



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

**Reserved on : 18.11.2019
Pronounced on : 29.11.2019**

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THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P (MD) Nos.21065 of 2018 & 323 of 2019

and

Crl.O.P. (MD) Nos.14347 and 14565 of 2019

and

Crl.O.P. (MD) Nos.13798 and 16058 of 2019

and

all other connected miscellaneous petitinos

1.Crl.O.P. (MD) No.21065 of 2018

- 1.Pandiyarajan
- 2.Thiyagarajan
- 3.Charles
- 4.Rengarajan
- 5.Sekaran
- 6.Jeeva
- 7.Ganesan
- 8.Srinivasan
- 9.Paulraj
- 10.Muthupandi
- 11.Marimuthu
- 12.Pandian
- 13.Madanagopal
- 14.Jayapaul
- 15.Raj
- 16.Jayachandran
- 17.Azhagar
- 18.Baskaran
- 19.Venugopal
- 20.Murugabupathi
- 21.Rajasundaram
- 22.Subbiah
- 23.Kaleeswaran
- 24.Kumar
- 25.Murugan
- 26.Krishnan
- 27.Kumar
- 28.Saravanan
- 29.Rajangam
- 30.Tamil Selvan



31.Kaliraj
32.Surendiran
33.Pandi Sankarraaj
34.Prabakaran

... Petitioners / Accused 1 to 34

Vs

State rep. by
The Inspector of Police,
Arupukottai Town Police Station,
Virudhunagar District.
Crime No.504 of 2018

... Respondent / Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records in crime No.504 of 2018 pending on the file of the respondent Inspector of Police, Arupukottai Town Police Station, Virudhunagar District and quash the same.

For Petitioners : Mr.Apudukumar Rajarathinam for F.Deepak

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor.

2.Cr1.O.P. (MD) No.323 of 2019

1.Sekar
2.Natarajan
3.Ravikumar
4.Ravichandran
5.Jeyaraj
6.Sethu
7.Maruthupandi
8.Purusothamman Kumar

... Petitioners/A1 to A8

Vs.

State rep. by its
The Inspector of Police,
Theni Police Station,
Theni District
Crime No.764/2018

... Respondent / Compalinant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records in crime No.764 of 2018 on the file of the respondent Police and quash the same.

For Petitioners : Mr.Apudukumar Rajarathinam for
Mr.F.Deepak

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor



3.Crl.O.P. (MD) No.14347 of 2019

Pon.Ashokkumar

... Petitioner/A1

Vs.

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1.State represented by
The Inspector of Police,
Subramaniapuram Police Station,
Madurai in crime No.806/2018 ... 1st Respondent / Complainant

2.A.Malaichamy
Inspector of Police.
Subramaniapuram Police Station,
Madurai. ...2nd Respondent / Defacto Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records of the case in crime No.806 of 2018 dated 14.10.2018 on the file of the 1st respondent and quash the same as against this petitioner.

For Petitioner : Mr.V.Murugan

For Respondents : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

4.Crl.O.P. (MD) No.14565 of 2019

M.Sakthivel

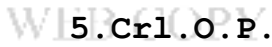
... Petitioner/A1

Vs.

1.State represented by
The Inspector of Police,
Subramaniapuram Police Station,
Madurai in crime No.761/2018 ... 1st Respondent / Complainant

2.A.Malaichamy
Inspector of Police.
Subramaniapuram Police Station,
Madurai. ...2nd Respondent / Defacto Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records of the case in crime No.761 of 2018 dated 28.09.2018 on the file of the 1st respondent and quash the same as against this petitioner concerned.



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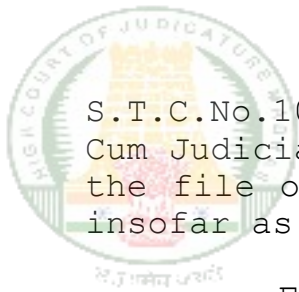
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- 5.Cr1.O.P.

5.Cr1.O.P.

5.Cr1.O.P.



S.T.C.No.10 of 2019 on the file of the additional District Munsif Cum Judicial Magistrate Court, Vendasandur in crime No.423 of 2018 on the file of the 1st respondent police and quash the same as illegal insofar as the petitioners herein.

For Petitioners : Mr.J.Lawrance
For Respondents : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

COMMON O R D E R

All these quash petitions have been filed challenging the FIR and Summary Trial Cases arising out of the offences under Sections 4 (1)(d), 8 and 9 of Tamil Nadu Gaming Act and Sections 45 and 46 of the City Police Act, 1988.

I. CRUX OF THE COMPLAINTS:

Crl.O.P. (MD) No.21065 of 2018

On 03.11.2018, when the respondent was in routine search operation upon secret information in Prince of Wales Recreation Club, they found that the accused persons were gambling with money by playing cards and hence, they registered a case in crime No.504 of 2018 for the offences under Sections 8 and 9 of the Tamil Nadu Gaming Act, 1930.

