REVISIONAL CIVIL

Before Kapur, J.

RAM CHANDER,—*Petitioner*

versus

KIDAR NATH AND OTHERS,—*Respondents*

Civil Revision No. 250 of 1953

1953

Oct. 23rd.

The East Punjab Urban Rent Restriction Act (III of 1949)—Sections 13 and 14—"Re-erection" in Section 13(3)(a)(iii) meaning of—Section 14 whether bars a second application under section 13(3)(a)(iii), when the means of the landlord have changed or his circumstances have improved—Constitution of India, Article 227—Scope of ...

Held, that re-erection in section 13 (3) (a) (iii) of the Punjab Urban Rent Restriction Act does not contemplate re-erection which is the result of the building being in a dilapidated condition or requiring re-erection on that ground but what it contemplates is that the landlord can apply for an order directing the possession to be delivered to him if he requires it for re-erection or replacement of the building or erection of other buildings. It is not the state of the building which is the test of re-erection, but it is the desire of the landlord to re-build.

Held, that a landlord may make an application for ejectment on the ground that he bona fide needs the property for the purpose of re-construction and he may not be able to prove that he bona fide did need it. That does not prevent on a subsequent occasion when his means have improved or circumstances have changed to be able to make another application. Merely because he was not able to satisfy the Judge two years ago that he required the premises for re-erection is not a ground that he cannot do so

now, and section 14 is no bar to the second application for ejectment under section 13(3)(a)(iii) of the Punjab Rent Restriction Act.

Held also, that the object of Article 227 of the Constitution is really to canalise the proceedings in inferior courts and tribunals so that there is no overflow of the banks, and if the court or the tribunal has mis-directed itself in regard to the law which is applicable or the scope of that application made, the High Court will interfere under the extraordinary jurisdiction.

Petition under Section 115, C.P.C., read with Article 227 of Constitution of India for revision of the order of Shri J. S. Bedi, District Judge, Ambala, dated the 13th June 1953, reversing that of Shri Parshotam Sarup, Rent Controller, Ambala, dated 17th March 1953. and setting aside the order of eviction in respect of the petitioner.

K. L. GOSAIN, for Petitioner.

A. N. GROVER, for Respondents.

JUDGMENT

KAPUR, J. This is a rule obtained by the landlord against an order of District Judge J. S. Bedi, dated the 13th June 1953, refusing to grant the landlord's prayer for ejectment of the tenant. Kapur, J.

This case has rather an unfortunate history. On the 21st January 1949, the landlord made an application for ejectment of the tenant on the ground that he needed the house for his personal use which was dismissed by the Rent Controller and this Order was affirmed by the District Judge on the 12th July 1949, but in this judgment the District Judge held that the requirement of the landlord for the purpose of reconstruction could not be urged in the appeal for the first time and that the landlord could make a fresh application.

On the 15th October 1949, the landlord made a second application on the ground that he wanted to reconstruct the building. This application was dismissed on the 11th April 1950, and on appeal being taken to the District Judge it was held that one of the walls of the building required repairs but that could be done without ejectment of the

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tenant and the order of refusal to eject was thus affirmed. The learned Judge in that case personally inspected the place and his inspection note is dated the 22nd June 1950, which has been placed on the record of this case by the landlord.

The tenant then made an application on the 30th August 1950, for the wall being built and the Rent Controller Mr. Augustine ordered that the tenant could build the wall in question and deduct the cost thereof from the rent payable.

On an application of the tenant the Rent Controller fixed the fair rent on the 22nd May 1952, at Rs. 10 per mensem.

On the 21st August 1952, the landlord again made an application for ejectment of the tenant on the ground that he wanted to rebuild the whole building which was in a damaged and dilapidated condition. Along with this application he filed a plan which he had got sanctioned from the Cantonment Board. The tenant pleaded that the landlord did not want the house to be rebuilt, that the house was not in a dilapidated condition and he denied that any notice for the purpose of re-erection had been sent to the landlord by the Cantonment Board. He denied other allegations also. He further pleaded that the landlord had made several applications for his ejectment which had been dismissed and it had been held that the house was in such a condition that it did not require rebuilding and all that required reconstruction was the northern wall which had been ordered to be rebuilt by the Rent Controller. The tenant further stated that the landlord was a litigious person and had brought the application mala fide just to trouble the tenant. Several issues were raised before the Rent Controller and he found that the applicant needed the house bona fide for reconstruction. He discussed the evidence produced and held that the circumstances had changed. He also found that the conduct of the tenant amounted to nuisance and on these grounds he ordered ejectment of the tenant.

