

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

THURSDAY, THE 24TH DAY OF JANUARY, 2019/4TH MAGHA, 1940

WP(C).No. 35535 of 2018

PETITIONER:

RAMACHANDRAN K
AGED 41 YEARS
SECRETARY, SOPANAM ARTS AND SPORTS CLUB,
ANGADIPURAM -679321
PERINTHALMANNA, MALAPPURAM DISTRICT.

BY ADV. SRI.K.K.MOHAMED RAVUF

RESPONDENT:

THE CIRCLE INSPECTOR OF POLICE
PERINTHALMANNA,
MALAPPURAM DISTRICT-679321.

BY SR.GP SRI.P.P.THAJUDEEN

BY AMICUS CURIAE ADV.SRI.P.N.SUKUMARAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY
HEARD ON 07.01.2019, THE COURT ON 24.01.2019 DELIVERED THE
FOLLOWING:

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P.R.RAMACHANDRA MENON & N.ANIL KUMAR, JJ

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'CR'

Dated this the 24th day of January, 2019

J U D G M E N T

N.ANIL KUMAR, J:

This writ petition is filed by the petitioner seeking for the issuance of a writ of mandamus or any other appropriate writ, order or direction directing the respondent not to interfere with the functioning of the club and not to make any frequent raid or book cases for playing rummy in the club of the petitioner.

2. Briefly put, the case of the petitioner is as follows:-

Petitioner is the Secretary of a club under the name and style '*Sopanam Arts and Sports Club*' which is a registered body functioning at Angadipuram, Perinthalmanna. The said club is registered under the Societies Registration Act, 1860 (Act No. 21 of 1860) and has been functioning as per Ext.P1 registered bye-law of

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the Society. The object of the said club as per Ext.P1 includes encouraging the cultural and sports talents of the people in the locality and conducting various programmes to promote sports and games and other charitable work among the members. Most of the members of the club are coolies doing some petty business. The members do come and avail the facilities being offered by the club like playing caroms, chess and rummy etc. during their leisure time. The club is having CCTV camera facility and every activity done therein is recorded automatically by CCTV, which will be live for the next fifteen days. After the recent devastating flood in Kerala, under the guise of inspection, the respondent is frequently visiting the club and booking cases against the members of the club for playing rummy and thereby, the conduct and business of the club is affected and members of the club are put to lot of inconveniences and hardships. The main objection of the respondent is that playing rummy is a kind of gambling punishable under Sections 7 and 8 the Kerala Gaming Act, 1960 (hereinafter referred to as 'the Kerala Act'). The

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members do face constant threat and humiliation from the Police. Hence, the petitioner is before us.

3. In the writ petition, the contention raised is that the petitioner and the members of the club are entitled to carry on lawful activities within their premises and there should not be any interference or harassment from the Police Authorities as long as their activities are not in violation of Sections 7 and 8 of the Kerala Act. True, in the normal circumstances, there should be no interference by the Police against the day-to-day lawful functioning of the club. It is not permissible for the Police to enter into the club premises as a routine measure so long as the club is functioning with the framework of law in accordance with Ext.P1.

4. To substantiate the contention advanced by the learned counsel for the petitioner, reliance has been placed upon the two unreported judgments of this Court in Appukuttan and others v. State of Kerala [Crl.M.C.4077/2018] and Bhaskaranunni and others v.

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State of Kerala [Crl.M.C.No.8949/2017], wherein the learned Single Judge had quashed the First Information Reports submitted by the Police Officer before the jurisdictional Magistrate, mainly relying on **State of A.P. v. K.Satyanarayana and others** [1968 KHC 615]. Reliance has also been made by the petitioner on two judgments of this Court in **Danykutty v. State of Kerala** [1999 KHC 699] and **K.P.Sugunasankaran and others v. The Circle Inspector of Police and Others** [Crl.M.C. 3124/2011 and connected cases].

5. When this case came up for consideration before us, the learned Senior Government Pleader Sri.P.P.Thajudeen raised a doubt about the legal interpretation laid down in the aforesaid judgments of this Court.

6. The apparent discernible question which requires decision in this case seems to be a question of great importance. Hence, we have requested Adv.P.N.Sukumaran, the former Additional Director

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General of Prosecution to assist this Court as an Amicus Curiae.