Crl.O.P. (MD) No.323 of 2019

On 02.11.2018, when the respondent was in routine search operation upon secret information in International Hotel, they found that the accused persons were gambling with money by playing cards and hence, they registered a case in crime No.764 of 2018 for the offences under Section 9 of the Tamil Nadu Gaming Act, 1930.

Crl.O.P. (MD) No.14347 of 2019

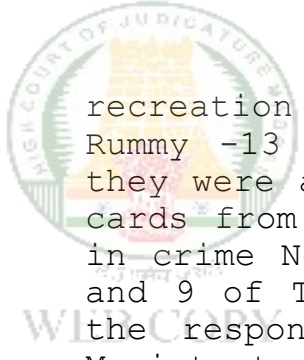
On 14.10.2018 in the usual raid, the respondents found that the accused persons were involved themselves in gambling with money by playing game of cards at Bhairava Recreation Club and hence, the respondents registered a case in crime No.806 of 2018 for the offences under Sections 45 and 46 of the Tamil Nadu City Police Act, 1888.

Crl.O.P. (MD) No.14565 of 2019

On 28.09.2018 in the usual raid, the respondents found that the accused persons were involved themselves in gambling with money by playing game of cards at Bhairava Recreation Club and hence, the respondent registered a case in crime No.761 of 2018 for the offences under Sections 45 and 46 of the Tamil Nadu City Police Act, 1888.

Crl.O.P. (MD) Nos.13798 and 16058 of 2019

On 04.11.2018, on receipt of secret information, the respondents along with their team mates surrounded the building, which consists of four rooms and where the Club viz., New Indian



recreation Club is situated and found some persons were playing Rummy -13 cards with plastic token and Ulle Veliye. Thereafter, they were arrested and recovered a sum of Rs.2,59,294/- and playing cards from the accused persons. Hence, a case has been registered in crime No.423 of 2018 for the offences under Sections 4(1)(d), 8 and 9 of Tamil Nadu Gaming Act, 1930 and after due investigation, the respondent filed charge sheet before the concerned Judicial Magistrate, which was taken cognizance in S.T.C.No.10 of 2019.

II.The grounds raised in Crl.O.P. (MD) Nos.21065 of 2018 and 323 of 2019 are as follows:

(i) that as per the first information report, the complainant and the investigating officer are one and the same and as such, the entire proceeding is vitiated and the very first information report itself cannot be sustained as against the petitioners. The registration of FIR itself is against the fundamental and constitutional right guaranteed under Article 21 of the Constitution of India, since the investigation officer, after receipt of secret information started investigation and also conducted search and seizure without even registering the FIR.

(ii) that even assuming that the alleged allegations are presumed to be true, the respondent ought to have registered the cases under the provisions of City Police Act and not under the Tamil Nadu Gaming Act.

(iii) that Section 6 of Tamil Nadu Gaming Act raises presumption against the accused. The presumption of innocence is a human right and statutory presumption can be raised against the accused only if foundational facts have been established by the prosecution. Therefore, the initial burden always exists upon the prosecution and only thereafter, the presumption would be raised against the accused.

(iv) that as per Section 5(1) of the Tamil Nadu Gaming Act, it is mandatory that a written warrant containing reasons to believe that a place is used as common gaming house has to be issued either by a Judicial Magistrate or Police Officer not below the rank of Deputy Superintendent of Police and thereby authorizing a police Officer not below the rank of Sub Inspector of Police to enter into the common gaming house. In the cases of hand, the entire procedure is completely violated by the respondent and no such written document was obtained by the respondent.

(v) that the object of the Tamil Nadu Gaming Act is different from the Bombay prevention of Gambling Act, 1887. The object of Tamil Nadu Act is to restrict running of common gaming house, whereas, Bombay Act restricts gambling. The respondent without even differentiate both the Acts, mechanically registered the cases as



(vi) that Section 3 of the Tamil Nadu Gaming Act is very clear that profit or gain is the primordial requisite for running a common gaming house. Unless and until the prosecution proves foundational facts that there was profit or gain by the owner or occupier of the place, the same would not come under the definition of common gaming house. In the cases on hand, no piece of word whispered about that the owner or occupier of the place profited or gained by running a common gaming house.

III. The grounds raised in Crl.O.P. (MD) Nos.14347 and 14565 of 2019 are as follows:

(i) that no case can be registered under the provisions of Tamil Nadu City Police Act, 1888 within the limits of Madurai City. The respondents can register a case only under the Madras City Police (Extension to the City of Madurai and to the City of Coimbatore) Act, 1987 and therefore, the very FIR itself cannot be sustained as against the petitioners.

(ii) that Section 2 of the Tamil Nadu Gaming Act excludes its applicability to the City of Madras as defined in the Madras City Police Act, 1988. Subsequently, it has been extended to the City of Madurai and City of Coimbatore under Act 32 of 1987 (extension to the City of Madurai and to the City of Coimbatore) Act, 1987.

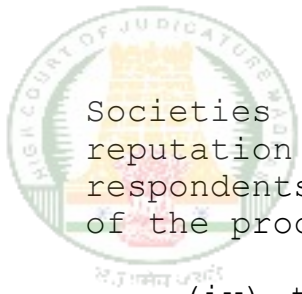
(iii) that the informant and the investigation officer are one and the same. Therefore, the very foundation of fair trial denied to the petitioners. Justice must not only be done, but must appear to be done also.

