

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Phillips.

W. C. WHITTON, PETITIONER,

v.

MAMMAD MAISTRY, RESPONDENT.*

1915.
October
18, 19 and 26.

Madras Planters Labour Act (I of 1903), ss. 24 and 35—Breach of contract by maistry or labourer—Prosecution of maistry—Successive prosecutions and convictions, if permissible under the Act—Directions by the Magistrate to complete performance—Successive directions, if permitted by the Act.

Under section 35 of the Madras Planters Labour Act (I of 1903), the Magistrate has power to issue successive directions to a maistry or labourer to complete the performance of his contract.

Re Funga Maistry (1913) I.L.R., 36 Mad., 47, dissented from.

Successive prosecutions can be instituted and convictions obtained against a maistry in respect of successive defaults made by him under section 24, clauses a, b and c of the Act.

Unwin v. Clarke (1866) 1 Q.B., 417 and *Cutler v. Turner* (1874) 9 Q.B., 502, followed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of the Second-class Magistrate of Vayitri declining to give further directions to the respondent herein to complete the performance of his contract under section 35 of the Madras Planters Labour Act (I of 1903).

The facts appear from the following order of the District Magistrate:—

“The accused Mammad Maistry was sentenced to one month’s rigorous imprisonment on 28th March 1913, in Calendar Case No. 131 of 1913, by M. NARAYANA MENON, First-class Magistrate of Vayitri for an offence under section 24 of Act I of 1903. After the expiry of the term of imprisonment, the complainant applied for an order directing the accused to complete the performance of his contract under section 35 of the Act. A warrant was therefore issued and the accused was apprehended and produced before the Court and was on the 18th November 1913, given the necessary direction but he failed to obey it and was again prosecuted.

* Criminal Revision Case No. 454 of 1915 (Criminal Revision Petition No. 367 of 1915).

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“He was found guilty and was sentenced to two months’ rigorous imprisonment which he suffered. The petitioner then applied for a second direction to be given to the accused to complete the performance of his contract with him on pain of further prosecution and punishment.

“The Magistrate declined to make the direction as the accused had already undergone two terms of imprisonment, saying he had only power to give one direction and that had been given—vide *Re Panga Maistry*(1) : Hence the petition was rejected”.

Against this order the petitioner, who was the employer, preferred a Criminal Revision Petition to the High Court.

W. Barton for *E. R. Osborne* and *C. Narasimha Achariyar* for the petitioner.

N. Grant, the Acting Public Prosecutor, for the Crown.

The respondent did not appear in person, nor was he represented.

AYLING, J.

AYLING, J.—We are asked to revise an order of the Second-class Magistrate of Vayitri, dated 17th March 1915, refusing to direct counter-petitioner under section 35 of the Madras Planters Labour Act (I of 1903) to complete the performance of the contract entered into by him with petitioner. The Magistrate’s ground of refusal is that he had already issued one such direction on 18th November 1913, in default of compliance with which counter-petitioner had been convicted and sentenced to two months’ rigorous imprisonment under section 24 (c) of the same Act. He had in addition been previously tried and convicted under the same section and clause on 28th March 1913, for failure in connection with the same contract. The Magistrate held, following *Re Panga Maistry*(1), that he had no power to make more than one direction; and on this view dismissed petitioner’s application.

Mr. Barton, who appears for petitioner, contends that the ruling above quoted is erroneous: and that apart from such special restrictions as may be involved in the particular contract, there is no limit to the number of successive directions which may be issued under section 35, or to the number of prosecutions and convictions, which may follow in default.

(1) (1913) I.L.R., 36 Mad., 497 at p. 493.

He has been at pains to explain that his client is prosecuting this petition simply as a test case and is only anxious to have the law on the matter determined.

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The counter-petitioner is not represented; but the learned Public Prosecutor has been instructed to oppose the petition, and support the Magistrate's order. He has done so, not with reference to the abstract question of law on which the order is based, but by arguing that the two previous convictions of counter-petitioner and the previous direction have all been illegal, and that for this reason the direction now applied for should not be granted. We do not think we should be justified in ignoring such points when asked to interfere in revision to counter-petitioner's detriment.

We have therefore to consider the facts of the present case as well as the bearing of the Act upon them.

The contract itself is Exhibit A. Disregarding superfluous detail, it may be said to provide as follows:—

Counter-petitioner (called the contractor) in consideration of an advance of Rs. 50 undertakes to work, with 25 coolies, whom he is to procure, on petitioner's estate for six months from 20th December 1912 to 19th June 1913, at fixed rates of wages; if he makes default in such work, in whole or in part, petitioner has the option of calling on him to complete the performance of the work in default at any time up to 20th December 1915.

His subsequent conduct is not in dispute.

He failed to appear till 13th February 1913, when he brought not 25 coolies, but 8; these worked till 28th February 1913, when they began to absent themselves, and were all gone by 16th March 1913. After that no more work was done. Counter-petitioner returned to the estate after his first imprisonment, and the first direction, and promised to pay the balance due by him. He has not however done so.