7. Heard the learned counsel for the petitioner, the learned Senior Government Pleader, Sri.P.P.Thajudeen and Sri.P.N.Sukumaran, the learned Amicus Curiae.

8. One of the arguments of the learned Amicus Curiae was that the decision rendered in **Satyanarayana**'s case (supra) on which reliance has been placed by the learned counsel for the petitioner is not applicable in the case on hand. It was his submission that while approving the dictum of **Satyanarayana**'s case, which has some relevance on its efficacy, the case does not seem to have been examined by the learned Single Bench in the social perspective prevalent in India. It was also submitted that the decisions rendered by the Constitution Bench and some by a strength of three Judges were not considered.

9. The learned Amicus Curiae relied on some judgments of the Supreme Court in this regard. Having

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considered the rival submissions and having considered the larger public interest involved, the matter was heard by us at length though it is not ordinarily required to examine the question in a writ petition seeking police protection.

10. The primary questions that emerge are,

- (1) Whether the game of rummy is a game of skill or chance liable to be regulated under the Kerala Act or rules framed thereunder?
- (2) Whether the premises of a club known as 'Sopanam Arts and Sports Club' situated at Angadipuram were being used as a common gaming house?
- (3) Whether the petitioner, who was the office bearer of the club, at the time of raid by the Police could be said to be instrumental in conducting common gaming house?
- (4) Whether playing rummy at the club is gambling as

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defined under the Kerala Act?

(5) Whether the game of rummy even if it is a game of mere skill is still prohibited under Sections 7 and 8 of the Kerala Act?

(6) Whether Sections 7 and 8 of the Kerala Act either expressly or impliedly exclude the game of rummy as a game of skill?

(7) Whether the Police is competent to set the criminal law in motion in accordance with the Kerala Act, if a case is registered by the Police under Sections 7 and 8 of the Kerala Act based on credible information or reasonable doubt that the activities carried on by the club or its members are not in accordance with law and thereby indulging in unlawful activities or nuisance?

11. Common questions of law and facts arise in the above points and therefore, we think, it is advantageous to deal with these points jointly. The

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important question arises as to whether the game of rummy, which depends to a substantial degree upon the exercise of skill, comes within the stigma of Sections 7 and 8 of Kerala Act. The judgments of the Apex Court (Constitution Bench) in the two Chamarbaugwala cases [**State of Bombay v. R.M.D Chamarbaugwala and another** (AIR 1957 SC 699) and **R.M.D. Chamarbaugwala and another v. Union of India and another** [AIR 1957 SC 628] had held that gambling is not a trade and as such, is not protected under Article 19(1)(g) of the Constitution of India. It was further held that the competitions, which involve, substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by Art.19(1)(g) of the Constitution. In the above backdrop, we have to examine the question whether game of rummy is a game of chance or a game involving substantial skill. The expression 'game of mere skill' has been interpreted by the Apex Court in **Satyanarayana's case** supra. In this

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connection, we may reproduce para 12 of the judgment as follows:-

“12. We are also not satisfied that the protection of S.14 is not available in this case. The game of Rummy is not a game entirely of chance like the 'three card' game mentioned in the Madras case to which we were referred. The 'three card' game which goes under different names such as 'flush','brag' etc. is a game of pure chance. Rummy on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance of Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out there is an element of chance because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore, we think that the High Court was right in accepting the reference as it did.”
(underline supplied)

In **Satyanarayana**'s case (supra), the question considered by the Apex Court was whether the premises of a club known as “Crescent Recreation Club” situated in

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Secunderabad were being used as a common gambling house and whether the members, who were playing rummy for stakes at the time of raid, could be said to be gambling therein under the Hyderabad Gambling Act (2 of 1305 F) which follows in outline the provisions of the Public Gambling Act, 1867 in force in India. In **Satyanarayana's** case (supra), the Apex Court clearly stated in para 12 of the judgment that if there is evidence of gambling in some other way or that the owner of the house or club is making a profit or gain from the game of rummy or any other game played for stakes, the offence may be brought home. Para 8 of the judgment is relevant in this context wherein it has been held as follows:-

“8. In our opinion the points made by Mr. Rama Reddy do not prove this club to be a common gambling house. The presumption under S.7, even if it arises in this case, is successfully repelled by the evidence which has been led, even on the side of the prosecution.”