IV. The grounds raised in Crl.O.P. (MD) Nos.13798 and 16058 of 2019 are as follows:

(I) that the respondents registered the cases without conducting proper enquiry and mechanically they have registered the cases under the Tamil Nadu Gaming Act.

(ii) that the respondents ought not to have filed charge sheet for the offence under Section 4(1)(d), 8 and 9 of the Tamil Nadu Gaming Act, since the place of occurrence is not a gaming house. The place of occurrence belongs to the petitioner's society and the members of the society were playing 13 cards without any stake. When the definition under Section 3 is not attracted to the place of occurrence, the other offences are not at all made out as against the petitioners. Thus, the basic ingredients to make out a case for registration of the very FIR is violation of the rights contemplated under the Constitution of India.

(iii) that when the respondent failed to appreciate the fact that the petitioner Club is having valid registration under the



Societies Act and its members are having very good name and reputation in the Society, without considering the said facts, the respondents mechanically registered the cases without following any of the procedures laid down under the Tamil Nadu Gaming Act.

(iv) that about 6 CCTV cameras are installed in all the rooms of the Club and as such, the respondent without even advertent to such footages of the CCTV cameras, which proves that there is no illegal gambling had taken place at the whims and fancies, the respondent foisted a false case against the petitioners.

Thus all the learned respective counsel prayed for quashment of the criminal proceedings as against the petitioners herein.

V. Overall Submission of the learned Additional Public Prosecutor in all the petitions are as follows:

(i) that the respondents in Crl.O.P.(MD) No.21065 of 2018 only after obtaining permission from the Deputy Superintendent of Police, Aruppukottai Sub Division, Virudhunagar District, made search in Prince Wales Recreation Club and they found all the accused persons were playing cards with stakes and therefore, the respondent arrested the petitioners and registered the case in crime No.504 of 2018 for the offences under Sections 8 and 9 of Tamil Nadu Gaming Act, 1930 and therefore, the respondent duly followed the procedures laid down under Section 5 of the Tamil Nadu Gaming Act.

(ii) that the common gaming house is defined under Section 3 of the Tamil Nadu Gaming Act.

"Common gaming house" means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle, vessel or place or otherwise howsoever, and includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened kept or used for the purpose of gaming; 'gaming' does not include a lottery but includes wagering or betting, except wagering or betting on a horse race then such wagering or betting takes places.

(iii) that the word otherwise howsoever as interpreted by the Hon'ble Supreme Court of India in **Jagat Singh Kishor Singh Dabar Vs. The State of Gujarat** reported in **AIR 1979 SC 857** will consider the similar provision under Bombay Gambling Act, wherein, it has been held that recovery of gambling materials along with money shall be the evidence to prove that the said place used as common gaming house. It is also followed by this Court in Crl.O.P.(MD) No.27741 of 2012 and held as follows:



"In the same decision, the term " otherwise howsoever" appearing in Section 3 of the Act was interpreted to be a comprehensive and does not suggest any limitation. It was further held that if profit or gain **is the probable and expected result of the game itself and if** that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition of common gaming house. "

"Therefore Prima facie it appears that the first accused was in know of the gambling taking place in the room raided by the police and the aspect whether the first accused earned profit or gain is a disputed question of fact, which can be decided only after full-fledged trial".

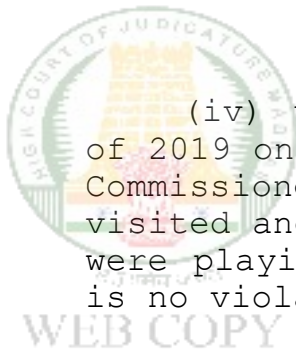
"Further more, it is not disputed that the instruments of gaming were seized from the premises, which shall be in evidence until the contrary is proved that room, house or place is used as a common gaming house and the persons found therein were present for the purpose of gaming."

Similarly earlier judgement 1938 Madras 705 in page 706, it has been held as follows:-

"That means that although there may **not be any independent proof** that any person makes a profit from this gambling or from the use of room for gambling, yet the mere finding of cards and instruments of gambling in a house searched on such a warrant, is evidence that the room was used for gambling and that some person was deriving a profit from it."

Further in 1964 MLJ 404, it has been held as follows:

"The second point is with regard to adequacy of the evidence let in to show that the place was really used as a common gaming house This point does not appear to have much substance, in view of the very clear evidence that not merely were these revision petitions then engaged ion gaming with cards, but that betting materials were seized, including both cards and a cash to the tune of Rs.156-99 n.p. These would constitute evidence under section 6 of Act III of 1930 that the place was 'used as a' common gaming house; it is urged that the material objects are not exhibited.



(iv) that the respondents in Crl.O.P.(MD) Nos.14347 and 14565 of 2019 only after obtaining permission from the concerned Assistant Commissioner of Police, Thilagar Thidal Range, Madurai City had visited and searched the Club and found that all the accused persons were playing with cards with a sum of Rs.23,510/- and hence, there is no violation of Section 5 of the Act.

