

Janardan vs State Of Maharashtra on 4 April, 1978

Equivalent citations: 1978 AIR 1234, 1978 SCR (3) 586, AIR 1978 SUPREME COURT 1234, (1978) 2 SCC 465, 1978 SC CRI R 292, 1978 CRI APP R (SC) 252, 1978 MADLW (CRI) 122, 1978 SCC(CRI) 277, 1978 SC CRI R 211

Author: Syed Murtaza Fazalali

Bench: Syed Murtaza Fazalali, P.N. Shingal

PETITIONER:

JANARDAN

Vs.

RESPONDENT:

STATE OF MAHARASHTRA

DATE OF JUDGMENT 04/04/1978

BENCH:

FAZALALI, SYED MURTAZA

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FAZALALI, SYED MURTAZA

SHINGAL, P.N.

CITATION:

1978 AIR 1234

1978 SCR (3) 586

1978 SCC (2) 465

ACT:

Bombay Prevention of Gambling Act, (Bom. Act IV of 1887), 1887, Section 6 read with Bombay Police Act, 1951 and S.- 17 of Bombay General Clauses Act, 1886-Ambit, scope and interpretation of Section 6 of Gambling Act-Whether the Assistant Commissioner of Police can validly issue search warrant.

HEADNOTE:

The appellant along with sixteen others was convicted under section 4 of the Gambling Act and sentenced to rigorous imprisonment for two months and a fine of Rs. 400/- or in default to suffer rigorous imprisonment for one month. The appellant alone filed a revision before the High Court and an appeal to this Court by obtaining a certificate from the High Court. It was contended that the search warrant issued by the Assistant Commissioner which formed the basis

of his conviction was legally invalid, and, therefore, the conviction was not sustainable in law.

Dismissing the appeal. the Court

Per Fazal Ali, J.

HELD :1. The conviction of the appellant does not suffer from any infirmity and must be upheld. But having regard to the fact that the offence took place more than ten years herein before, the interests of justice do not require that he should be sent back to jail. [592 B-C]

[While maintaining the sentence of fine awarded under both the Courts namely Sections 4 and 5 of the Gambling Act, the sentences of imprisonment were modified to the period already undergone]

2. It would be seen from a perusal of section 6 of the Gambling Act that as the term 'Commissioner of Police' has not been defined anywhere in the Act it cannot per se include an Assistant Commissioner and the provisions of the Police Act which was passed long after the Gambling Act could not be pressed into service, unless there was some other Act which could make the provisions of the Police Act applicable to the Gambling Act. Prima facie, therefore, the contention of the appellant seems to be tenable. [589 G-H]

3. (a) Bombay General Clauses Act of 1886 was amended by Act 1 of 1904 which doubtless was an Act passed before the coming into force of the Gambling Act. Section 17 of the Bombay General Clauses Act which remained unamended even after the Amendment Act of 1904 runs thus :-

"17(1) ~~IBombay~~ Act made after the commencement of this Act it shall be sufficient for the purpose of indicating the application of law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed."

Analysing this definition it would appear that any official title of the officer mentioned in any Act made after the General Clauses Act would deem by fiction of law to include any such official title referred to in any Act passed after the General Clauses Act. Not only the official title but even the functions" executed by the said officer would also be deemed to have been exercised by the official designated in the subsequent Act. The combined effect, therefore, f

587

section 6 of the Gambling Act and Section 17(1) of the General Clauses Act would be that the term 'Commissioner of Police' would include all officers who are executing or performing the functions of the Commissioner of Police as defined or authorised under the latter Act, namely, the Police Act.

[589 H, 590 C]

(b) A perusal of section 11 of the Police Act leads to the inescapable conclusion that an Assistant Commissioner appointed under subsection (1) is to perform such duties and functions as can be exercised under the Act or any other law for the time being in force, which undoubtedly includes the Gambling Act which was a law in force at the time when the Police Act was passed. Apart from this the Assistant Commissioner could also perform those functions which could be assigned to him by the Commissioner under the general or special orders of the State Government. [591 A-B]

4. Having regard to the combined reading of the provisions of section 17 of the General Clauses Act and the Police Act the term 'Commissioner of Police' appearing in section 6 of the Gambling Act would include even an Assistant Commissioner who was legally and validly assigned the powers, functions and duties of the Commissioner of Police by the State Government under section 10(2) of the Police Act. As the General Clauses Act was a statute which was passed before the Gambling Act came into force, section 17 of the General Clauses Act could be called into aid to interpret the scope and ambit of the term 'Commissioner of Police' as used in section 6 of the Gambling Act.

