

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. Cal. No. 2 : Unrep. Cri. Cas. 534.

CRIMINAL REFERENCE.

Before Mr. Justice Chondavarkar 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 *nokharnama* 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 1903.

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

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Rs. 99 to the complainant within 15 days. The accused having failed to comply with the order has been sentenced by the said Magistrate to two months' rigorous imprisonment or until such sum has been sooner paid.

(iii) Summary nature of the trial.

(iv) Reasons. It has been laid down in *Emperor v. Dhondu* reported at 6 Bom. L. R. 255, that offences under Act XIII of 1859 are not triable summarily. The practice of the Magistrates in this district varies considerably. At the time when the reported reference was made, the contrary view was not pressed upon the attention of their Lordships who heard the reference. They say "We prefer to follow I. L. R. 4 Mad. 234," while saying "there is no doubt this to be said for the contrary view" . . . that the preamble seems to prescribe punishment for fraudulent breach of contract.

The District Magistrate has appeared through the Public Prosecutor and adduced the following considerations for the contrary view:—

(i) The word "complaint" is used in section 1, and complaint is defined in section 4, Criminal Procedure Code, as "an allegation made to a Magistrate with a view to his taking action under the Criminal Procedure Code." Had the breach been merely disobedience of the Magistrate's preliminary order, the word "application" would have been used.

(ii) It is the practice of some Magistrates to pass preliminary order while some make the order and penalty on failure to comply in one and the same order, the latter seems to be justified by the fact that the wording of section 2 is not disjunctive. "And, if . . ."

3. The following considerations appear also to the Court to have weight.

(i) The penalty is 3 months' imprisonment and this is within the limit of summary jurisdiction.

(ii) The order is conditional "or until such sum of money be sooner paid," so the workman is not prejudiced.

(iii) Summary jurisdiction is exercised by Magistrates of experience, and they only take action under Act XIII of 1859 when the case is a clear one. If a regular procedure be prescribed, the object of the Act will be largely defeated, for an element of delay will be introduced, and the remedy of masters and employers will be as speedily obtained through the Civil Courts, though the Act was designedly framed to avoid the necessity of resorting to the Civil Courts.

4. The necessity for making this reference arises as it is desirable to have the point cleared up definitely, whether cases under the Act XIII of 1859 can be legally tried in a summary manner or not.

The reference was heard by Chandavarkar and Heaton, JJ.

M. B. Chaubal, Government Pleader, for the Crown,

PER CURIAM.—The law enunciated in *Emperor v. Dhondu*⁽¹⁾ ought, we think, to be followed. It is in accordance with the rule of construction applicable to an Act, such as Act XIII of 1859. That rule is well explained by Lord Herschell in *Derby Corporation v. Derbyshire County Council*⁽²⁾. The action there was a proceeding in the County Court under the 10th section of the Rivers Pollution Act, 1876, under which a County Court Judge had power to order any person to abstain from polluting a river and the said person might be required to perform that duty in the manner specified in the order. If the order were disobeyed, the County Court Judge had jurisdiction to impose a penalty not exceeding £50 a day, as he should think reasonable.

As Lord Herschell says in his judgment, the proceeding in which the County Court Judge orders any person to abstain from polluting the river and requires him to perform that duty in a specified manner is not a penal proceeding, because "all it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance." Then his Lordship goes on: "The Legislature has provided that if that order is disobeyed then the County Court Judge may impose a penalty . . . That is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed".

This Court, therefore, quashes the orders in this case. The lower Court will be at liberty to take fresh proceedings according to law.

Order set aside.

R. R.

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

(2) [1897] A. C. 550.