(v) that the Hon'ble Division Bench of this Court in W.A.(MD) No.296 of 2013 specifically prohibited playing of Rummy with stakes by members and guest holding that this amount to the offence.

(vi) that insofar as the investigation by the same officer, who registered the FIR is concerned, the cases are under investigation stage and as such, the point raised by the petitioner is premature. In fact, the Hon'ble Supreme Court of India, after the **Mohan Lal's case**, clarified in **2019 SCC online SC 170** as follows:

"15. Societal interest therefore mandates that the law laid down in Mohan Lal (Supra) cannot be allowed to become a spring board by an accused for being catapulted to acquittal, irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was nebulous. Criminal jurisprudence mandates balancing the rights of the accused and the prosecution. If the facts in Mohan Lal (Supra) were telling with regard to the prosecution, the facts in the present case are equally telling with regard to the accused. There is a history of previous convictions of the appellants also. We cannot be oblivious of the fact that while the law stood nebulous, charge sheets have been submitted, trials in progress or concluded, and appeals pending all of which will necessarily be impacted."

18. The Criminal justice delivery system, cannot be allowed to veer exclusively to the benefit of the offender making it uni-directional exercise. A proper administration of the criminal justice delivery system, therefore requires balancing the rights of the accused and the prosecution, so that the law laid down in Mohan Lal(Supra) is not allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. We therefore hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in the Mohan Lal (Supra) shall continue to be governed by the individual facts of the case".

Therefore, the grounds raised by the petitioners cannot be considered now, since the cases are in FIR stage and it cannot be quashed on its threshold.



(vii) that the respondents, in Crl.O.P.(MD) Nos.13798 and 16058 of 2019, upon obtaining permission from the Superintendent of Police, Dindigul District, on 04.11.2018, they made search in the New Indian Recreation Club and found that the accused persons were playing cards with stakes. Thereafter, the respondents arrested the accused persons and produced before the Judicial magistrate concerned upon registering the case under Section 4(1)(d), 8 and 9 of the Tamil Nadu Gaming Act 1930.

VI. Heard the learned respective counsel appearing for the petitioners in all the petitions and the learned Additional Public Prosecutor appearing for the respondent.

VII. POINTS FOR CONSIDERATION:

(i) In all the above cases, the following questions have been answered:

1. Whether the Tamil Nadu Gaming Act is applicable to the City of Madurai or not?

2. Whether the place of occurrence in all the cases are the common gaming houses or not as defined under the Act.

3. Whether the registration of FIR after conducted search and seizure on the secret information by the respondents is violation of Article 21 of the Constitution of India?

4. Whether the respondents followed the procedures as contemplated under Section 5(1) of the Tamil Nadu Gaming Act?

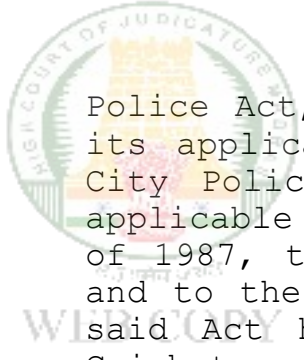
5. Whether the respondents satisfy the presumption against the accused as contemplated under Section 6 of Tamil Nadu Gaming Act?

6. Whether the Bombay prevention of Gambling Act 1887 and the Tamil Nadu Gaming Act, 1930 are different or not?

7. Whether the respective officers, who registered the cases as against the accused persons and the respective investigation officers are one and the same or not?

(ii) Point No.1: .Whether the Tamil Nadu Gaming Act is applicable to the City of Madurai or not?

(i) In Crl.O.P.(MD) No.14347 and 14565 of 2019, the respective petitioners are arraigned as A1 in crime Nos.806 and 761 of 2018 respectively. The Club in both the cases viz., Bhairava Recreation Club is situated at No.110/1, Old Murugan Talkies Road, Muthuramalingapuram, Byekara, Madurai- 4. There are totally 8 accused, in which, the respective petitioners are arraigned as A1. The Club also registered under the Tamil Nadu Societies Act, 1975 as Sl.No.133/18 dated 30.08.2018 with the Registrars of Societies, Madurai South, Tamil Nadu. Therefore, admittedly, the Club is situated within the City of Madurai. The cases have been registered for the offences under Sections 45 and 46 of the Tamil Nadu City



Police Act, 1888. Section 2 of the Tamil Nadu Gaming Act excludes its applicability to the City of Madras as defined in the Madras City Police Act, 1988. Earlier, the Madras City Police Act is applicable to the whole City of Madras. Subsequently under Act 32 of 1987, the Madras City Police (Extension to the City of Madurai and to the City of Coimbatore) Act, 1987, the applicability of the said Act has been extended to the City of Madurai and City of Coimbatore. Therefore, the registration of FIR under the Tamil Nadu City Police Act, 1988 is not applicable to the City of Madurai. Therefore, the very registration of FIR is not sustainable against the petitioners, since the Club is situated within the City of Madurai. Point No.1 is decided accordingly.