[591 E-F]

5. To contend that the power of assignment of functions by the Government given to the Commissioner of Police or the Assistant Commissioner of Police could be exercised only in respect of matters covered by the Police Act and not beyond that is to overlook the avowed object of section 17 of the General Clauses Act which has been passed to resolve such anomalies and it is not possible to construe the provisions of the Police Act in complete isolation by ignoring the provisions of the General Clauses Act which undoubtedly apply to the facts, in circumstances of the present case.

[591 G-H. 592]

Per Shinghal, J.

1. Sub-section (2) of s. 17 of the Bombay General Clauses Act, 1904, specifically provides that the section applies also to all Bombay Acts made before the commencement of the Act. It would follow that section 17(1) is applicable to the present controversy under the Gambling Act of 1887. Under sub-section (1) it was therefore sufficient for the purpose of indicating the application of the law to every person "for the time being executing the functions of an office" to mention the official title of the officer "at present executing the functions." Accordingly it was enough to mention the "Commissioner of Police" by his official title for purposes of section 6 of the Gambling Act. It lies that the functionary who was executing the functions referred to in the section at the time when that Act came into force. As section 17 of the Bombay General Clauses Act deals with the substitution of functionaries, it enabled that functionary to discharge the functions of the Commissioner of Police under section 6(1) of the Gambling Act who was

"for the time being executing the functions" of that office. In other words, as it was the Commissioner of police who had the authority to issue the special warrant under section 6(1) of the Act when it came into force, it would be permissible for the Assistant Commissioner of police to be substituted for that functionary if it could be shown that it was he who was executing the functions of the Commissioner of police on the date of issue of the special warrant referred to above i.e. on December 25, 1967. [593 D-G]

2. Section 11(2) of the Bombay Police Act, 1961 provides that an Assistant Commissioner of Police shall exercise such powers and perform such duties and functions as can be exercised or performed under the provision of that Act or any other law for the time being in force or as are assigned to him by the Commissioner under the general or special orders of the State Government. The High Court has taken note in this connection of the State Government's order dt. March 10, 1967, which empowered all Commissioners of Police to

588

assign to the Assistant Commissioners of Police working under them any of their powers, duties and functions not only under the Police Act but also under any other law for the time being in force. It is also not disputed that the Commissioner of Police issued an order dated September 19, 1967 authorising all Assistant Commissioners of Police working under him to issue search warrants under s. 6 of the Act to any Police Officer working under them not below the rank of a Sub-Inspector. This was legally permissible and the High Court did not commit any error in taking that view. [594 A. C, E-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 36 of 1972.

From the Judgment and Order dated 8-11-1971 of the Bombay High Court (Nagpur Bench) at Nagpur in Criminal Revision Application No. 39 of 1971.

S. K. Mehta and K. R. Nagaraja for the, appellant. M. C. Bhandare and M. N. Shroff for the Respondent. The Judgments of the Court were delivered by FAZAL ALI, J. This appeal by certificate granted by the Bombay High Court raises an interesting question of law as to the ambit, scope and interpretation of section 6 of the Bombay Prevention or Gambling Act, 1887 (Act No. IV of 1887) (hereinafter referred to as the Gambling Act) read with the Bombay Police Act, 1951 (hereinafter referred to as the Police Act).

The appellant along with others was convicted under section 4 of the Gambling Act and sentenced to rigorous imprisonment for two months and a fine of Rs. 400/- or in default to suffer rigorous imprisonment for one month. He was also convicted under section 5 of the Gambling Act and sentenced to 7 days rigorous imprisonment and a fine of Rs. 501/-. 16 accused besides the appellant were convicted but the appellant alone filed a revision before the High Court and an appeal to this Court by obtaining a certificate from the High Court'.

The facts of the case are not in dispute and counsel for the appellant has not raised any question relating to the merits of the case. In fact, all the three courts have concurrently found that the offence against the appellant has been established beyond any doubt and in view of the concurrent finding of facts by the courts below there is no question of arguing the case on merits.