An appeal was taken to the learned District Judge who once again inspected the spot and found the northern wall of the house bulging out and it

needed repairs badly. He also found that the shop below required repairs and there were depressions at one or two places. After arguments were heard the learned District Judge came to the conclusion that the previous position had not actually changed, that only the northern wall required reconstruction and that could be done without ejectment of the tenant and, therefore, the application was barred by section 14 of the Rent Restriction Act. (It appears that the learned District Judge erroneously said section 13). With regard to the nuisance he found that it was not made a ground of attack and it was an after-thought and that it had not been a ground even in the previous application which is contrary to facts. He took into account the strained relations between the landlord and the tenant and peculiarly enough he was of the opinion that if the tenant had been responsible for nuisance he had already been punished. He, therefore, allowed the appeal and set aside the order of ejectment. The landlord has come up with a petition under Article 227 of the Constitution of India.

It appears to me that the learned Judge has misdirected himself entirely in regard to the points in controversy. The application made by the landlord was that he required the premises under section 13(3)(a)(iii) of the Punjab Urban Rent Restriction Act which provides that landlord may apply "to the Controller for an order directing the tenant to put the landlord in possession in the case of any building, if he requires it for the re-erection of that building, or for its replacement by another building, or for the erection of other buildings." The learned Judge seems to be of the opinion that the re-erection which is mentioned in this section is that which is the result of the building being in a dilapidated condition or requiring re-erection on that ground, but what the section contemplates is that the landlord can apply for an order directing the possession to be delivered to him if he requires it for re-erection or replacement of the building or erection of other buildings. It is not the state of the building which is the test of re-erection, but it

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is the desire of the landlord to rebuild. This question, the learned Judge seems to have entirely ignored. In a judgment of the Calcutta High Court *Bhullan Singh and others* v. *Ganendra Kumar Roy*, (1), the same point had arisen under section 11(1)(f) of that Act and it was held by a Division Bench that that section applied if the landlord required the premises bona fide for re-building. The state of premises, therefore, was not an essential factor in the case. The learned Judge in this case seems to have taken just the opposite view that the essential factor was the state of the premises and not the requirement of the landlord himself.

I am informed by counsel that both the landlord and the tenant have been bound down under section 107 of the Code of Criminal Procedure. It was not the intention of this Act to allow the landlord to be the subject-matter of security proceedings nor was it meant to protect tenants who do not behave properly. In the present case as the learned Judge has taken, in my opinion, an erroneous view of the law, it is a fit case in which I should interfere in the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India, and although the judgment of Lord Justice Denning in *R.* v. *Northumberland Compensation Appeal Tribunal* (2), relates to a case under certiorari, the principles of that apply to the facts of this case. The Lord Justice there said :—

> "But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction."

In any case, in this particular case the learned Judge has misdirected himself in regard to the law which is applicable or the scope of the application made.

(1) A.I.R. 1950 Cal. 74
(2) (1952) 1 A.E.R. 122, 128

Mr. Grover has drawn my attention to several cases. His first submission is that the scope of Article 227 is very limited and if the District Judge had jurisdiction to decide the matter, it does not make any difference in what way he decides. He referred me to *Khushi Ram* v. *Amin Chand and others* (1), and has drawn my attention to an unreported judgment, Civil Writ No. 233 of 1951, decided by Falshaw, J., and myself on the 8th July 1952, and there are several other judgments to which reference can be made, but in none of them the learned Judge had failed to decide the case which really arose and had decided a totally different question. The object of Article 227 of the Constitution is really to canalise the proceedings in inferior Courts and Tribunals so that there is no overflow of the banks. Well, if that is the test as was laid down by this Court as well as by the Calcutta High Court, in *Subodh Bala Biswas* v. *The State of West Bengal* (2), this Court can interfere in a case such as this.

Mr. Grover has then submitted that this application is barred by section 14 of the East Punjab Urban Rent Restriction Act. That section provides :—

> "14. The Controller shall summarily reject any application under subsection (2) or under subsection (3) of section 13 which raises substantially the issues as have been finally decided in a former proceeding under this Act."

In the first place, a man may make an application for ejectment on the ground that he bona fide needs the property for the purpose of reconstruction and he may not be able to prove that he bona fide did need it. That does not prevent on a subsequent occasion when his means have improved or circumstances have changed to be able to make another application. Merely because he was not

(1) 1951 P.L.R. 264
(2) 57 C.W.N. 601

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able to satisfy the Judge two years ago that he required the premises for re-erection is not a ground that he cannot do so now.

For the reasons that I have given above I am of the opinion that this petition should be allowed, the order of the learned District Judge set aside and that of the Rent Controller restored.

I would allow the tenant three months' time in which to vacate the premises.

The landlord will have his costs of this petition

REVISIONAL CRIMINAL

Before Khosla and Soni, JJ.

MANI RAM AND OTHERS—*Convict-Petitioners*

versus

THE STATE,—*Respondent*

Criminal Revision No. 452 of 1953

1953

Oct. 26th.

Public Gambling Act (III of 1867)—Section 6—Presumption under—Extent of—Sections 3 and 4—Ingredients of offences under, to be proved.