(iii) Point No.2: Whether the place of occurrence in all the cases are the common gaming houses or not as defined under the Act.

(i) In all the cases, the respective respondents made search and found that the accused persons were playing cards in the Club, which is duly registered under the Tamil Nadu Societies and Registration Act, 1975. Under the Tamil Nadu Gaming Act, 1930,

"the **"common Gaming house"** means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle, vessel or place or otherwise howsoever, and includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened kept or used for the purpose of gaming; 'gaming' does not include a lottery but includes wagering or betting.

(ii) The game of playing cards is not an offence per se. It is an offence only when it is carried on in a public place or in a common gaming house as defined under the Act. It is also very clear that profit or gain is the primordial requisite for running a common gaming house. Unless and until the prosecution proves that there was profit or gain by the owner or occupier of the place, the same would not come under the definition of common gaming house.

(iii) Mr. Abudukumar Rajarathinam, the learned counsel for the petitioners in Crl.O.P. (MD) Nos.21065 of 2018 and 323 of 2019 took much pain to explain the definition of common gaming house and relied upon the judgment reported in **1983 LW Crl. 183 - Sundaram and Others Vs. The State of Sub Inspector of Police, Kovilpatti police station**, wherein, it has been held as follows:

"8. In a number of cases, it has been held that the running of a common gaming house is a primordial



requisite before anyone can be convicted under sec.8 or 9 of the act, as a early as in santhanam iyengar vs state, Ramaswamy, J. has pointed out as follows;

"Gaming is not an offence per se. It is an offence only when it is carried on in a public place or in a common gaming house as defined in the Public Gaming Act or its local variants . The Act nowhere penalises gambling as such. Therefore, gambling in a private house, being neither within the ambit of S.8 nor of S.12, is not an offence under the Act"

9.Again in C.R.Subramaniam and others In re, Natesan, J., has pointed out that:

"The cardinal constituent for an offence under sec.45 and 46 of the (city Police) Act is that the place used for gaming should be a common gaming house as defined in the (City Police) Act. Profit or gain to the persons owning, occupying, using, keeping the place, whether by way of a charge for the instruments of gaming or of the place or otherwise howsoever is a necessary and primary element and when that is not established , there can be no offence under S.45 and S.46 of the Act. What is prohibited is not game of cards for stakes, but playing the game in a common gaming house"

10.I myself had consider this question in Padmanabhan, etc. vs State and I have held as follows:-

"Having regard to the standing of the Club in the present case and its activities and the strata of society from which its office bearers are drawn, it Is very doubtful if the club would have been used as a common gaming house. As I have stated at the outset, the mere playing of cards for stakes will not make the club a common gaming house as envisaged under the gaming Act or the City police Act. It is rather unfortunate that law enforcing agencies have still not realized the market difference between the play of games in a club or house and gaming activities carried on in a common gaming house. This lack of understanding often leads to



harrasing prosecutions and needless embarrassments."

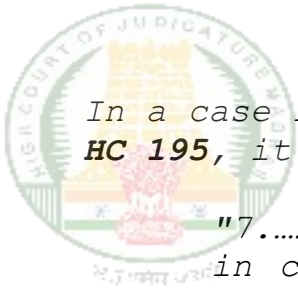
11. Still later, Sathar sayeed, J., had to consider this question on Arumugham etc., Vs state. The Learned Judge ordered the quashing of the proceedings against the petitioners in that case and held as follows:-

" In the charge-sheet filed by the police, I do not find any allegation that the petitioners, who are the members of the club, were playing for commercialisation purposes nor there are any such allegations so as to come within the purview of Ss.8 and 9 of the Gaming Act. There is not even a whisper in the charge-sheet that the Indian officers' club is gaming house or for that matter, any money was collected or that the premises was used for profit or gain. The charge-sheet taken on its face value, I am of the view, does not come within the purview of Sec.8 and 9 of the Gaming act."

12. In Spite of the legal position being well settled, the police authorities, particularly the lower strata of officers seem to be completely unaware of the provisions of law. It is not known whether their ignorance of the correct legal position is on account of lack of proper instructions or due to a wanton attitude to flout the law. On this ground alone, the proceedings pending before the court below deserve to be quashed. But something more has to be said in the case."

(iv) He also cited the judgment reported in **2006(2) MLJ (Crl.) 78 - Peer Appa V. Inspector of Police, Tankasi, Tirunelveli District**, wherein, it has been held as follows:

"5. Admittedly, the respondent-police, on information received, has visited the club at 2.00 p.m on 26.10.2005. It has been repeatedly held by the Supreme Court and by this Court that when a Police Officer visits a club of similar nature, he must appreciate the information received and must approach the nearest learned Magistrate to obtain a search warrant in this regard. In the instant case, though the respondent has visited the club during day time and when there is every possibility of getting such warrant, it has not been obtained. Admittedly, the petitioner and others are members of a club.