One of the important points of law which was urged before the High Court as also before this Court was that the search warrant issued by the Assistant Commissioner which formed the basis of the conviction of the appellant was legally invalid, and, therefore, the conviction was not sustainable in law. It was also argued before the High Court that the search warrant did not contain a full and complete description of the hut where the game was being played but the High Court has rightly repelled this contention on the ground that the search warrant contained full description of the place and this finding was not assailed before us also.

Thus, the entire case turns upon the validity of the search warrant issued by the Assistant Commissioner. In this connection, it was submitted before us that under section 6 of the Gambling Act it was lawful for the Commissioner of Police to issue a search warrant but in the instant case admittedly the search warrant was not issued by the Commissioner of Police but by the Assistant Commissioner. It was contended that as the Commissioner of Police has not been defined in the Gambling Act so as to include an Assistant Commissioner any warrant issued by the Assistant Commissioner were legally invalid and could not be acted upon. The High Court appears to have met this argument on the ground that under the provisions of the Police Act the term 'Commissioner of Police' includes an Assistant Commissioner, and, therefore, the provisions of section 6 of the Gambling Act were fully complied with inasmuch as the word 'Commissioner of Police' would include, an Assistant Commissioner also. Learned counsel for the appellant however submitted that the view taken by the High Court is legally erroneous because the definition of the term 'Commissioner of Police' in the Police Act could not be imported into section 6 of the Gambling Act. First, the term 'Commissioner of Police' was not defined in the Gambling Act and secondly, the Gambling Act was passed long before the Police Act came into force. In our opinion, the argument put forward by learned counsel for the appellant merits serious consideration. It is no doubt true that the Gambling Act does not at all contain any definition of the word 'Commissioner of Police. In this connection, the relevant part of section 6 of the Gambling Act runs thus :-

"It shall be lawful for the Commissioner of Police in the City of Bombay, and elsewhere for any Magistrate of the First Class or any District Superintendent of Police or for any Assistant superintendent empowered by Government in this behalf, upon any complaint made before him on oath, that there is reason to suspect any house, room or place to be used a common gaming-house,, and upon satisfying

himself after such enquiry as- he may think necessary that there are good grounds for such suspicion, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector, or other superior officer of Police, of not less rank than a chief constable....."

It would be seen from a perusal of section 6 of the Gambling Act that as the term 'Commissioner of Police' has not been defined anywhere in the Act it cannot per se include an Assistant Commissioner and the provisions of the Police Act which was passed long after the Gambling Act could not be pressed into service, unless there was some other Act which could make the provisions of the Police Act applicable to the Gambling Act. Prima facie, therefore, the contention of the appellant seems to be tenable. Our attention has however been drawn to the Bombay General Clauses Act of 1886 as amended by Act 1 of 1904 which doubtless was an Act passed before the coming into force of the Gambling Act, Section 17 of the Bombay General Clauses Act which remained unamended even after the Amendment Act of 1904 runs thus :

"17(1) In any Bombay Act made after the commencement of this Act it shall be sufficient for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed'.

Analysing this definition it would appear that any official title of the officer mentioned in any Act made after the General Clauses Act would be deemed by fiction of law to include any such official title referred to in any Act passed after the General Clauses Act.

Furthermore, not only the official title but even the functions executed by the said officer would also be deemed to have been exercised by the officer designated in the subsequent Act. The combined effect, therefore, of section 6 of the Gambling Act and section 17(1) of the General Clauses Act would be that the term 'Commissioner of Police' would include all officers who are executing or performing the functions of the Commissioner of Police as defined or authorised under the latter Act, namely, the Police Act. It would thus be seen that sub-section (6) of section 2 of the Police Act clearly mentions that the term 'Commissioner of Police' would include, an Assistant Commissioner. Thus, sub-section (6) runs thus :

"2. In this Act, unless there is anything repugnant in the subject or context * * * * (6)..... A Commissioner of Police including an Additional Commissioner of Police, A Deputy Inspector General of Police (including the Director of Police Wireless and Deputy Inspector General of Police appointed under section 8A), a Deputy Commissioner of Police and Assistant Commissioner of Police.....

Section 11 of the Police Act runs thus "11 (1) The State Government may appoint for any area for which a Commissioner of Police has been appointed under section 7 such number of Assistant

Commissioners of Police as it may think expedient.

(2) An assistant Commissioner appointed under subsection (1) shall exercise such powers and perform such duties and functions as can be exercised or performed under the provisions of this Act or any other law for the time being in force or as are assigned to him by the Commissioner under the general or special orders of State Government".