Held, that section 6 of the Public Gambling Act, 1867, clearly lays down that in certain cases a presumption of guilt arises but that presumption is not conclusive and may in certain circumstances be extremely weak. The presumption, even in the absence of any defence evidence, may be rebutted by bringing out circumstances which go to show that some or all the ingredients which constitute the offence under section 3 or the offence under section 4 are lacking, and in such a case the accused persons will not be held guilty.

Held, that in order to convict a person under section 3 it is necessary to prove—

(1) that the premises are habitually used for gambling;

(2) that the premises are owned or occupied by the accused person;

(3) that the premises are used for gambling with the intention or knowledge of the accused person; and

(4) that the accused derives some gain or profit from the gambling.

In order to find a person guilty under section 4 it must be further proved that he was present in the gambling house.

Case referred by Hon'ble Mr. Justice Soni, to the above Division Bench,—*vide* his order, dated the 7th August 1953.

Petition under section 439 of Criminal Procedure Code, *for revision of the order of Shri Din Dayal Sharma, Additional District Magistrate, Amritsar, dated the 6th February 1953, affirming that of Shri Kanwar Krishan Puri, Magistrate 2nd Class, Amritsar, dated the 15th December 1952, convicting the petitioners.*

Bhagirath Dass, for petitioners.

H. S. Doabia, for Respondent.

ORDER

Soni, J. Seven persons—Mani Ram, Raj Kumar, Jagdish Kumar, Ram Pal, Charanjit Lal, Tilak Raj and Surjit Singh—were sent up to take their trial for having offended the provisions of sections 3 and 4 of the Public Gambling Act, 1867. They were found guilty by the trial Magistrate, who convicted Mani Ram under section 3 of the Act and sentenced him to pay a fine of Rs. 50. He convicted the others under section 4 of the Act and sentenced them to pay a fine of Rs. 30 each. These people were said to have been found gambling on the night between the 15th and 16th of October, 1952. The Dewali in that year was on the 18th of October, 1952. The Magistrate passed his order on the 15th of December 1952. The convicts appealed to the Additional District Magistrate, who by his order, dated the 6th of February 1953, rejected their appeal. They have put in an application for revision in this Court. Soni, J.

The facts of the case are that Mr. Durga Singh, Station House Officer of Kotwali, Amritsar, applied to a Magistrate to issue a warrant under section 5 of the Act on the 15th of October 1952, saying that he had "credulous information to the fact that house No. 374/12 situated in Chowk Bazar Pasian, Amritsar, belonging to Mani Ram (one of the present accused) was being used

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as a common gaming house as defined in the Public Gambling Act, III of 1867." He attached a plan to his application and requested that warrants under section 5 be issued. The Magistrate on that very date signed a typed form, which was put before him, in which the blanks had been filled up by Sub-Inspector Bhana Ram of Police Station Kotwali, Amritsar, authorising Bhana Ram to enter that house and to arrest the persons, who may be found there, whether actually gambling or not and seize all instruments of gaming and all money and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which may be found therein on search of the house, etc., etc. Accordingly a raid was made on this house at 11-30 that very night, the 15th of October, 1952, and the seven accused persons were arrested. All the seven accused were found gaming by playing cards. Sums of money were said to have been lying in front of each of them, the total amount being Rs. 28. The Sub-Inspector took into possession the money and the playing-cards. The Sub-Inspector arrested the seven accused and later on let them out on bail. Mr. Bhagirath Das on behalf of the petitioners states that taking into consideration the normal professions of these men, it was improper on the part of the Magistrate without further enquiry to have issued the warrant and that he should also have taken into consideration the proximity of the Dewali. The trying Magistrate also should not have come to the conclusion that the house was a common gaming-house or that Mani Ram was applying, opening, keeping or using his house as a common gaming-house. Mr. Bhagirath Das also urges that though after a warrant has been issued under section 5 of the Act, the statute declares that any instruments of gaming found in the house entered on search under the provisions of section 5 may be evidence that the house was used as a common gaming-house, yet the normal occupations of the persons and the time of the occurrence rebut that presumption and the statements of these persons that they were not gaming