In a case reported in *Raman Nair and others v. State* 1990(2) MWN(Cr) HC 195, it has been held as follows:

"7.....To decide a question whether a club, where gaming in cards is carried on, is a gaming house or not, the relevant consideration is not whether any member of the club makes a profit but whether the club, as a person, occupying or using or keeping the house or room makes a profit. The fact that the police recovered huge sum of money on the table on the date in question is not sufficient to throw any light as to the club or the Secretary of the club deriving anything from out of the money available on the table at the relevant time. The fact that the members playing cards make a profit is not at all a criterion to decide the question of the premises being used as a gaming house. The huge amount, available on the table at the relevant time, may be going to the pockets of the members playing the game of cards. As already indicated, that is not sufficient to consider the premises of the club a gaming house under Section 3 of the Act. Once the premises is not proved to be a gaming house, it goes without saying that the petitioners cannot be stated to have committed the offences under Sections 8 and 9 of the Act."

It has been repeatedly held that running of a common gaming house is a primordial requisite before a person could be convicted for offence under Sections 8 and 9 of the Act and gaming is not an offence per-se. Even assuming that the allegations putforth by the prosecution is true, it cannot constitute an offence as alleged. Even if the prosecution is allowed to continue, in view of the facts and circumstance of the case, it would be a futile exercise and there is no scope for conviction."

(v)He also cited the judgment reported in **2018 5 L.W. 554 - Kalaiselvan and others Vs. State rep. by the Inspector of Police and another**, wherein, this Court has held as follows:

"10.It has been repeatedly held that running of a common gaming house is a primordial requisite before a person could be convicted for an offence under Sections 8 and 9 of the Act and gaming is not an offence per se. Even assuming that the allegations putforth by the prosecution is true, it cannot be constituted an offence as alleged by the prosecution. In these circumstances, even if the prosecution is allowed to continue, in view of the facts and circumstance of the case, it would be a futile exercise and there is no scope for conviction."



Therefore, the materials collected in support of the charges do not disclose the commission of any of the offence or make out a case against the petitioners/accused and as such, the entire criminal proceedings cannot be sustained.

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11. Further, in this case, there is absolutely no mention in the report about anybody running a common gaming house. There is no mention about the first petitioner permitting the use of the premises for gaming activities with a view to derive profit or gain for himself. Therefore, the place in which the petitioners played in 'vettu cheetu' and recovered huge sum by the respondents is not a common gaming house. Time and again, this Court has pointed out that gaming is not an offence per se but it is punishable only when it is carried on in a public place for commercialisation purpose and in a common gaming house with profit motive as contemplated under the Gaming Act. However, the law enforcing agencies ignoring the marked differences between play of games in a house or club and gaming activities carried in a common gaming house indulge in endless prosecution merely harass the innocent."

(vi) In the case on hand, admittedly, the respondents recovered money on the table and it is not sufficient to throw any light as to the club or the secretary of the club deriving anything from out of the money available on the table at the relevant point of time. The members playing cards making profit is not at all a criterion to decide the question of the premises being used as gaming house. Therefore, it is not sufficient to consider the premises of the club is a common gaming house as defined under Section 3 of the Act. Therefore, the petitioners in all the petitions cannot be stated to have committed the offences under Sections 8 and 9 of the Tamil Nadu Gaming Act. Point No.2 is decided accordingly.

(iv) Point No.3: Whether the registration of FIR after conducted search and seizure on the secret information by the respondents is violation of Article 21 of the Constitution of India?

(i) In all the cases, the respondents were in routine search operation upon secret information and made search in the respective clubs and found the accused persons were gambling with money playing cards. Thereafter, they seized the playing cards and cash etc. and arrested the accused persons and they were brought to the police station and registered the respective cases as against the accused persons. Therefore, admittedly, the respondents registered the cases only after made search and seizure and also arrested all the



(ii) Mr. Abudukumar Rajarathinam, learned counsel for the petitioners in Crl.O.P. (MD) Nos. 21065 of 2018 and 323 of 2019 cited the judgment of the Hon'ble Supreme Court of India reported in **2014 (2) SCC 1- Lalita Kumari Vs. Government of Uttar Pradesh**, wherein, it has been held as follows:

"85. The maxim expression *unius est exclusio alterius* (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.

86) Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law".

In paragraphs 93, 96 & 97 the Constitution Bench has held as under;

"93) The object sought to be achieved by registering the earliest information as FIR is inter alia two fold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc., later."

"96) The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. Section 157(1) deploys the word 'forthwith'. Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

"97) The Code contemplates two kinds of FIRs. The duly signed FIR under Section 154(1) is by the informant to the concerned officer at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this



information has to be duly recorded and the copy should be sent to the Magistrate forthwith. The registration of FIR either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

97.1. a) It is the first step to 'access to justice' for a victim.

97.2. b) It upholds the 'Rule of Law' inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.

97.3. c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.

97.4. d) It leads to less manipulation in criminal cases and lessens incidents of 'ante-dates' FIR or deliberately delayed FIR.

The Constitution Bench by rendering the Aforesaid findings concluded with the following directions:

120. In view of the aforesaid discussion, we hold:

120.1 Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2 If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3 If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4 The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.