Hence it is very clear from the finding that the trial court convicted the accused after a full-fledged trial. The convicts then filed an application for revision before the Sessions Judge, Secunderabad, who made a reference to

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the High Court recommending the quashing of the conviction and the setting aside of the sentence. This recommendation was accepted by the learned Single Judge in the High Court and the appeal was brought against the judgment by Special Leave granted by the Supreme Court. Since necessary elements to constitute the offence were missing in the said case, the Supreme Court held that the High Court was right in accepting the reference as it did.

12. In the case on hand, the crux of the allegation made by the petitioner is that the Police Officers are disturbing the petitioner frequently under the guise of inspection as it would disturb the peace and harmony of the petitioner's club. In substance, it is maintained that the petitioner and the members of the club are entitled to carry on lawful activity within their premises and there should not be any interference from the Police authorities so long as their activities are in accordance with law. Before proceeding further with the rival contentions, let us have a look into the provisions of the Kerala Gaming

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Act,1960 and the Public Gambling Act, 1867.

Kerala Gaming Act,1960	Public Gambling Act,1867
<p>Section 2. Definitions.- In this Act, unless the context otherwise requires.-- (a) "common gaming house" means any house, room, tent,enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room,tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure,vehicle, vessel or place or otherwise howsoever; and <u>include any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming;</u> (underline supplied) (aa) xxxxx xxxxxxxx (b) "gaming" means wagering, betting or gambling, which includes the organizing, conducting, promoting, marketing or selling of on-line lotteries, but does not include paper lotteries organized conducted or promoted by any State Government or the Central Government.</p>	<p>1. Interpretation clause.--In this Act-- "Common gaming-house", means any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place or otherwise howsoever.</p>
<p>Explanation 1:- For the purpose of this definition, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution; Explanation 2.- For the purpose of this definition, gambling shall be deemed to comprise the conduct of on-line lotteries, by electronic devices including computers; computer peripheral and other equipments for operating on-line lottery systems, lottery terminals etc., through common gaming houses by selection of numbers or series of numbers which may be pre-determined, instantly determined pre-printed or pre-designed and whereby one or more of such participants who selected a specific number or series of numbers may or may not be declared as winners and rewarded with pre-determined, instantly determined, pre-printed or pre-designed winnings or prizes in the form of money or otherwise.</p>	

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<p>7. Penalty for opening etc. a common gaming house.-- (1) <u>Whoever opens, keeps or uses or permits to be used any common gaming house, or conducts or assists in conducting the business of any common gaming house</u> or advances or furnishes money for gaming therein, shall be liable on conviction to fine not exceeding five hundred rupees, or to imprisonment not exceeding three months, or to both. (underline supplied)</p> <p>(2) Whoever commits any offence relating to gambling by means of on-line lotteries shall be liable on conviction to a fine of rupee twenty thousand or with imprisonment which may extend to two years or with both.</p>	<p>3. Penalty for owning or keeping or having charge of a gaming-house.-- Whoever, being the owner or occupier, or having the use, of any house, walled enclosure, room 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, walled enclosure, room or place 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, walled enclosure, room or place 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, walled enclosure, room or place; shall be liable to a fine not exceeding two hundred rupees, or to imprisonment of either description in the Indian Penal Code (45 of 1860) for any term not exceeding three months.</p>
<p>8. Penalty for being found gaming in a common gaming house.--(1) Whoever is found gaming or present for the purpose of gaming in a common gaming house shall, on conviction (be liable to imprisonment which may extend to one month or to fine which may extend to five hundred rupees or to both) <u>and any person found in any common gaming house during any gaming or playing therein</u> shall be presumed, until the contrary be proved, to have been there for the purpose of gaming. (underline supplied)</p> <p>(2) Whoever commits any offence relating to gambling by means of on-line lotteries shall be liable on conviction to a fine of rupees twenty thousand or with imprisonment which may extend to two years or with both.</p>	<p>4. Penalty for being found in gaming-house.--Whoever is found in any such house, walled enclosure, room or place, playing or gaming with cards, dice, counters, money or other instruments of gaming, or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description, as defined in the Indian Penal Code (45 of 1860), for any term not exceeding one month; and any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purposes of gaming.</p>