in a common gaming-house should be accepted. The accused persons give their professions as follows : Mani Ram is an employee of the Municipality of Amritsar. Raj Kumar is a cloth merchant of Amritsar. Jagdish Kumar has not told the Court his profession. Ram Pal is the Manager of Parbhat Bank. Charanjit Lal is a student of Amritsar. Surjit Singh though his profession was not mentioned to the Court, is, according to Mr. Bhagirath Das, who has produced a letter before me, a clerk in the Intelligence Department, Amritsar. Tilak Raj is an employee of the Public Works Department. Mani Ram stated that the house belonged to him and that he was not using it for gaming or getting illicit profit by way of *Nal*. He alleged that he was sleeping there and that the other accused were not present. Raj Kumar stated that they were not gambling. They were simply playing cards. He said that there were five persons present, viz., himself, Kewal Krishen, Ram Pal, Jagdish Kumar and Charanjit Lal and they were playing sweep. Jagdish Kumar stated that his statement was the same as that of Raj Kumar. So did Ram Pal and Charanjit Lal. Tilak Raj stated that his brother had a laundry-shop in that bazar. On hearing the alarm he reached there and found a crowd there and the police arrested him outside the house of Mani Ram. He said that he was neither playing cards there nor gambling. Surjit Singh stated that his house was near Mani Ram's house, that on hearing an alarm he got to the place and was arrested by the police and that he was not playing cards or gambling. The Magistrate has found that all these seven persons were there relying on the evidence of Bhana Ram. The Additional District Magistrate on apeal has also relied on his evidence. It would appear, therefore, that it must be taken for granted that all the seven persons were there in the house and playing cards with stakes. The question remains whether the house was being kept or used as a common gaming-house and whether the persons, who were playing cards with

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stakes there, were gambling in a common gaming-house. Section 3 of the Act reads as follows:—

> "Whoever being the owner or occupier, or having the use, of any house, room, tent, enclosure, vehicle, vessel or place situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and
>
> Whoever, being the owner or occupier of any such house, etc., etc., as aforesaid, knowingly or wilfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and
>
> Whoever has the care or management of, or in any manner assists in conducting, the *business* of any house, etc., etc., as aforesaid, opened, occupied, used or kept for the *purpose* aforesaid; and
>
> Whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, etc., etc.
>
> Shall be liable to a fine not exceeding two hundred rupees, or to imprisonment of either description as defined in the Indian Penal Code, for any term not exceeding three months."

'Common gaming-house' is defined in section 1 as follows:—

> "'Common Gaming House' means any house or room or tent or enclosure or vehicle or vessel or any place whatsoever in which any instruments of gaming are kept or used for gaming purposes *with a view to the profit or gain* of any person owning, occupying or keeping such house, etc., etc., whether by way of charge for the use of such house, etc., etc., or instruments or otherwise howsoever."

There is another clause in this definition, which it is not necessary to reproduce. Mr. Bhagirath Das's argument is that, in the circumstances of the case, having regard to the fact that the persons

assembled there were persons whose occupations have already been given above and the time when they gambled was the time of Dewali, it cannot be said that Mani Ram's house was used as a common gaming-house with a view to the profit or gain of any person. Mr. Bhagirath Das further urges that the use of the house which is prohibited under section 3 is a habitual use. His argument is that the words "applies, opens, keeps or uses" used in section 3 connote an intentional habitual use of the house as a gaming-house for the purposes of making profit and do not cover a house in which some friends, either ordinarily or on a special occasion, may gather for the purpose of friendly enjoyment of fun. All the clauses of section 3, according to Mr. Bhagirath Das, point to the same conclusion. In the present case Mr. Bhagirath Das argues that there is no proof that Mani Ram was using his house for making any profit either for himself or for somebody else and that this was an occasional use of the house and the law is not to be construed in such a manner as to declare such a thing happening at Dewali time an offence. Mr. Doabia states that a presumption arises in favour of the prosecution, if a Magistrate issues a warrant under the provisions of section 5, that under the provisions of section 6 the cards and money found there may be used as evidence to show that the house was used as a common gaming-house until the contrary is made to appear. Mr. Doabia urges that the contrary has not been made to appear in the present case. Mr. Doabia urges that the points involved in the case are of sufficient importance and that further time should be granted to him to argue the case. He urges that the presumption raised under section 6 of the Act is of special importance. Section 6 runs as follows:—

> "When any cards, dice, gaming-tables, clothes, boards or other instruments of gaming are found in any house, room, tent, enclosure, vehicle, vessel or place, entered or searched 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

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contrary is made to appear, that such house, etc., etc., 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 any of his assistants."

In the circumstances, I adjourn the case to Friday next.

SONI, J. I have already given the facts of the case in my order of the 15th July 1953.

Mr. Bhagirath Das and Mr. Doabia have come prepared to argue the case. Mr. Bhagirath Das cites *Emperor* v. *Alloomiya Husan* (1), relying on the observations made by one of the Law Lords in the House of Lords in the case reported in *Powell* v. *Kempton Park Race-Course Company* (2). He also relies on *Pabumal and others* v. *Emperor* (3), *Ram Charan and others* v. *Emperor* (4), *Lachhman and others* v. *Emperor* (5) and *King Emperor* v. *Shanker Dayal and others* (6). These rulings have been cited for the purpose of showing that the use must be more than a casual use and that some of the Judges in these cases have strongly deprecated the action of the police in having a raid on or about the Dewali day. In *Emperor* v. *Alloomiya Hussan* (1) the case was under the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). Section 4 of that Act dealt with keeping a common gaming-house. With reference to that section Mr. Justice Chandavakar observed at pages 135 and 136 as follows :—