A perusal of section 11 of, the Police Act leads to the inescapable conclusion that an Assistant Commissioner appointed under sub-section (1) is to perform such duties and functions as can be exercised- under the Act or any other law for the time being in force, which undoubtedly includes the Gambling Act which was a law in force at the time when the Police Act was passed. Apart from this the, Assistant Commissioner could also perform those functions which could be assigned to him by the Commissioner under the general or special orders of the State Government. The provision for assignment of powers by the Government to the Commissioner are contained in section 10(2) of the Police Act which runs thus "10(2) Every such Deputy Commissioner shall, under the orders of the Commissioner, exercise and perform any of the powers, functions and duties of the Commissioner to be exercised or performed by him under the provisions of this Act or any other law for the time being in force in accordance with the general or special orders of the State Government made in this behalf".

The High Court has found as a fact that there was a notification by the State Government dated 10th March, 1967 by which all the Assistant Commissioners of Police including that of Nagpur were conferred powers and functions of the Commissioner of Police. Thus, in, the instant case at the time when the offence was committed two things had happened, (1) that in Nagpur where the offence had taken place there was a Commissioner of Police, and (2) that the Commissioner of Police had been conferred the power by the Government Notification to assign his functions, powers and duties to the Assistant Commissioner. In these circumstances, therefore, we do not find any difficulty in accepting the contention of the respondent that having regard to the combined reading of the provisions of section 17 of the General Clauses, Act and the Police Act the term 'Commissioner of Police' appearing in section 6 of the Gambling Act would include even an Assistant Commissioner' who was legally and validly assigned the powers, functions and duties of the Commissioner of Police by the State Government under section 10(2) of the Police Act. As the General Clauses Act was a statute which was passed before the Gambling Act came into force. section 17 of the General Clauses Act could be called into aid to interpret the scope and ambit of the term 'Commissioner of Police' as used in section 6 of the Gambling Act.

Learned counsel for the appellant however submitted that the power of assignment of functions by the Government given to the Commissioner of Police or the Assistant Commissioner could be exercised only in respect of matters covered by the Police Act and not beyond that. I am however unable to agree with this contention which completely overlooks the avowed object of section 17 of the General Clauses Act which has been passed to resolve such anomalies and it is not possible to construe the provisions of the Police Act in complete isolation by ignoring the provisions of the General Clauses Act which undoubtedly apply to the facts and circumstances of the present case. For these reasons, therefore, the second contention put forward by the appellant also fails. I am,

therefore, satisfied that the conviction of the appellant does not suffer from any infirmity but having regard to the fact that the offence took place more than 10 years herein before I feel that the interests of justice do not require that the appellant should be sent back to jail. I would, therefore, while upholding the conviction of the appellant under sections 4 and 5 of the Gambling Act reduce the sentence of imprisonment to the period already served maintains the sentence of fine awarded under both the counts, namely, sections 4 and 5 of the Gambling Act. With this modification only the appeal is dismissed. SHINGHAL, J., While agree with the conclusion arrived at by my brother Fazal Ali, I would like to state my reasons for the same.

This appeal by a certificate of the Bombay High Court is directed against its judgment dated November 8, 1971, by which it dismissed the petition for revising the appellate judgment of the Additional Sessions Judge of Nagpur upholding the conviction of the revision petitioner. 'This trial court convicted appellant Janardhan of an offence under section 4 of the Bombay Prevention of Gambling Act, 1887, hereinafter referred to as the Act, and sentenced him to rigorous imprisonment for two months and a fine of Rs. 400/-, or in default of payment of fine to undergo further rigorous imprisonment for one month. The remaining accused (except accused No. 15) were convicted of an offence under section 5 of the Act, and were sentenced to rigorous imprisonment for 7 days and a fine of Rs. 501- each. This appeal relates to appellant Janardhan.

It was alleged against the appellant that he, was keeping a common gaming house in a hut in Nagpur which was in his occupation. , The Assistant Commissioner' of Police issued a special warrant of entry and search under section 6 of the Act on December 25, 1967, which was valid upto December 31, 1967, empowering the Police Inspector to enter and search the appellant's hut as it was suspected to be used as common gaming house. This was done by the Police Inspector on December 27, 1967, when he found that the other accused were indulging in gaming and the appellant was accepting the bet. They were accordingly apprehended and were challenged and convicted as aforesaid.