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13. Learned Amicus Curiae placed reliance on the following decisions rendered by the Apex Court, the High Court of Kerala and the Madras High Court in [**State of Bombay v. R.M.D Chamarbaugwala and another** (AIR 1957 SC 699), **R.M.D. Chamarbaugwala and another v. Union of India and another** [AIR 1957 SC 628], **Sindhi Lohona Choithram Parasram v. State of Gujarat** [1967 KHC 714], **Sugathan v. State of Kerala and another** [2018(4) KHC 45(DB)], **MJ Sivani and others v. State of Karnantaka and others** [1995 KHC 982], **Director General of Police, Chennai and others v. S.Dillibabu** [2018 KHC 3340] and **State of Tamil Nadu v. Thirukkural Perumal** [(1995)2 SCC 449] and maintained that the offences under Sections 7 and 8 of the Kerala Act will be attracted, if the game of rummy is played for stakes. In other words, it is maintained that the stake involved in playing the game of rummy amounts to gambling.

14. Learned Senior Government Pleader, on

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instructions, submitted that the members of the Office bearers of the club are misleading the general public that the object of the club is to promote socio-economic, literary, intellectual and charitable activities. At the same time, it is submitted that illegal activities are carried out behind other activities like playing of football, badminton, chess and caroms. The learned Senior Government Pleader also maintained that the members of the club are engaged in gambling by way of playing rummy and certain members are professional gamblers.

15. Having regard to the above submissions, learned Amicus Curiae maintained that under Section 16 of the Kerala Act, the offences are cognizable notwithstanding anything contained under the Cr.P.C. According to the learned Amicus Curiae, there is nothing illegal on the part of the Police in registering the case under Sections 7 and 8 of the Kerala Act provided Section 5 of the Kerala Act has been complied with by the Police Officer before making such search or raid in the club. In applying this artificial

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presumption under Section 6 of the Kerala Act, the court should act with circumspection.

16. Sections 7 and 8 of the Kerala Act which we had already extracted hereinabove is not exactly similar to Sections 3 and 4 of the Hyderabad Gambling Act referred to in **Satyanarayana's case** (supra). In para 8 of the judgment, it is explicitly made clear that the Apex Court concurred with the views of the High Court that the prosecution failed to prove in the said case that the club was used as a common gambling house and the presumption arising under Section 7 of the Hyderabad Gambling Act was successfully repelled by the evidence which has been led even on the side of the prosecution. The corresponding provision to Section 7 of the Hyderabad Gambling Act is Section 6 of the Kerala Act. In **Sugathan v. State of Kerala and another** [2018(4) KHC 45(DB)], a Division Bench of this Court held that two preconditions are required in order to conduct a proper search by a detecting officer within the meaning of Section

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5 of the Act-- firstly, his reason to believe that the said place is used as a 'common gaming house', and; secondly, he has to record his reasons to entertain such a belief. In support of his submission, para 20 of the judgment is relied on wherein it has been held thus:-

“20. A presumption under Section 6 of the Act, can arise only if Section 5 of the Act has been complied with in letter and spirit. If there is non-compliance of Section 5 of the Act, a presumption under Section 6 is not available. As proof of compliance of Section 5 of the Act, the prosecution will have to produce materials, to indicate on what basis the Officer entertained a reason to believe that said place is used as a 'common gaming house' and the same should be borne out in the form of a record or a document. If any search or seizure is conducted without any such record or material, the search and seizure becomes illegal.”

17. Going by the above decisions, it is very clear that in case the club is used as a gaming house for the purpose of playing rummy for stakes and all the persons physically present there are found playing rummy, then they are certainly accused in the eye of law provided the detecting officer has complied with Section 5 of the Kerala Act before making such raid or inspection in the club.

18. “Common gaming house” is defined under

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Section 2(a) of the Kerala Act. From the definition, it is seen that even a residential house or room in a hotel can be converted into a common gaming house, if the other requirements in the definition are satisfied. However, on a careful reading of the Kerala Act, we are not persuaded to think that what really makes it a common gaming house is that gaming must be permitted or the instrument for the game must be kept there for profit or gain if the person is owning, occupying, using or keeping it. The Kerala Act provides a wider definition and latter part of the definition underlined supra makes it clear in this regard. Section 6 of the Kerala Act provides that any card, dice, gaming table, cloth, board or other instrument of gaming found in any place entered or searched under Section 5, shall be evidence, until the contrary is proved, that such place is used as a common gaming house. Whether the search was conducted in compliance of the requirements under Section 5 of the Act is a matter to be examined and decided by the trial court. When Section 6 of the Kerala Act declares the law that any card, dice etc. seized on