"That section divides the offence into four classes, and all are described in the marginal note as 'keeping a common gaming-house'. The first class has reference to the owner or occupier of a house, room, or place, who uses or keeps it as a common gaming-house. Now, the user of a place or the keeping of it

(1) I.L.R. 28 Bom. 129
(2) (1899) A.C. 143
(3) A.I.R. 1933 Sind. 42
(4) A.I.R. 1925 Oudh. 674
(5) A.I.R. 1930 Oudh. 403
(6) A.I.R. 1922 Oudh. 224

for a particular purpose necessarily connotes the existence of a state of mind. They imply a purpose showing intention to use the place for that purpose and knowledge that it is so used. To keep a common gaming-house is to hold the house and manage it with the intention of using it as such *habitually*. In the words of Lord Hobhouse in *Powell* v. *Kempton Park Race-course Company* (1) 'the phrase *use for a purpose* necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand'. 'Kept' and 'used', he says, are expressions necessarily or very strongly importing an habitual or repeated use of the thing for the purpose. So also in the second class of the offence. According to it, a person commits the offence of keeping a common gaming-house, if, being the owner or occupier of it, he *knowingly* or *wilfully* permits the same to be opened, occupied, kept, or used by any other person as aforesaid; or, in the third class, if he advances or furnishes money *for the purpose of* gaming with persons frequenting any such house. These are ingredients of the offence which render it necessary to give proof of his *knowledge or intention* and habitual course of dealing with the house, room, or place so far as they are relevant to the proof of the offence."

The case in the House of Lords, to which reference is made in this judgment by Mr. Justice Chandavarkar, related to a case under the English Betting Act, 1853 (16 & 17 Vict chap. 119). There the Earl of Halsbury, L. C., had to construe section 1 of the Betting Act, which was :—

"No house, office, room or other place shall be opened, kept or used for the purpose of the owner, occupier or keeper thereof,

(1) 1899 A.C. 143

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or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper or person using the same or of any person having the care of management, or in any manner conducting the business thereof betting with persons resorting thereto."

Lord Halsbury at page 161 said :—

"It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual better, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the race-course or on the high road. There is no betting establishment at all, and there is no keeper of one."

At the bottom of page 162 Lord Halsbury says :—

"It is not very obscure why the Legislature has used so many words to express its meaning, and I have divided the words into five paragraphs to show what has been the cause of this multitude of alternatives. Suppose the thing intended

to be prohibited is what in my construction of the section it is, and suppose the Legislature had not provided for all the alternatives, and the section had run thus, "No house shall be kept for the purpose of the owner betting with persons resorting thereto : the Legislature of course had to provide for the place not fulfilling the legal meaning of a house; so follow the words 'office, room, or other place.' It had to provide for any evasion of the word 'kept' so we have the words 'opened, kept, or used.'

Then, in like manner, the person betting is to be got at, whatever form he assumes betting on behalf of the betting establishment; so we then get 'owner', 'occupier', 'keeper', 'person using.' Then another evasion occurred to the mind of the draftsman, and he proceeds to deal with any person employed by or acting on behalf of the classes previously described, or any person having the care of management or in any manner conducting the business thereof; so that all through there must be a business conducted and a place so connected with that business that the person owning it is betting with the persons resorting thereto."

Lord Halsbury was laying stress on the kind of place, "the house with a purpose" which was involved in that case. He was drawing a distinction between the place where persons assembled in the place were to bet with each other, but where the owner, occupier, keeper or the person using it was not betting with the persons assembled in the place, and he was expounding the meaning of the words "person using".

Mr. Justice Chandavarkar in the Bombay case, in my opinion, goes perhaps further than what the House of Lords decided in Powell's case.

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In the Bombay case the other two Judges, who dealt with the case, do not appear to have relied upon the observations of Lord Hobhouse in Powell's case, but the majority agreed that the user must be with a guilty knowledge or intention.

In *King Emperor* v. *Shanker Dayal and others* (1), the Judicial Commissioner observed that the presumption raised by the Public Gambling Act is not as strong when the gambling takes place openly on the Dewali occasion, as when it takes place on other occasions in a private house. The Judicial Commissioner quoted another case of his Court reported in *Ram Shankar* v. *King Emperor* (2), and said that it was not unusual for persons to gamble on the occasion of the Dewali festival by way of a common friendly amusement rather than for the purpose of making any profit or reaping a commission.

In *Ram Charan and others* v. *Emperor* (3) the head-note states:—

> "Where at the time the accused's house was searched under the provisions of section 5 of the Public Gambling Act, *cauris* were found therein."

and it was held that :—

> "There is a presumption that the house was used as a common gaming-house and further that the persons found therein were there present for the purpose of gambling and that within the presumption is included the ingredient that the accused kept or used the house for profit or gain, and that that presumption would be rebutted if the object of the persons was merely to indulge in a common friendly amusement with a view to pass time, the idea of making any gain being entirely foreign to the mind of the entire party."

