



Shubham Talle

22.CR.WP.NO.1175 of 2023

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 1175 OF 2023

1. Mr. Akshay Anant Matkar
Age-26 yrs Occ-Business
R/o-88/B Pratapganj Peth,
Satara-415 002
(Proprietor of Wingame Enterprises)

2. Mr. Satish Ramchandra Botalji
Age- 45 yrs Occ-Business R/o Kalkai
Galli Tal- Koregaon
Dist. Satara-415501

.... Petitioners/Accused.

Versus

1. The State Of Maharashtra
Through Koregaon Police
Station Dist. Satara.
2. Police Inspector Koregaon Police
Station Dist. Satara.

.... Respondents

Mr. Rushikesh C. Barge for the Petitioner.
Mr. K.V. Saste, APP for the State.

CORAM : SUNIL B. SHUKRE AND
M.M. SATHAYE, JJ.
Date : 30th March, 2023.

JUDGMENT (Per M.M.SATHAYE,J.):

1. Rule. Rule made returnable forthwith. Learned APP waives service for Respondent No. 1 & Respondent No. 2. Taken up for final disposal with consent of parties.

2. This matter was initially heard along with Criminal Public Interest Litigation No. 15 of 2022, in which notices were issued on 7th February, 2023 and learned Counsel for the Petitioner in Criminal PIL was directed to supply spare copy in the Registry and condition was imposed that if such spare copy is not supplied within the stipulated time, the Criminal PIL will stand dismissed for non prosecution without further reference to the Court. Today when the matter is listed before us and argued, there is a office note dated 29th March, 2023 stating that as per order dated 7th February, 2023 the Advocate for the Petitioner has not supplied spare copy in said Criminal PIL and therefore, the conditional orders stands, which means that the said Criminal PIL has been dismissed without further reference to the Court, as on today. In such situation the present Criminal Writ Petition is pressed before us by learned Counsel for the Petitioner and it is argued finally.

3. This is a Petition filed under Article 226 of the Constitution of India read with section 482 of the Criminal Procedure Code, for quashing and setting aside FIR No. 416 of 2022 registered with Koregaon Police Station District Satara for offence punishable under Sections 12(a) of the Maharashtra Prevention of Gambling Act, 1887 (“the said Act” for short)

4. Heard learned Counsel for the Petitioner and learned APP for the State. The FIR is filed by Police Inspector and as such Respondent No. 2/Complainant is also represented by learned APP. Learned Counsel for the Petitioner has taken us through various documents on record including the impugned FIR dated 15th November, 2022 as well as relevant provisions of the said Act. For the sake of convenience section 12 of the said Act is reproduced below :

“12. Power to arrest without warrant for gaming and setting birds and animals to fight in public streets
A Police officer may apprehend [and search] without warrant-

(a) any person found (gaming) (or reasonably suspected to be gaming) in any public street, (or thoroughfare, or in any place to which the public have or are permitted to have access) (or in any race-course);

(b) any person setting any birds or animals to fight in any public street, (or thoroughfare, or in any place to which the public have or are permitted to have access);

(c) any person there present aiding and abetting such public fighting or birds and animals.

Any such person shall, on conviction, [be punished both with fine which may extend to three hundred rupees and with imprisonment] which may extend to [three months] [and where such gaming consists of wagering or betting or of any such transaction as is referred to in the definition of gaming given in section 3, any such person so found gaming shall, on conviction, be [punishable] in the manner and to the extent referred to in section 4, and all moneys found with such person shall be forfeited.]

Seizure and destruction of instruments found

And such police officer may seize all birds and

animals and (things reasonably suspected to be instruments of gaming) found in such public street, (thoroughfare, (place or race-course)] or on (or about) the person to those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed, and such birds and animals to be sold and the proceeds forfeited. (When any thing has been found on or about any person and a court is satisfied that the Police officer had reasonable grounds for suspecting that such thing was an instrument of gaming, such circumstance shall, until the contrary is proved, be evidence that such thing was an instrument of gaming and that the person on or about whom the thing was found was present for the purpose of gaming.]

5. Learned Counsel for the Petitioner submitted that the averments in the impugned FIR, even if taken at its face value do not constitute the offence as contemplated under Section 12(a) of the said Act and therefore, it is urged that the impugned FIR be quashed. He has relied on following

judgments in support of his case :

1) Dr. K.R. Lakshmanan Vs. State of T.N. and Anr (1996) 2 SCC 226

2) Shri. Varun Gumber Vs. Union Territory of Chandigarh and ors CWP No. 7559 of 2017 decided on 18th April, 2017 decided by Punjab & Haryana High Court.

3) Gurdeep Singh Sachar Vs. Union of India and ors. (Criminal Public Interest Litigation Stamp No. 22 of 2019) decided on 30th April, 2019 by this Court.

6. Learned APP for the Respondents have opposed this Petition. Learned APP has also taken us through the averments in the FIR and has urged that no interference is called for.