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search by the authorised officer shall be evidence, until the contrary is proved, it is not proper to set aside the First Information Report at its threshold itself. Based on the materials produced by the prosecution, including the articles seized by the Police Officer, the trial court is the competent forum to decide whether those articles are in fact articles or materials used for gaming purposes, whether search is made in compliance of the provisions under Section 5 of the Kerala Act and whether the alleged place of incident satisfies the requirements and conditions in accordance with the definition of common gaming house. The purpose of referring to **Sugathan's** case (supra) is to highlight the fact that in case Section 5 of the Kerala Act has been complied with in letter and spirit, the presumption under Section 6 of the Act is attracted and the search conducted thereafter is in accordance with law. We have referred to the above authority to distinguish between playing rummy for stakes and playing rummy for innocent pastime. The Kerala Act provides an inclusive

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definition of common gaming house, which clearly includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming. The definition contained in Section 2(a) of the Kerala Act is not in pari materia with the Hyderabad Gambling Act, which arose for consideration before the Apex Court in **Satyanarayana's** case.

19. Coming to the offences stipulated under Sections 7 and 8 of the Kerala Act, the learned Amicus Curiae pointed out that under Section 14A of the Kerala Act, the Government may, if they are satisfied that in any game the element of skill is more predominant than the element of chance, by Notification in the Gazette, exempt such game from all or any of the provisions of this Act, subject to such restrictions and conditions as may be specified in the notification. Admittedly, no notification was issued by the Government, exempting the game of rummy for stakes.

20. Now let us take the unreported Single Bench

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judgments of this Court in **Appukuttan and others v. State of Kerala** [Crl.M.C.4077/2018] and **Bhaskaranunni and others v. State of Kerala** [Crl.M.C.No.8949/2017]. Those cases were registered by the Police under Sections 7 and 8 of the Kerala Act for illegal game of rummy. Placing reliance on **Satyanarayana**'s case, the First Information Reports were set aside by the learned Single Judge in the above cases. In this regard, a Division Bench of the Madras High Court in **Director General of Police, Chennai and others v. S.Dilibabu** [2018 KHC 3340] clearly held that playing rummy as such does not constitute an offence. But, playing rummy with stakes to make money for gambling would be punishable under Section 3 of the Public Gambling Act, 1867. Hence the Division Bench authoritatively held that gambling is an evil and it is rampant, that gaming houses flourish as profitable business and that detection of gambling is extremely difficult, it is not proper to restrain the Police Officials

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from visiting club premises for inspection from time to time in accordance with law. In the context of game of rummy, the Division Bench followed the Constitution Bench decision of the Apex Court (Five Judge Bench] in **State of Bombay v. R.M.D.Chamarbaugwala and another** [AIR 1957 SC 699]. We may extract paragraphs 40,41 and 42 of the judgment as follows:-

“40.As far back as 1850, the Supreme Court of America, in Phalen v. Commonwealth of Virginia (1850) 49 U.S.163;12 Law Ed.1030 at p.1033(z) observed:

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with widespread pestilence, of lotteries. The former are confined to a few persons, and places, but the latter infests the whole community; icenters every dwelling; it reaches every class; it prays upon the hard earnings of the poor; it plunders the ignorant and the simple.

41. The observations were quoted with approval, in Douglas v. Commonwealth Kentucky, 1897-168 U.S.488;42 Law Ed.553 at p.555(zl). After quoting the passage from (1850) 49 U.S.163:12 Law ED.1030 at.p 1033(Z) the judgment proceeded:

'Is the state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the Legislature of a State contract away its power to establish such regulations as are

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reasonably necessary from time to time to protect the public morals against the evils of lotteries?"

42. It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above.

We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art.19(1)(g).

We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art.301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word 'trade', 'business' or 'intercourse'.

We are, however, clearly of opinion that gambling whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts.19(1)(g) and 301 could not possibly have been to guarantee or

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declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art.19(1)(g) or Art.301 of our Constitution.”