(1) A.I.R. 1922 Oudh. 224
(2) 39 I.C. 334
(3) A.I.R. 1925 Oudh. 674

In *Lachhman and others* v. *Emperor* (1), in the judgment of Mr. Justice Pullan of the Oudh Court it is stated:—

"In his judgment the Magistrate observed :—

> 'The festival of Dewali does not give a free permit to persons to gamble in contravention of the provisions of the Gambling Act.'
>
> The last words are important. The festival of Dewali is recognized by all Hindus as a time when gambling is not only permissible but praiseworthy, and the law has never yet interfered with this practice as such. It is, however, true to say that the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. If, therefore, this gambling took place in a public place, or if the owner of the premises was making a profit out of the gamblers, the conviction might not be illegal although the raid and the prosecution would still in my opinion be deplorable. The only evidence in this case that anything was being done in contravention of the Gambling Act is that the owner of the house had in front of him a small pot containing annas 15: There is no reason whatever for supposing that this represented his profits or that it was what is known as *nal*. It may very well have been the small sum which he had won or which he proposed to stake. In my opinion this was an ordinary case of Dewali gambling in a private house. The sums staked were trifling and in my opinion no offence was committed under the Gambling Act."

He continued to say :—

"In my opinion to issue such warrants is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons

(1) A.I.R. 1930 Oudh. 403

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in order to get a reward."

In *Pabumal and others* v. *Emperor* (1) a Division Bench of the Sind Court had to deal with gambling on Satam day and the provisions noticed were those of the Bombay Gambling Act. The head-note states:—

> "Where it was found that a certain number of Hindus were gambling in a house on a Satam day on which according to the local customs Hindus used to gamble and that no non-Hindus were admitted to the premises:—
>
> *Held*, that the presumption under S. 7 of the Act was sufficiently rebutted by the fact that it was the Satam day on which the gambling was going on.

Mr. Doabia, on behalf of the State, relied on an earlier Sind ruling reported as *Bhanji and others* v. *Emperor* (2), in which a Division Bench of the Sind Court held that under section 4 of the Bombay Prevention of Gambling Act it need not be shown that the house was habitually used for gaming. Mr. Doabia relied on two rulings of the Allahabad Court. He quoted *Sita Ram and others* v. *King Emperor* (3), in which a single Judge of the Allahabad Court held that it was not necessary for the police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. The other judgment of the Allahabad Court cited was *Emperor* v. *Basant Rai and others* (4). This was a case brought up in appeal from an acquittal. Bennet, J., in his judgment observed:—

> "There is also the evidence of the informer that gambling was carried on at that house and that he had been present on a previous occasion and also on the day of the raid, and that he had gone to call the Sub-Inspector. The evidence of this informer is that Basant Rai took commision and that the game in question

(1) A.I.R. 1933 Sind. 42
(2) A.I.R. 1926 Sind. 254(2)
(3) A.I.R. 1924 All. 186
(4) A.I.R. 1933 All. 574

was called Flush. Basant Rai received profits or gains in two ways. One was by taking two pice commission when any person won Re. 1, and the other way was by one pice being placed on the board and one being placed as a stake while play was being made. The defence called a witness Anant Ram whose evidence was designed to show that the account of the game called Flush given by the approver was not correct, and that the game was played in some slightly different manner, and that commission was not taken when Flush was played."

Bennet, J., then went on to say that he could not understand why commission could not be taken when the game of Flush was played. He, however, relied upon section 6 of the Act, which provided that where cards, etc., are found in any house, it shall be evidence, until the contrary is made to appear, that such house, etc., etc., 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 any of his assistants. This section lays down that the Court must draw a presumption from the finding of cards, etc., that the house was used as a common gaming-house, and that that presumption will stand until it is rebutted. The Public Gambling Act of 1867 has been amended in the United Provinces by the United Provinces Gambling Amendment Act, I of 1925, in which the definition of a 'common gaming-house' is perhaps different to the definition of the 'common gaming-house' as given in the Public Gambling Act III of 1867.

It appears to me that the observations of Mr. Justice Pullan in *Lachhman and others* v. *Emperor* (1) are observations which apply to the facts of this case. The case, which he was dealing with, was a case on Dewali