7. Lets first consider the law involved.

8. We have perused the judgment of **Dr. K.R. Lakshmanan Vs. State of T.N. (supra)** in which Hon'ble Apex Court had an occasion of considering the challenge to Madras Race Club (Acquisition and Transfer of Undertakings) Act, 1986. In the said

judgment after considering the law in respect of gambling activity in various earlier judgments, Hon'ble Apex Court held that horse racing is game of mere skill and it is neither gaming nor gambling. The Apex Court ultimately held that the said Act of 1986 was *ultra-vires* article 14 of the Constitution and accordingly it was struck down. In the said Judgment the Apex Court has held as follows.

“The New Encyclopaedia Britannica defines gambling as the betting or staking of something of value, with consciousness of risk and hope of

a) gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance or accident or have an unexpected result by reason of the better's miscalculations”. According to Black's Lay Dictionary (6th Edn.) “Gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward”. Gambling in a nutshell is

b) payment of a price for a chance to win a prize. Games may be of chance or of skill or of skill and chance

combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution

c) or the dealer has dealt with the cards. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated — is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even rummy are considered to be games of skill. The courts have reasoned that there are few games, if any, which consist purely of chance or skill, and

d) as such a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. It is the dominant element — ‘skill’ or ‘chance’ — which

determines the character of the game.”

9. In the said judgment, the Apex Court, after considering various aspects concerned with the horse racing and its participants, has held that horse racing is a game where the winning depends upon substantially and preponderantly on Skill and therefore wagering or betting on horse racing, which is game of skill, does not come within the definition of gaming under the Acts which were under consideration.

10. In the judgment of **Shri. Varun Gumber Vs. Union Territory of Chandigarh and ors (supra)** the aspect of whether an online game called “Fantasy Cricket Dream 11” involves gambling and therefore whether it is illegal was considered The High court of Punjab and Haryana after considering various aspects of the said online gaming, held that the success in said online ‘Dream-11’ fantasy sport game basically arises out of user’s exercise of superior knowledge, judgment and attention. It is held that the element of skill has predominant influence on the outcome said online game and therefore it was held that the

said game does not fall within the activity of gambling and therefore it was held exempt from application of penal provisions and held protected under Article 19 (1) (g) of the Constitution of India.

11. The said online game Dream 11 was also sought to be impugned in the case of **Gurdeep Singh Sachar Vs. Union of India and ors. (supra)** in which, a co-ordinate Bench of this Court was called upon to consider the same issue as to whether activities of said online game amounts to gambling. This Court relying on the aforesaid judgment in **Gumber's case (supra)** of Punjab and Haryana High Court, has held that there is no reason to take a different view and as such the Criminal PIL was dismissed. In the said judgment even the provisions of Section 65(B) (15) of Finance Act 1994 for the purpose of expressions 'betting and gambling' has been considered and it is held that the said Dream 11 Fantasy game is not at all dependent on winning or loosing of any particular team in the real world and therefore there is no betting or gambling involved.

12. In view of the aforesaid judgments, it can be safely said that this Court must understand the nature and activity involved in a particular online game, if it is alleged that it involves gambling or “gaming” as contemplated under Section 3 of the Maharashtra Prevention of Gambling Act. The Definition of ‘gaming’ under the said Act shows that it includes wagering or betting subject to certain exceptions. Section 3 of the said Act is reproduced below for ready reference:

3. “Gaming” defined

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

a) On the day on which such race is to be run, and

b) In an enclosure which the license of the race-course, on which such race is to be run, has set apart for the purpose under the terms of the licence issued under section 4 of the Bombay Race-Courses Licensing Act, 1912, or as the case may be, of the Maharashtra Dog Race-Courses Licensing Act, 1976 in respect of

such race-course, or in any other place approved by the State Government in this behalf, and

C) between any individual in person, being present in the enclosure [or approved place] on the one hand, and such licensee or other person licensed by such licensee in terms of the aforesaid licence on the other hand [or between any number of individuals in person in such manner and by such contrivance as may be permitted by such licence;

but does not include a lottery.

Any transaction by which a person in any capacity whatever employs another in any capacity whatever or engages for another in any capacity whatever to wager or bet whether with such licence or with any other person shall be deemed to be “gaming”:

Provided, nevertheless, that such licensee may employ servants, and persons may accept service with such licensee, or wagering or betting in such manner or by such contrivance as may be permitted in such licence.

The collection or soliciting of bets, receipt or distribution

of winnings or prizes in money or otherwise in respect of wagering or betting or any ace which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution shall be deemed to be “gaming”.

