

1908.
BANK OF
BOMBAY
v.
SULEMAN
SOMJI.

"The Bank dealt with him (the mortgagor) as, and in his capacity of, an individual owner—not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its creditor really had in the capacity in which he was dealt with, namely, as beneficial owner, *i.e.*, as residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants:—*Cameron Kemm & Co.*

Solicitors for the respondents:—*Rawle Johnstone & Co.*

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. DHONDU BIN KRISHNA KAMBLYA.*

1904.
February 4.

Workman's Breach of Contract Act (XIII of 1859), sections 1, 2—Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870), section 31—Court fee on petition of complaint—Liability of the workman to pay.

An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

* Criminal Reference No. 142 of 1903.

THIS was a reference made by Mr. J. K. Kabraji, District Magistrate of Ratnagiri.

The reference was in the following terms :—

1. In this case the complainant Gharu Rama Pilankar complained that the accused Dhondu bin Krishna Kambya having agreed to serve as a Khalashi on the complainant's ship on condition of his paying him Rs. 25 in addition to food for a season of 7 months, received Rs. 3 in advance; that it was agreed two rupees more would be given to the accused at the time of sailing; that the accused wanted the balance earlier which the complainant refused to pay; however the complainant paid him two annas in the interval; that the accused worked for 3 days on the ship and left the service and thus committed a breach of contract of service punishable under section 2 of Act XIII of 1859. The accused almost admitted these allegations and stated that in consequence of the ill-treatment by the tindal of the ship employed by the complainant he left the service. The Magistrate held the accused liable for the breach of the contract.

2. The accused was summarily tried and convicted of the breach under section 2 of Act XIII of 1859 and ordered by Mr. A. R. Chitre, Magistrate, First Class, Ratnagiri, to pay the complainant Rs. 3 and annas 2 advanced by him in addition to Rs. 1-4-0 on account of the expenses incurred in the prosecution by the complainant.

3. The order awarding the expenses in the prosecution made presumably under section 31 of the Court Fee Act as well as the conviction are considered illegal and are recommended to be quashed and the whole amount awarded to be ordered to be repaid.

4. The conviction is considered illegal inasmuch as the case cannot be tried summarily, and enquiry to be made under section 2 of Act XIII of 1859 not being an enquiry into an offence which may be tried summarily (I. L. R. 4 Mad. 234). The order about the payment of compensation is considered wrong on the ground that according to section 2 of the Act, the Magistrate is to order only the repayment of the money advanced or such part thereof as may seem to the Magistrate just and proper (High Court Ruling 2 of 1891). Further, according to the same section the workman must be shown to have wilfully and without lawful and reasonable excuse neglected or refused to perform the work contracted, but from the papers of the case it does not appear that the Magistrate has found this to be so.

The reference came up for disposal before Chandavarkar and Aston, JJ.

PER CURIAM.—The question whether an offence under Act XIII of 1859 can be tried summarily has been answered in the affirmative by the Madras High Court in *In re Higgins* (Weir's Criminal Rulings, p. 466) and by the Allahabad High Court in

1904.

EMPEROR

v.

DHONDU.

1904.

EMPEROR
v.
DHONDU.

Queen Empress v. Indarjit ⁽¹⁾ and in the negative by the former Court in another case, *Pollard v. Mothial* ⁽²⁾. We prefer to follow the ruling last cited. A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, sections 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any "offence" as defined in the Criminal Procedure Code. Where there has been a wilful neglect or refusal on the part of a person to perform his part of the contract, the Statute enables the Magistrate to give at the option of the complainant to such person a *locus penitentiae* by ordering him either to return the advance or perform the contract. If he obeys the order, he commits no offence. It is only when the order has been disobeyed that there is "an act or omission, made punishable" by the law and falling within the definition of "offence" in the Criminal Procedure Code. The Magistrate has only then jurisdiction to deal with the disobedience of his order and sentence the person who has disobeyed to imprisonment.

There is no doubt this to be said for the contrary view that, having regard to the recital in the preamble that "it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment," and to the provisions of section 1 enabling the party aggrieved by such breach to make a complaint to a Magistrate and the Magistrate to issue a summons or warrant, it was the intention of the Legislature to treat such fraudulent breaches as "offences," and that, though the punishment provided is only for disobedience of the Magistrate's order, yet it is in reality punishment for the fraudulent breach. This view of the Act has been suggested in *Queen-Empress v. Kattagan* ⁽³⁾. There is no express decision of this Court on the point, but had that been the intention of the Legislature they would have said that the punishment provided was for the fraudulent breach itself, not for disobedience of the order of the Magistrate.

(1) (1889) 11 All. 262.

(2) (1881) 4 Mad. 234.

(3) (1897) 20 Mad. 235.

The order of the Magistrate awarding the expenses of the prosecution is illegal (see *Imperatrix v. Budhu Devu*)⁽¹⁾. As was held there, the repayment to the complainant of the Court fee paid on his petition of complaint could only be ordered "in addition to the penalty imposed" upon the person complained against and no penalty could be imposed till the person complained against had disobeyed the order for the payment of the sum advanced to him.

As the person complained against admitted the advance made to him and agreed to repay it and has repaid it, no prejudice can be said to have been caused to him by the summary trial held by the Magistrate and we decline to interfere with that part of the order which directed repayment. But we set aside the order as to Rs. 1-4-0 and direct that the complainant do refund it to Dhondu bin Krishna Kamblya.

R. R.

(1) (1891) Cri. Rul. No. 2 : Unrep. Cri. Cas. 534.

1904.

EMPEROR
v.
DHONDU.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarbar and Mr. Justice Heaton.

EMPEROR v. BALU SALUJI.*

Workman's Breach of Contract Act (XIII of 1859)—Inquiry under the Act—Summary trial not permissible.

1903.
October 13.

An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

Emperor v. Dhondu Krishna⁽¹⁾, followed.

THIS was a reference made by F. J. Varley, Acting Sessions Judge of Ahmednagar.

The reference was in the following terms :—

2. (i) The facts out of which this reference arose are that the accused Balu Saluji passed a *nolcrnamā* to do certain weaving work, in consideration of a sum of Rs. 99, which he wilfully and without lawful excuse failed to perform.

(ii) Mr. R. B. Phansalkar, Magistrate, First Class, Sangamner, who tried the case under Act XIII of 1859 directed the accused under section 2 to repay

* Criminal Reference No. 92 of 1908.

(1) (1904) ante p. 22 : 6 Bom. L. R. 255.