21. In this regard, another aspect has to be noted.

Reference was made by the learned Amicus Curiae to the dictum laid down in **Sindhi Lohona Choithra Parasram v. State of Gujarat** [1967 KHC 714], a Two Judge Bench of the Supreme Court after analysing the law in detail has ruled as follows:-

“6..... The seizure of instruments of gaming in the appellant's house entered under S.6 raises a presumption under S.7 that the house was used as a common gaming house and the persons found therein were then present for the purpose of gaming. In applying this artificial presumption the Court should act with circumspection. Playing cards may be kept and used for innocent pastimes. The presumption can be rebutted if from the prosecution evidence itself it is apparent that there was a reasonable probability of the playing cards not being kept or used as means of gaming or for the profit or gain of the occupier of the house. In the present case, the appellant could not successively rebut the presumption.....”

A similar view is expressed by the Supreme Court in a

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Two Judge Bench decision in **MJ Sivani v. State of Karanantaka** [1995 KHC 982]. While appreciating the point, it has been laid down in paras 10 and 11 of the judgment as follows:-

“10. A common gaming house is a place or public place kept or used for playing therein any game, or of chance, or any mixed game of chance and skill, in which the organizer keeps one or more of the players. It is also a place in which any game is played, the chances of which are not alike favorable to all the players. Gaming is to play at any game whether of skill or chance for money or money's worth and the act is not less gaming because the game played is not in itself unlawful and whether it is involved or did not involve skill.

11. Where in a certain game, certain operations are to be performed to enable the gamester to play the game, the persons taking part in such operations must be deemed to be 'gaming' or actually assisting in the gaming. “To game” therefore, is to play any game, whether of skill or chance, for money or money's worth. It is playing of the game for money or money's worth whether the game be or be not lawful. No game can be a game of skill alone. In any game in which even great skill is required, chance must play a certain part. Even a skilled player in a game of mere skill may be lucky and unlucky, so that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision the relative proportion of chance or skill when deciding whether a game is a game of mere skill. When in a game the element of chance strongly preponderate, it cannot be a game of mere skill. Therefore, it is not practicable to decide whether particular video game is a game of skill or mixed of skill and chance. It depends upon the facts, in each case.”

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Reference was also made by the learned Amicus Curiae to the decision reported In **K.R.Lakshmanan v. State of T.N** [1996 KHC 691] (Three Judge Bench), wherein the Apex Court in para 18 of the judgment clearly held as follows:-

“18. The judgments of this Court in the two Chamarbaugwala cases and in the Satyanarayana case clearly lay down that (1) the competitions where success depends on substantial degree of skill are not “gambling” and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of “mere skill”. We, therefore, hold that the expression “mere skill” would mean substantial degree or preponderance of skill.”

22. On a close analysis based on the decisions cited above, as has been rightly submitted by the learned Amicus Curiae, the definition contemplated under the Kerala Act with regard to common gaming house does not exclude rummy for stakes within the club, even if the club is not making profit from the business. Even otherwise, the decision as to whether a first information report submitted before the court under Sections 7 and 8 of the Kerala Act should not be quashed, on the ground that the place wherein the accused was arrested is not a common

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gaming house, is based ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated. The legal position is well settled that when a prosecution at its initial stage is sought to be quashed, the primary test to be applied by the court is as to whether the uncontroverted allegations as made, prima facie, establish the offence. It is for the court to take into consideration any special circumstance, which the court may deem fit and proper to permit the prosecution to continue. Elaborating his submission, reliance was also placed in **State of Tamil Nadu v. Thirukkural Perumal** (1995)2 SCC 449, considering the scope of Section 482 of Cr.P.C. to quash the FIR and criminal proceedings, wherein a Two Judge Bench of the Apex Court has held as under:-

“.....The power of quashing an FIR and criminal proceedings should be exercised sparingly by the courts. Indeed, the High Court has the extraordinary or inherent power to reach out injustice and quash the first information report and criminal proceedings, keeping in view of the guidelines laid down by this Court in various judgments (reference in this connection may be made with advantage to *State of Haryana v. Bhajan Lal*) but the same has to be done

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with circumspection. The normal process of the criminal trial cannot be cut short in a rather casual manner.....”

As far as the issue regarding the registration of the FIR under Sections 7 and 8 of the Kerala Act is concerned, in case the court is satisfied that the game of rummy is played for stakes, in accordance with the search and seizure as contemplated under Section 5 of the Kerala Act, the court should be extremely cautious to interfere with the investigation of a criminal case and should not stall the investigation except when it is convinced beyond doubt that the FIR does not disclose commission of offence and that the continuation of the criminal prosecution under Sections 7 and 8 of the Act would amount to abuse of process of court.