(1) A.I.R. 1930 Oudh. 403

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day and there the owner of the house had in front of him a small pot containing annas 15. Pullan, J., there had observed that there was no reason whatever for supposing that this represented his profits or that it was what is known as *nal*. In the present case there is no evidence that the owner was making any profit out of the game. It is an essential ingredient of a common gaming-house that the house, in which the instruments of gaming are kept or used for gaming purposes, should be with a view to the profit or gain of the owner, occupier or keeper of such house. Though section 6 of the Act does provide that when cards or other instruments of gaming are found in any house searched under the provisions of section 5, that it shall be evidence unless the contrary is made to appear that such house is used as a common gaming-house, still the very small amounts found in front of the persons playing and the equally small amount of Rs. 4-5-0 found in a cigarette tin opposite Mani Ram, the owner of the house, would not necessarily prove, as observed by Pullan, J., that this sum represented the profit of Mani Ram. The further fact to be taken into consideration is the fact that it was near about the Dewali that this took place when, as observed by Pullan, J., some Hindus consider it a sort of semi-religious obligation on them to play. It is not necessary that evidence should directly be led to rebut the presumption under section 6. Circumstances can rebut the presumption. The small amounts of stake, the occasion on which the gambling was found and the occupations of persons found gambling can themselves be taken into consideration in order to decide whether the presumption is or is not rebutted. In *Emperor* v. *Basant Rai and others* (1), there was the evidence of an informer. There is no such evidence in the present case. In the present case the evidence is merely of the raiding party. There is no evidence that anybody had played before with the persons assembled there or that this house was being applied, opened, kept or used by

(1) A.I.R. 1933 All. 574

the owner for any profit to himself or that such was the business of that house or that it was a gambling den where persons had been frequenting and gambling had been going on for considerable time. Mani Ram has led evidence of good character which was not challenged.

I would like to refer to the case, *The Queen* v. *Davis* (1). The head-note in that case states:—

> "By S.4 of the Gaming Houses Act, 1854, 'any person, being the owner or occupier, or having the use of any house, room, or place who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein,' is made liable on summary conviction to a penalty not exceeding 50£.
>
> The defendant, with three friends whom he met, went to his house for the purpose of having a game of cards; after playing whist, they played for money a game called 'German Bank', which the jury found to be an unlawful game. There was no evidence that they or any one else had ever played an unlawful game of cards at the defendant's house on any other occasion:—
>
> Held, that the defendant could not be convicted under the above section of using the house or room for the purpose of unlawful gaming being carried on therein."

In this case there was only one occasion on which the game had been played. In another English case, *Jayes* v. *Harris* (2), Lord Alverstone, C.J., said:—

> "It seems to me that giving full effect to the evidence, there is only evidence of one user. The case states that Whiting went

(1) (1897) 2 Q.B.D. 199
(2) (1909) 99 L.T. 56

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into the house and gave the appellant 2s., and asked him as a favour whether he would put 1s., each way on "Lady Hasty" for him for the Cambridgeshire race if he was going to Wolverhampton. That is no evidence of the user of the house, and was only evidence of the publican being willing to help his friend to make a bet. The case also states 'Whiting had five or six bets in all with appellant, some in the alley by the side of the Bush Inn leading to the allotment, in the village of Albrighton. Whiting stated that he thought he won on one occasion, and appellant paid him. In cross-examination he said he thought he might have had five or six or seven or eight like transactions with the appellant, but the previous transactions had been outside the house'. That raised some doubt in my mind, for of course if there had been a statement in the case which led the justices to believe that the man came in, and the appellant went out to avoid being inside the house. some question might have arisen. But as the case is stated, the only evidence with reference to the inside of the house is with regard to one occasion. If we are asked to draw the inference that the other cases were a colourable going outside the house, there ought to have been some facts to support it. There is no evidence that the appellant was keeping and using his house for the purpose of betting contrary to the Betting Act, 1853,".

and the conviction was set aside.

Powell's case had been decided by the House of Lords in 1899. Therein Lord Halsbury had, no doubt, said at page 164:—

> "I cannot doubt that if the prohibited thing is done, whatever that prohibited thing is, by a person who does it for the first

time in his life, he is just as amenable to the law as though he had been for many years in the practice of it. Let a man open a house for such a purpose, and though he never in fact made a bet or received a deposit, though the proof might be difficult, yet the offence, if proved, would be consummated."

Powell's case came for consideration before the House of Lords forty years later in the case, *Milne* v. *Commissioner of Police for City of London* (1). Lord Porter said:—

"What then is meant by 'user'. No doubt physical presence might be enough and, though the mere opening of the house for the purpose specified before any actual betting took place would constitute an offence, yet as a rule some evidence of the repetition would be required to show the purpose for which the premises were opened, kept or used."

It might be urged in the present case that the evidence of the police is that they had watched this house on two nights. But the house had been seen from the outside. There is no evidence as to who had been frequenting this house and whether its purpose and business was with a view to the profit or gain of any person. The proof of this purpose and business is essential. Without this there is no offence committed under the Act. The presumption raised under section 6 can be rebutted by circumstances of the case and of the occasion. This case, therefore, in my opinion, comes very near to the case decided by Mr. Justice Pullan.

No case from the Punjab has been cited before me. The matter that has been argued by Mr. Bhagirath Das in this case affects the administration of the Gambling Act and is of general importance. I consider that this case should be heard by a Division Bench and order accordingly.

