (b) in a enclosure which the licensee of the race-course, on which such race is to be run, has set apart for the purpose under the terms of the license issued under section 4 of the Bombay Race-Courses Licensing Act, 1912, or as the case may be, of the Maharashtra Dog Race-Courses Licensing Act, 1976 in respect of such race-course or in any other place approved by the State Government in this behalf and
 - (c) between any individual in person, being present in the enclosure [or approved place] on the one hand, and such licensee or other person licensed by such licensee in terms of the aforesaid license on the other hand or between any number of individuals in person in such manner and by such contrivance as may be permitted by such licence;
- but does not include a lottery.

Any transaction by which a person in any capacity whatever employs another in any capacity whatever or engages for another in any capacity whatever to wager or bet whether with such licensee or with any other person shall be deemed to be “gaming” : Provided, nevertheless, that such licensee may employ servants, and persons may accept service with such licensee, or wagering or betting in such manner or by such contrivance as may be permitted in such license. The collection or soliciting of bets, receipt or distribution of winnings or prizes in money or otherwise in respect of wagering or betting or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution shall be deemed to be “gaming”.

In this Act the expression “instruments of gaming” includes any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming.

In this Act, “Common Gaming-House” means-

- (i) in the case of gaming -

- (a) on the market price of cotton, opium or other commodity or on the digits of the number used in stating such price, or
 - (b) on the amount of variation in the market price of any such commodity or on the digits of the number used in stating the amount of such variation, or
 - (c) on the market price of any stock or share or on the digits of the number used in stating such price, or
 - (d) on the occurrence or non-occurrence of rain or other natural event, or
 - (e) on the quantity of rainfall or on the digits of the number, used in stating such quantity or
 - (f) on the pictures, digits or figures of one or more playing cards or other documents or objects bearing numbers, or on the total of such digits or figures, or on the basis of the occurrence or non-occurrence of any uncertain, future event, or on the result of any draw, or on the basis of the sequence or any permutation or combination of such pictures, digits, figures, numbers, events or draws;
any house, room or place whatsoever in which such gaming takes place or in which instruments of gaming are kept or used for such gaming;
 - (ii) in the case of any other form of gaming, any house, room or place whatsoever in which any instruments of gaming are kept or used for the profit or gain of the person, owning, occupying, using or keeping such house, room or place by way of charge for the use of such house, room or place or instrument or otherwise howsoever.
- In this Act, "place" includes a tent, enclosure, space, vehicle and vessel;]

Section 4 :

(1) Whoever -

- (a) opens, keeps or uses any house, room or place 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 purposes of gaming with persons frequenting any such house,

room or place,
shall, on conviction, be punished with imprisonment
which may extend to two years and may also be
punished with fine :

Provided that -

(a) for a first offence such imprisonment shall not
be less than three months and fine shall not be less
than five hundred rupees;

(b) for a second offence such imprisonment shall
not be less than six months and fine shall not be less
than one thousand rupees; and

(c) for a third or subsequent offence such
imprisonment shall not be less than one year and fine
shall not be less than two thousand rupees.

(2) Nothing contained in the provisions of the
Probation of Offenders Act, 1958, or in sub-sections
(1), (4), (5) and (6) of section 360 of the Code of
Criminal Procedure, 1973, shall apply to any person
convicted under this section.

Section 5 :

Whatsoever is found in any common gaming-house
gaming or present for the purpose of gaming, shall
on conviction be punished with imprisonment which
may extend to six months and may also be punished
with fine :

Provided that -

(a) for a first offence such imprisonment shall not
be less than one month and fine shall not be less than
two hundred rupees;

(b) for a second offence such imprisonment shall
not be less than three months and fine shall not be
less than two hundred rupees; and

(c) for a third or subsequent offence such
imprisonment shall not be less than six months and
fine shall not be less than two hundred rupees.

Any person found in any common gaming-house
during any gaming therein shall be presumed, until
the contrary is proved, to have been there for the
purpose of gaming. “

7] A bare look at these provisions would make it clear that basic
element of wagering and betting has to be there. Further the
establishment for being branded as a Common Gaming House has
to be used for the purpose of such Gaming and a person needs to be

found in such Common Gaming House for the purpose of Gaming. The contents of the impugned FIR on the face of it, read that it is only the applicant no.1 who was found present in the Video Parlour raided by police party. Even it has been mentioned that the business is actually owned by applicant no.1 and the applicant no.2 was merely conducting it at the formers instance as his employee. No other person was found in the Video Parlour. There is no material to prima facie show that the instruments like the computers etc. could have been used for playing a game of chance. Suffice for the purpose to refer to the decision in the case of K.L.Mansukhani (supra), wherein the learned Single Judge has elaborately discussed by referring to various decisions of High Court and by referring to the provisions of the Act, particularly Section 3 to demonstrate as to how it is only when a game of sheer chance or a game of mixed chance and skill alone would constitute Gaming within the meaning of Section 3. If it is a game of skill, it would clearly bring out the game from the definition of Gaming under Section 3 of the Act. In view of such long standing and settled interpretation, when there is absolutely no material in the matter in hand to even prima facie show or for that matter when there is absolutely no allegation that game of chance and skill or a game of pure chance was being played or the instruments were being used for playing such games, even by accepting allegations in the FIR at their face value, it cannot be said that all the necessary concomitants for constituting offences punishable under Sections 4 and 5 of the said Act can be made out from the FIR. Thus the case in this behalf clearly falls in category no.1 of the seven categories laid down in the case of Bhajanlal (supra) which reads as under :

“1] Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in

their entirety do not prima facie constitute any offence or make out a case against the accused.”

8] Now coming to the alleged offence punishable under Section 188 of IPC is concerned, the Section needs to be carefully read and reads thus :

“Section 188 : Disobedience to order duly promulgated by public servant.-

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. “

9] A careful reading of the provisions clearly reveals that the offence as contemplated under this Section can occur when a person knowingly disobeys or causes obstruction to any order promulgated by a public servant, who is lawfully empowered to promulgate such order, provided such disobedience causes or tends to cause danger to human life, health or safety or riot or affray. It is necessary to note that the impugned FIR is absolutely silent as to for which order passed by which authority the applicants can be said to have committed breach. The allegations are clearly vague and do not make out an offence punishable under Section 188 of IPC.

10] Besides, as has been rightly submitted by the learned

advocate appearing for the applicants, in view of Section 195 of Cr.P.C., the cognizance for an offence inter alia punishable under Section 188 of IPC can be taken by a Court only on a complaint of the public servant concerned or some other public servant to whom he is administratively subordinate who has promulgated the order, the breach of which is complained of. Section 195 (1) of Cr.P.C. (relevant portion) reads as under :

“Section 195: Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence – (1) No Court shall take cognizance -

(a) (i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.”

11] As is observed above, the FIR neither refers to any order promulgated by any public servant nor does it refer to any authorisation issued by such public servant for lodging of the FIR. It would be a sheer abuse of process of law in allowing the applicants to face investigation for allegedly committing offence punishable under Section 188 of IPC. Their case thus would be covered by Category No.3 in addition to Category No.1 of the categories of cases defined in Bhajanlal's case (supra). Category No.3 reads as under :

“3] Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose

the commission of any offence and make out a case against the accused”

12] Under these circumstances, we are satisfied that the applicants cannot be allowed to face investigation on the basis of the impugned FIR and it deserves to be quashed and set aside. Hence the application is allowed. The impugned FIR is quashed and set aside. The Rule is made absolute.

(MANGESH S. PATIL,J.)

(S.S.SHINDE ,J.)

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