

1904.
 VARAJI LAL
 v.
 SHOMESHUWAR.

The case of *Pirjade v. Pirjade* ⁽¹⁾ was only dissented from in *Tarachand Megraj v. Kashinath Trimbak* ⁽²⁾ as to its applicability to execution proceedings, and these two cases support our view herein while *Krishnaji Lakshman v. Vithal Rajji* ⁽³⁾ is directly in support of it. There Parsons J. (p. 633) says: "The former suit did not fail for want of jurisdiction or any defect of a like nature, such as is contemplated by section 14 of Act XV of 1877: (see *Bai Jamna v. Bai Ichha*) ⁽⁴⁾. It was withdrawn by the plaintiff himself, as it was defective for want of parties, and he was allowed to bring a fresh suit. It appears, therefore, that section 374 of the Civil Procedure Code applies to the case."

The result is that we must reverse the order of the District Court and dismiss the suit with costs on the plaintiff throughout.

R. R.

Order reversed.

(1) (1882) 6 Bom. 681.
 (2) (1885) 10 Bom. 62.

(3) (1887) 12 Bom. 625.
 (4) (1886) 10 Bom. 604.

CRIMINAL REVISION.

Before Mr. Justice Batty and Mr. Justice Aston.

EMPEROR v. WALIA MUSAJI AND ANOTHER.*

1904.
 December 14.

Gambling Act (Bombay Act IV of 1887), secs. 4, 5, 7†—Common gaming house—Jamātkhāna of the Borah community.

The accused were found playing for money with cards in a building ordinarily used as a *Jamātkhāna*, but accessible to such members of the Borah

* Criminal application for Revision No. 248 of 1904.

† Sections 4, 5 and 7 of the Bombay Prevention of Gambling Act provide as follows:

"4. Whoever—

- (a) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same 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,

community as have no place to live in and are too poor to afford the rent of a room. This place was frequented by the petitioners and others and instruments of gaming were found there when the accused were arrested. The Magistrate convicted the accused of offences under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887):

Held, that it was open to the Magistrate to rely on the presumption which under section 7 of the Act might be drawn that this place was used as a common gaming house unless the contrary was made to appear by the evidence before him: there was, therefore, no ground to interfere in revision with the convictions under section 5 of the Act.

Held, further, that no presumption arose under section 7 of the Act that the place was "kept" by any person as a common gaming house: the conviction under section 4 was therefore wrong.

In order to constitute an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), of keeping a common gaming house, it is necessary to show, in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) against convictions and sentences passed by Karsondas Chhabildas, Third Presidency Magistrate of Bombay.

(d) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place,

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

"5. Whoever is found in any common gaming-house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wager, stake or otherwise, shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

"Any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

"7. When any cards, dice, gaming-table, counters, cloth, board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room or 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 Magistrate or Police Officer or by any person acting under the authority of either of them.

1904.

EMPEROR
v.
WALLA
MUSAJI.

1904.

EMPEROR
v.
WALLA
MUSAJI.

The accused with thirteen others, all belonging to the Borah community, were found gaming in a building known as the Borah *Jamátkhána* (i.e., a place where usually feasts are held). The place or room where the accused were arrested was accessible only to the members of the Borah community, and was kept open day and night to enable it to be used by any member of the Borah community who had no place to live in and who was too poor to afford the rent of a room. The accused (1 and 2) were charged under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house and gaming therein while the rest were charged under section 5 of the Act with gaming therein.

The Magistrate convicted the accused of the offences charged and sentenced accused No. 1 to undergo two months' rigorous imprisonment, and accused No. 2 to a fine of Rs. 150.

H. C. Coyaji, for the accused.

Scott (Advocate General), with the Public Prosecutor for the Crown.

ASTON, J.:—"Common gaming house" means "a house, room, or place 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, or place, whether by a charge for use of the instruments of gaming, or of the house, room or place, or otherwise howsoever."

The petitioners, when arrested, were playing for money with cards in a building ordinarily used as a *Jamátkhána*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room.

This place was frequented by the petitioners and others and instruments of gaming were found there when the place was entered under warrant issued under the provisions of section 6 of Bombay Act IV of 1887.

It was open to the Magistrate to rely on the presumption which under section 7 of the Act may be drawn that this place is used as a common gaming house unless the contrary was made to appear by the evidence before him. There is, therefore, no ground to interfere in revision with the convictions under sec-

tion 5 of the Act. But no presumption arises under section 7 that the place was "kept" by any person as a common gaming house.

In order to establish an offence under section 4 of keeping a common gaming house, it is necessary to show, in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house.

It is not sufficient to show that either of the accused used the place in question for the purpose of gaming there.

The conviction under section 4 of the Act must, therefore, be set aside.

As to punishments, there being nothing to show that the place where the petitioners were gaming was a resort of disorderly persons, or was otherwise a nuisance, the sentences appear to us to be unduly severe, and we set aside the unexpired portion of the sentence of two months' rigorous imprisonment passed on accused No. 1 and reduce the fine in the case of accused No. 2 to Rs. 15, the balance, if paid, to be returned to accused 2.

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

BAI MEHERBAI (ORIGINAL PLAINTIFF), APPELLANT, v. MAGANCHAND MOTIJI (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay Regulation II of 1927, section 52—Vakil's fee—Calculation according to the actual value of the property in suit.

A vakil's fee should be calculated on the amount of the actual value of the property, the subject-matter of the suit, and not on the amount of the claim as estimated for the purposes of the payment of Court-fees.

PER JENKINS, C.J. :—"The principle and rule of taxation ought (in our opinion) as far as possible to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court, and this can best be secured by adopting the actual value as the basis of taxation."

The real as well as the Court-fee value should be stated on every plaint and memorandum of appeal, and in case of dispute an issue should be raised as to the real value.

* Appeal No. 26 of 1904.

1904.

EMPEROR
v.
WALIA
MUSAJI.

1904.

December 22