120.5 The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6 As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

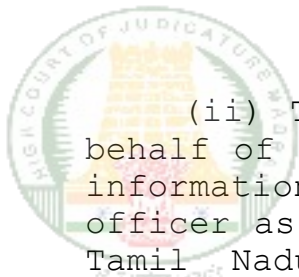
- a) Matrimonial disputes/ family disputes
- b) Commercial offences
- c) Medical negligence cases
- d) Corruption cases
- e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry."

(iii) Admittedly, in the above cases, the respondents after receipt of secret information did not register any case. After obtaining permission from the superior officers, they conducted search and also seized the materials. Only thereafter, the respondents registered the case and released the accused persons on bail. When the respondents obtained permission from the superior officer as contemplated under the Act, fails to register the case as against the petitioners. Therefore, the non registration of FIR by the investigation officer is against the procedures established under law and is violation of Article 21 of Constitution of India. Therefore, the entire proceedings are invalid and unsustainable under law. Point NO.3 is decided accordingly.

(v) Point No.4:Whether the respondents followed the procedures as contemplated under Section 5(1) of the Tamil Nadu Gaming Act?

(i) On receipt of secret information, the respondent obtained permission from the superior officer as contemplated under Section 5 (1) of the Tamil Nadu Gaming Act and made search and found that the accused persons were playing cards. Thereafter, they also seized the playing cards, cash and etc from the accused persons.



(ii) The learned Additional Public Prosecutor filed counter on behalf of the respondent and submitted that after receipt of secret information, the respondents obtained permission from the superior officer as contemplated under the provision of Section 5 (1) of the Tamil Nadu Gaming Act in all the cases respectively. Only thereafter, they made search and seized the playing cards etc. Therefore, the respondents did not violate the procedures as contemplated under Section 5(1) of Tamil Nadu Gaming Act and there is no violation. However, as earlier pointed out, admittedly, the respondents though obtained permission from the superior officer, without registering any FIR, they made search and seizure in all the cases. Point No.4 is decided accordingly.

(vi) Point No.5: Whether the respondents satisfy the presumption against the accused as contemplated under Section 6 of Tamil Nadu Gaming Act?

(i) Section 6 of the Tamil Nadu Gaming Act raises presumption against the accused. It is relevant to extract the provision of Section 6 of the Tamil Nadu Gaming Act, which reads thus:

"6.Cards, dice, etc., found in search under last section to be evidence that the place is a common gaming-house -

Any cards, dice, gaming table or cloth, board or other instruments of gaming found in any place entered or searched under the provisions of the last preceding section, or on any person found therein shall be evidence that such place is used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police Officer or any of his assistants."

(ii) The presumption of innocence is a human right and statutory presumption can be raised against the accused only if foundational facts have been established by the prosecution. The initial burden always exists upon the prosecution and only when it stands satisfied, presumption would be raised against the accused.

(iii) In this regard, Mr.Abudukumar Rajarathinam, learned counsel appearing for the petitioners in Crl.O.P.(MD) Nos.21065 of 2018 and 323 of 2019 relied upon the judgment reported in **2008 16 SCC 417 - Noor Aga Vs. State of Punjab and another**, the Hon'ble Supreme Court has held as follows:

"58.Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully



satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself. In *Sheldrake v. Director of Public Prosecutions* [(2005) 1 All ER 237] in the following terms:

"21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirements of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be



reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

(iv) In the case on hand, no prima facie evidence is available that a common gaming house was run by the accused. As defined under the Act, in respect of common gaming house, the clubs are not coming under the purview of common gaming house. Therefore, the entire proceedings are initiated and it cannot be sustained as against the petitioners. Point No.5 is decided accordingly.

(vii) Point No.6: Whether the Bombay prevention of Gambling Act 1887 and the Tamil Nadu Gaming Act, 1930 are different or not?

(i) It is relevant to extract the statement of objects and reasons of Tamil Nadu Gaming Act, 1930, which reads as follows:

"The Madras City Police (Amendment) Act, 1929, was designed to deal with bucket shops in the city of Madras. There is increasing evidence of the fact that bucket shops are springing up outside the multiple limits. In order to deal with them effectively and to consolidate the law on gaming and the keeping of common gaming-house throughout the province, the Bill extends to the Presidency, with the expectation of Madras City, those provisions of the The Madras City Police Act, 1888, as amended by The Madras City Police (Amendment) Act, 1929, which deal with the bucket shops. It also combines in the same Bill, the provisions of the The Madras City Police Act, 1888, and the Towns Nuisances Act, 1889, which relate to gaming and the keeping of common gaming- house.

Published in Part IV of the Fort St.George Gazzette, dated 21st January 1930, page 186; for report of Select committee, see Proceedings of the Madras Legislative Council, Volume LI, pages 1002-1006, for proceedings in council, set ibid , Volume LI, pages 496-497 and 952-957."