13. In the light of above emerging legal position, lets scan the material on record.

14. It is the case of the Petitioners that Petitioner No. 1 is an educated person having Diploma in Computer Engineering who is Proprietor of ‘Wingame Enterprises’. He has knowledge of Skill Games and running of skill games through Internet. The Petitioner is stated to have developed a Skill game by name “WINGAME” which can be played on Internet. It is contended that the Petitioner is having necessary shop act license as well as Udyog Adhar Number bearing no. UAN No. MH30D0022718 India dated 1/1/2020 from the Competent Authority of the Ministry of Micro Small and Medium Enterprizes, Government of India and also GST No. 27CKCPM527001ZJ and as such a tax payer.

15. It is contended that in the said wingame, the player is required to answer various quizzes in which there are questions in the nature of MCQ [multiple choice questions], which is figure based. It is contended that every figure has a value which changes in every question and as such the contestant is required to figure out the value of the figure and then make necessary calculations and once the calculation is made then the contestants is required to choose the options that gives the answer. It is further contended that after answering various questions in combination, points are gathered and winner is declared. It is a time bound game and every quiz having two question is required to be solved in 30 seconds. Based on this, it is contended that the said wingame is a game of knowledge and skill. The skill involved is to make fast calculations, observations and therefore, this is not game of mere chance but it is a game of skill or at least game of pre-dominantly skill. It is contended that the Petitioner is protected under Article 19 (1) (g) bestowing right to practice any profession or to carry on any occupation, trade or business to all citizens.

16. Learned Counsel for the Petitioner has taken us through the documents executed by Petitioner No. 1 Developer of Wingame for registration of patent for the said online game. He has also taken us through print out of “How to Play / User manual” available online giving instructions how to play the said wingame. Learned Counsel urged that the activity which was being run at the concerned place of raid, was not gambling because the said online game (Win Game) is not a game of chance but is in fact purely a game of skill or at least predominantly the game of skill.

17. Perusal of the impugned FIR shows that it is alleged by Respondent No. 2 (concerned Police Inspector) that on 15th November, 2022 on the basis of a tip from secret informer, a raid was conducted near Botalji Complex in the open teen shade when Petitioner No. 2 was found to be accepting money and indulging in gambling activity based on Numbers appearing on computer. It is alleged that he did not have license to run online gaming. It is further alleged that when demanded, he supplied username and password, and it was found that the computer which was running at the spot, was having Win

Game.in/index.php website running where on the screen Contest 1, Contest 2, Contest 3 was visible. Certain computer and related peripheral were confiscated and some cash was found with Petitioner No. 2. On this allegations FIR has filed against Petitioner No. 2.

18. Averments in the FIR, as narrated in nutshell above, shows that the online game of wingame developed by Petitioner No. 1 was being played at the place where raid was conducted and therefore what can be gathered is that an online game was being played. Whether the said game is gambling or not is not clear from the averments in the FIR. It is only alleged that the gambling was being conducted based on numbers appearing on the computer screen and therefore, it is necessary to consider the aspect as to whether the said win game is actually a game of skill or game of mere chance.

19. Perusal of the said game's manual (how to play), shows that the player of the said game is required to solve mathematical Quizzes based on different combinations for

geometric figures which are assigned specific values and based on the equations, a mathematical answer is to be found and the answer is to be given in the form of multiple choice question. After the activity is carried out in time bound manner, the player advances in the stages of the game.

20. From the perusal of the examples given in the manual, as well as the model answer sheet in which points are calculated on the basis of answer to various Quizzes, we are of the considered opinion that this online game is not game of chance but there is mathematical skill involved. Apart from said skill, observation and ability to solve mathematical equations within time bound manner is also required, which definitely requires skills. Hon'ble Apex Court in the case of ***Dr. K.R. Lakshmanan Vs. State of T.N. and anr (1996) 2 SCC 226*** has held that even if there is some chance involved in a game but if a game is preponderantly a game of skill, it would nevertheless be game of skill. In our view the present online game stands on better footing and the same is definitely preponderantly a game of skill and therefore, it cannot be said from mere averments in

the FIR that any offence was committed under the said Act.

21. Therefore in our view with the allegations in the FIR as they stand, if the Petitioners are made to face trial, it will be an abuse of process of law, since no offence is made out as alleged in the facts and circumstances of the case. According to us this case squarely falls in one of the categories illustrated by Apex Court in the case of ***State of Haryana Vs. Bhajan Lal & Ors. 1992 Supp (1) SCC 335.***

22. Therefore the petition succeeds and we pass following order.

i) Writ Petition is allowed, in terms of prayer clause (A), which reads as under:

“A) That this Honourable Court be pleased to issue a writ mandamus or writ in the nature of mandamus or any other appropriate writ direction or order under Article 226 r/w. Section 482 of Code of Criminal Procedure quashing and setting aside the First Information Report being FIR No. 416 of 2022 registered with Koregaon Police Station Dis. Satara, for

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offence punishable under Section 12 (a) of the
Maharashtra Prevention of Gambling Act, 1887.”

ii) Rule is made absolute in the aforesaid terms. No costs.

(M.M.SATHAYE, J.)

(SUNIL B. SHUKRE, J.)