On these facts I can find nothing illegal in the first conviction which is dated 28th March 1913. We have heard some discussion of the meaning of clause (c) of section 24; but I take it that the words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received, or to refund any balance of the

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advance for which he is unable to supply labour or to prove that it has been legitimately expended.

On this reading, the conviction was justified, and also the direction which was passed on 18th November 1913, under section 35 on counter-petitioner's apprehension after release from the first term of imprisonment.

Admittedly this direction was not complied with; counter-petitioner promised to return the balance of money due, but failed to do so, or to do any more work.

Now what was the effect of this? The Act nowhere makes non-performance of a contract punishable in itself. Section 24 renders punishable three specified failures in connexion with a contract. It says: "Any maistry who (a) fails without sufficient cause to present himself at an estate upon the date specified in his contract; or (b) having contracted to remain upon an estate for a specified time fails without sufficient cause so to remain; or (c) fails to account for the money advanced to him by a planter in consideration of his contracting to supply labourers to work on an estate shall be punishable with imprisonment which may extend to three months or with fine which may amount to five hundred rupees or with both; and the Magistrate may award to the planter out of the fine such compensation as he may deem fit."

Section 35 runs thus: "On the expiry of any sentence of imprisonment on a maistry or labourer for any offence under this Act the maistry or labourer shall, if the planter or employer so requests, be produced before the Magistrate, who shall direct such maistry or labourer to complete the performance of his contract on pain of further prosecution and punishment in case of his refusal to do so, and no conviction under this Act or imprisonment under such conviction shall have the effect of releasing any maistry or labourer from the terms of his contract or labour contract, as the case may be.

"Provided that no such direction shall be given in the case of a labourer, if more than twelve months have elapsed since the date on which his original labour contract would have determined."

We cannot take this as constituting disobedience of the contract a distinct offence, if only for the simple reason that no punishment is specified for it. Mr. Barton admits that the words

“on pain of further prosecution” can only be taken to refer to a fresh prosecution under section 24.

This is the view taken by the Magistrate who in Calendar Case No. 580 of 1914 has convicted counter-petitioner of the same offence under section 24 (c)—failure to account for the advance. The question is whether this was legal—or whether counter-petitioner was entitled to plead “*autre-fois convict.*”

That the contract was still in force cannot, I think, be disputed. As already pointed out, petitioner had the option of extending the period for performance up to 20th December 1915, and section 35 itself provides that the previous conviction should not operate as a release.

Mr. Barton in supporting the legality of the second conviction relies on two English cases—*Unwin v. Clarke*(1) and *Outler v. Turner*(2).

Both these cases are of workmen absenting themselves from work contrary to the terms of a contract; and it is held that in such circumstances though the workman did not return to work after his first conviction and imprisonment, yet, as the contract continued, he was guilty of a fresh offence, and could be again convicted. The question is whether the principle of these rulings applies to a case of failure to account for an advance. After careful consideration I am inclined to think it does. The contract and with it the liability to account for the advance is still in force: and counter-petitioner is by the option of the employer given a fresh chance of accounting for it, in either of the ways in which he could have accounted for it originally. His failure to do so is just as much a fresh offence as the workman's failure to resume work in the English cases. I can find no valid ground of distinction.

No argument has been addressed to us to the contrary.

The conviction in Calendar Case No. 580 of 1914 was therefore correct; and there only remains the question of whether the Magistrate was justified in refusing the second direction. The wording of the section appears to leave him no option; and I can see nothing in the Act, which is opposed to the issue of repeated directions. I have carefully considered the judgment

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(1) (1886) 1 Q.B., 417.

(2) (1874) 9 Q.B., 502.

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in *Re Panga Maistry*(1). I am not without some sympathy for the view which the learned Judge seems to have taken: but we have to construe the statute as it stands, and, with all respect, I am unable to agree that the Magistrate can issue only one direction. It seems to me unfortunate that the Magistrate is given no discretion regarding the issue of directions: and in this as in other respects, the Act seems to call for amendment. The Magistrate has of course discretion as to the imposition of punishment on conviction and would presumably exercise it where the Act was being vindictively used. But this is only a partial safeguard against the possibility of oppressive use of the section. As the law stands, in the present case, the Magistrate should have issued the direction: and I would now direct under section 423, Code of Criminal Procedure, that a direction should issue.

PHILLIPS, J.

PHILLIPS, J.—I need only add that I agree in the view taken by my learned brother of the meaning of section 35 of the Act. The section itself does not limit the number of directions to fulfil the contract that can be made, but it does say that action taken under the section does not put an end to the contract. If the contract is still in force there can undoubtedly be a fresh breach of such contract, and for each breach (coming within the provisions of section 24) the offender renders himself liable under section 35. This view is in accordance with the interpretation put upon similar statutes in England—*Unwin v. Clarke*(2) and *Cutler v. Turner*(3).

I therefore concur in the order proposed.

K.R.

(1) (1913) I.L.R., 36 Mad., 497.

(2) (1866) 1 Q.B., 417.

(3) (1874) 9 Q.B., 502.