It has been argued before us that the special warrant under section 6 of the Act, referred to above, could be issued only by the Commissioner of Police, and not by the Assistant Commissioner of Police, so that the warrant under which the entry and the search were made in the appellant's hut was unauthorised and invalid and that the High Court erred in taking a contrary view.

Section 6 (1) (i) of the Act with which we are concerned in this case provides for entry and search in gaming houses, inter alia, by the following Police. Officers,-

"6(1) (i) in any area for which a Commissioner of Police has been appointed not below the rank of a Sub-Inspector and either empowered by general order in writing or authorised in each case by special warrant issued by the Commissioner of Police....."

The expression "Commissioner of Police" has however not been defined in the Act.

The Bombay General Clauses Act, 1904, does not also define the expression "Commissioner of Police." Section 17 of that Act appears under the rubric "Powers and Functionaries" and reads as

follows,-

"17. (1) In any Bombay Act or Maharashtra Act made after the commencement of this Act it shall be sufficient for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to, mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed."

Sub-section (2) of the section specifically provides that the section applies also to all Bombay Acts made before the commencement of the Bombay General Clauses Act, 1904. It would therefore follow that section 17(1) is applicable to the present controversy. Under sub-section (1) of section 17 it was therefore sufficient for the purpose of indicating the application of a law to every person "for the time being executing the functions of an office" to mention the official title of the officer "at present executing the functions". Accordingly it was sufficient to mention the "Commissioner of Police" by his official title for purposes of section 6 of the Act as he was the functionary who was executing the functions referred to in the section at the time when the Act came into force. As section 17 of the Bombay General Clauses Act deals with the substitution of functionaries, it enabled that functionary to discharge the functions 'of the Commissioner of Police under section 6(1) of the Act who was "for the time being executing the functions" of that office. In other words, as it was the Commissioner of Police who had the authority to issue the special warrant under section 6(1) of the Act when it came into force, it would be permissible for the Assistant Commissioner of Police to be substituted for that functionary if it could be shown that it was he who was executing the functions of the Commissioner of Police, on the date of issue of the special warrant referred to, above i.e. on December 25, 1967.

It remains for consideration whether the Assistant Commissioner of Police could be said to be executing the functions of the Commissioner of Police under section 6(1) of the Act at the time when he issued the special warrant. Reference in this connection may be made to section 11 (2) of the Bombay Police Act, 1951, which provides as follows,--

11(2). An Assistant Commissioner appointed under subsection (1) shall exercise such powers and perform such duties and functions as can be exercised or performed under the provisions of this Act or any other law for the time being in force or as are assigned to him by the Commissioner under the General or Special orders of the State Government."

It was therefore permissible for the Assistant Commissioner of Police not only to exercise such powers and perform such duties and functions as he could, in terms, exercise or perform under the provisions of the Bombay Police Act, or any other law for the time being in force, but also the duties and functions assigned to him by the Commissioner of Police under the general or special orders of the State Government. The High Court has taken note in this connection of the State Government Order No. APO-2463-C-2896- (III)(E)-V. dated March 10, 1967, which empowered all Commissioners of Police to assign to the Assistant Commissioners of Police working under them any of their powers, duties and functions not only under the provisions of the Bombay Police Act, 1951, but also under any other law for the time being in force. The existence of such an order has not in fact been challenged before us. The Assistant Commissioner of Police was therefore the functionary

who could, by virtue of section 17 of the Bombay General Clauses Act, discharge the functions of the Commissioner of Police under section 6(1) of the Act in the matter of issuing a special warrant like, the one issued in the present case. It is also not disputed that the Commissioner of Police issued Order No. 2036 dated September 19, 1967, authorising all Assistant Commissioners of Police working under him to issue search warrants under section 6 of the Act to any Police Officer working under them not below the rank of a Sub-Inspector of Police. As has been shown, this was legally permissible, and it is futile to contend that the High Court erred in rejecting the appellant's contention to the contrary.

It however appears that in a matter like, this, when a period of more than 7 years has gone by since the appellant's conviction, it would not be necessary to send him back to prison. While therefore the appellant's conviction is upheld, the sentence, is reduced to the imprisonment already undergone by him without, however, making any change in the sentence of fine and the imprisonment which has been ordered in default of its payment. With this modification the appeal fails and is dismissed.

S. R.

Appeal dismissed.