23. In view of the various decisions of the Apex Court, there cannot be any doubt that playing rummy for stakes within the club premises is an offence, provided the Police conducted search in accordance with Section 5 of the Kerala Act. We are in full agreement with the view

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expressed by the Division Bench of the Madras High Court in **Dili Babu**'s case (supra). Having heard the learned Amicus Curiae, learned counsel for the petitioner and the learned Senior Government Pleader, we are left in no doubt that playing rummy for innocent pastime is not an offence and is certainly a game of skill as held in **Satyanarayana**'s case (supra).

24. Coming to the statement filed by the respondent, we have noticed that the petitioner is one among the accused in the three crimes registered by the Station House Officer, Perinthalmanna Police Station for the offences punishable under Sections 7 and 8 of the Kerala Act. In all the aforementioned crimes, the petitioner is an accused and booked by the Police as he was found indulging in gaming for stakes. On investigation of the above referred crimes, it was revealed that the accused were playing “pullyvally”, “panimalath” etc. which are certainly games of chances for stakes. The amounts involved in the aforesaid crimes were seized by the Police

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in accordance with law from the 'Sopanam Arts and Sports Club' and produced before the jurisdictional Magistrate Court. After investigation, the Police submitted final report before the court concerned and the court took cognizance of the offences punishable under Sections 7 and 8 of the Kerala Act. The cases are now pending consideration before the Judicial First Class Magistrate Court, Perinthalmanna as S.T.Nos. 281/2017, 265/2018 and 298/2018 respectively.

25. While we cannot agree with the point of playing rummy for stakes within the club premises by the professional gamblers as a game of skill, we are of the opinion that the issue has, however, to be looked at from the social perspective as well. Coming to the reliefs sought for in the writ petition, we are of the considered view that if at all there is any objectionable or unlawful activities against the scheme of the Kerala Gaming Act, it should be enquired into by the Police. Needless to say, if the Police authorities have specific information or reasonable doubt that the activities made by the club or its members are not

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in accordance with law, or they indulge in the unlawful activities in violation of the provisions of the Kerala Act or any other enactment, it would be open to them, after recording reasons in the general diary maintained in the Police Station, to proceed to enter into the club premises, conduct investigation, interrogate those who involve themselves in such unlawful activities and take appropriate action on merits and as per law. While exercising the powers, the Police authorities are obliged to follow the mandatory provisions as contained in Section 5 of the Kerala Act. Logically, legal steps being taken by the Police as a prudent invigilator cannot be brushed aside by quashing the FIR in exercise of Art.226 of the Constitution of India. The court should be extremely cautious to quash the FIR unless it is brought out that the FIR prima facie does not disclose the commission of offences under Sections 7 and 8 of the Kerala Act and that the continuation of the prosecution would amount to abuse of the process of court. However, the Police should take extreme care to see that no innocent member of the club is

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harassed in any manner if no objectionable or illegal activity is being pursued in the club. We do make it clear that so far as the activity of the club is within the framework of law, the same shall not be interdicted by the Police on flimsy grounds. However, this shall not be a bar for the Police to take appropriate action to ensure that no illegal activities involving money transactions are being pursued in the club and its premises under the cover of playing rummy or “pullyvally” or “panimalathu” etc. In our view, this is absolutely essential in the interest of justice to maintain an orderly society. In view of the foregoing discussion and analysis, the judgments in **Appukuttan and others v. State of Kerala** [Crl.M.C.4077/2018] and **Bhaskaranunni and others v. State of Kerala** [Crl.M.C.No.8949/2017] and other decisions of the Single bench on similar lines also stand distinguished.

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26. Before we part with the case, we frankly express our deep appreciation for the extremely valuable assistance rendered by Sri.P.N.Sukumaran, the learned Amicus Curiae. In our view, the learned Amicus Curiae has discharged his duties towards this Court in an ideal manner. We also record our appreciation for the effort put forth by Sri.K.K.Mohamed Ravuf, the learned counsel for the petitioner and learned Senior Government Pleader Sri.P.P.Thajudeen for the good assistance rendered by them in disposing of this writ petition.

With the above observation, the writ petition is disposed of as above.

Sd/-
P.R.RAMACHANDRA MENON,
JUDGE

sd/-
N.ANIL KUMAR,
JUDGE

MBS/