(1) 1940 A.C.I. at page 44

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JUDGEMENT

KHOSLA, J. This case was referred to a Division Bench by my brother Soni, J., because he felt that the principles governing the interpretation of section 6 of the Public Gambling Act, required to be stated after a fuller consideration.

The facts briefly are that a house situated in the town of Amritsar was raided by the Police on the authority of a warrant issued under section 5 of the Gambling Act, on the night of the 15th October 1952. In this house seven persons including Mani Ram, who is admittedly the owner and occupier of the house, were found. The Police also found playing-cards and money which were being used by the various persons in a game of chance. These persons were prosecuted under the Gambling Act, Mani Ram for being the owner and occupier of a public gambling-house under section 3 and the remaining six persons for being found in a gaming-house under section 4. The accused persons put forward a somewhat stupid defence with which we are not concerned now, and the only point for our decision is whether in the circumstaces of the case the presumption arising under section 6 of the Act is sufficient to hold these seven persons guilty of the offences of which they have been convicted.

On behalf of the accused persons it was contended before us by Mr. Bhagirath Das that the night of occurrence was two days before Diwali day and that the Diwali festival is considered an auspicious occasion for gambling by all Hindus. Indeed, the gambling has assumed the proportions of a religious rite on this occasion. It was further contended that Mani Ram is a Municipal employee and is not the keeper of a gambling-house and the remaining six persons who were found in the house are not the kind of persons who indulge habitually in gambling, and had gone to Mani Ram's house as friends to celebrate the Diwali festival. Mr. Bhagirath Das also contended that the prosecution had not proved all the ingredients of the charges upon which the convictions of the petitioners were based.

My brother Soni, J., has referred to a large number of cases and judicial pronouncements of Courts in England and in India. "Common gaming-house" is defined in section 1 of the Act as "any house or room or tent or enclosure or vehicle or vessel or any place whatsoever in which any instruments of gaming are kept or used for gaming purposes with a view to the profit or gain of any person owning, occupying or keeping such house * * * whether by way of charge for the use of such house * * * or instruments or otherwise howsoever." Under section 3 a person who owns, occupies or uses a common gaming-house is liable to a penalty, and under section 4 whoever is found in a common gaming-house is also liable to a penalty. It is, therefore, clear that in order to convict a person under section 3 it is necessary to prove—

(1) that the premises are habitually used for gambling;

(2) that the premises are owned or occupied by the accused person;

(3) that the premises are used for gambling with the intention or knowlege of the accused person; and

(4) that the accused derives some gain or profit from the gambling.

In order to find a person guilty under section 4 it must be further proved that he was present in the gaming-house.

Mr. Har Parshad who appeared on behalf of the State frankly conceded that these ingredients must be proved by the prosecution. The English decisions as also certain remarks made in *Emperor* v. *Alloomiya Husan* (1), clearly show that a house must be habitually used as a gaming-house and the person who owns or occupies it must have the intention or knowledge that it is being so used. Similarly the accused person must derive some benefit or profit from the game, otherwise he cannot be held guilty

(1) I.L.R. 28 Bom. 129.

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under section 3. But the question is what is the mode of proving these ingredients. Section 6 of the Act clearly lays down that in certain cases a presumption of guilt arises. Under section 6 if a house is raided on the authority of a warrant under section 5 and cards, dice or instruments of gaming are found in the house, then it may be presumed that the house is a common gaming-house and the persons present in the house at the time of the search had gone there for the purpose of gaming. Under section 6 the presence of certain articles is evidence until the contrary is made to appear that the house is a common gaming-house. The presumption arising under section 6, however, is not conclusive and may in certain circumstances be extremely weak. I am clearly of the view that even in a case where no defence evidence is led the presumption may be rebutted by bringing out circumstances which go to show that some or all the ingredients which constitute the offence under section 3 or the offence under section 4 are lacking, and in such a case the accused persons will not be held guilty. There is no doubt that a presumption does arise under section 6, and it is for this reason that the English rulings which require independent proof of a habitual user, intention or knowledge and the incidence of gain or profit to the occupier of the house have no application. It seems that there is nothing corresponding to section 6 in English Law. At any rate no such provisions have been brought to our notice. In the presence of section 6 of the Indian Act the presumption clearly arises and must be recognised. In the present case we find that the occasion was two days before the Diwali day and it is a matter of common knowledge that in those days Hindus indulge in a great deal of gambling because it is considered auspicious. Again Mani Ram is a Municipal employee and it has not been shown that he has derived any profit or gain from gambling either on this occasion or on any other occasion. The presence of a pot containing some money near his knee is scarcely evidence of the fact that he was taking a share of the winnings of other persons. Nor has it been shown that in this house gambling took place on any previous

occasion, and these circumstances appear to me to be quite sufficient to rebut the presumption arising under section 6 of the Act. I would, therefore, hold that the charges have not been brought home to the petitioners in this case and allowing the petition acquit them. Fines, if paid, will be refunded.

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SONI, J. I agree.