PREAMBLE of Both Acts

The preamble of The Bombay Prevention of Gambling Act, 1887 and the preamble of THE TAMIL NADU GAMING ACT, 1930 differ with each other as follows;

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The Bombay Prevention of Gambling Act, 1887

"Whereas it is expedient to consolidate and amend the law for the prevention of gambling in the State of Bombay; It is enacted as follows:-"

THE TAMIL NADU GAMING ACT, 1930

"An Act to provide for the punishment of gaming and the keeping of common gaming-house in the state of Tamil Nadu.

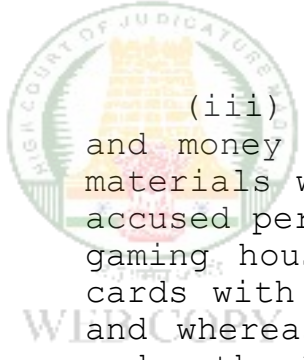
" WHEREAS it is expedient to make provision for the punishment of gaming and the keeping of common gaming-houses in the Tamil Nadu Adaptation of Laws Order, 1970 [State of Tamil Nadu] And whereas the previous sanction of the Governor-General has been obtained to the passing of this Act; It is hereby enacted as follows:"

(ii) The object of the Tamil Nadu Gaming Act, 1930 is different from the Bombay prevention of Gambling Act, 1887. Under the Tamil Nadu Gaming Act, the running of common gaming house is restricted and whereas the Bombay prevention of Gambling Act restricts the gambling. Insofar as the definitions of common gaming house in both the Acts are not *pari materia*. As per Section 3(1)(f) of the Bombay Act, playing cards in 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 itself would come under the definition of common gaming house and the element of profit or gain is not necessary in Bombay Act. Therefore, both the Acts are different one, since the objects of both the Acts and the definition of common gaming house are different with each other. Therefore, the judgment cited by the learned Additional Public Prosecutor held in ***Jagat Singh Kishor Singh Dabar Vs. The State of Gujarat*** reported in ***AIR 1979 SC 857*** is not applicable to the Tamil Nadu Gaming Act. In this case, the Hon'ble Supreme Court of India has enumerated following conditions:

1. Instrument of gaming must be kept or used in the premises in question.

2. The keeping from using of the instruments aforesaid must be for the profit or gain of the person owning, occupying, using or keeping such premises.

3. Such profit or gain may be by way of charge for the use of the premises or of the instruments or in any other manner, whatsoever."



(iii) In the case on hand, except the recovery of playing cards and money from the persons playing cards, no other incriminating materials were seized from the place of occurrence to show that the accused persons have any direct or indirect connection with a common gaming house was run by the accused for profit or gain. Playing cards with stakes is not an offence under the Tamil Nadu Gaming Act and whereas playing cards in any gaming house is only an offence under the Act. As already pointed out that the Clubs in which the accused persons were played cards are not gaming under the purview of common gaming house. Point No.6 is decided accordingly.

(viii) Point No.7: Whether the respective officers, who registered the cases as against the accused persons and the respective investigation officers are one and the same or not?

(i) Except two cases, all the cases are in FIR stage. In the cases, where, charge sheet were filed, the respective officers, who registered the case and the respective investigating officers are one and the same. In the decision in **Mohan Lal- vs- The State of Punjab in Criminal Appeal No.1880 of 2011**, the Hon'ble Supreme Court of India has categorically held that the foundation of the fair trial postulates that the informant and the investigator must not be the same person.

(ii) Therefore, the entire proceedings are vitiated and it cannot be sustainable. Any possibility of bias or pre-determined conclusion has to be excluded. Therefore, the investigating officer and the informant cannot be the same person. Point No.7 is decided accordingly.

VIII. In view of the above discussions, all the petitions are allowed and the proceeding in crime No.504 of 2018 pending on the file of the respondent Inspector of Police, Arupukottai Town Police Station, Virudhunagar District, crime No.764 of 2018 on the file of the Theni Police Station, Crime Nos.761 and 806 of 2018 on the file of the Subramaniapuram Police Station and also the proceedings in S.T.C.No.10 of 2019 on the file of the additional District Munsif Cum Judicial Magistrate Court, Vedasandur are quashed in respect of the respective petitioners alone. Consequently, all the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



To

- 1.The Additional District Munsif Cum Judicial Magistrate Court,
Vedasandur
 - 2.The Inspector of Police,
Arupukottai Town Police Station,
Virudhunagar District.
 - 3.The Inspector of Police,
Theni Police Station,
Theni District
 4. The Inspector of Police,
Subramaniapuram Police Station,
Madurai
 5. The Inspector of Police,
Vedasandur Police Station,
Dindigul District,
 - 6.The Inspector of Police.
Town South Police Station,
Dindigul.
 - 7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- +1 CC to M/s.F.DEEPAK, Advocate (SR-102520)
+1 CC to M/s.J.LAWRANCE, Advocate (SR-102629)
+1 CC to M/s.V.MURUGAN, Advocate (SR-103152)

Order made in
CRL.O.P (MD) No.21065 of 2018 & 323 of 2019
and
Crl.O.P. (MD) Nos.14347 and 14565 of 2019
and
Crl.O.P. (MD) Nos.13798 and 16058 of 2019
29.11.2019

Arul
SDS(08.01.2020) 25P-11C