

1931
 INDRACHAND
 BAGHRAJ
 v.
 EMPEROR
 Beaumont C. J.

withdrawn. I am in some doubt from the papers before us whether the complaint which has been lodged by the petitioners covers any case to which section 195 would not apply. That is a matter to which the learned Magistrate will have to direct his mind.

Rule discharged. Applicant will have liberty to apply if the learned Magistrate is found at a later stage to take cognizance of an offence of which he could not take cognizance under our judgment.

BROOMFIELD, J. :—I agree.

Rule discharged.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.

1932
 January 11.

VITHALDAS MOOLJI (ORIGINAL ACCUSED), APPELLANT v. EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 514—Sentence of fine—Bond for appearance before Court on a particular date—Extension of time—Fresh bond necessary if time extended.

On August 10, 1931, the accused was convicted of cheating and sentenced to pay a fine of Rs. 1,000. Being unable to pay the fine, the accused on the same day entered into a bond by which he bound himself to appear before the Court of the Presidency Magistrate, Third Court, on August 24, 1931, and in case of making default therein, he bound himself to forfeit to His Majesty the King-Emperor of India the sum of Rs. 1,000. On August 24, the accused applied for extension of time and one week's extension was allowed. On August 28, further time was given till September 4. On this date the accused neither appeared in Court nor paid the fine. On October 29, a distress order was issued by the Magistrate and on November 6, the accused was arrested, and committed to prison for default of payment of fine. On November 18, the appeal of the accused against the conviction and sentence was heard and allowed and he was discharged from prison. On November 20, the Magistrate made an order enforcing the bond. The accused having appealed to the High Court from this order :

Held, setting aside the order, that on the terms of the bond, which must be strictly construed, the accused only bound himself to appear on August 24, 1931, and not on any date finally fixed for payment. A Magistrate is bound, when he extends the time, to take a fresh bond requiring the accused to appear on the altered date,

*Criminal Appeal No. 708 of 1931.

unless the original bond provides for the appearance of the accused on the specified date or on such other date or dates as may be fixed for the payment of the fine.

APPEAL against the order passed by D. N. D. Khandalawala, Presidency Magistrate, Third Court, Bombay.

1932
VITHALDAS
MOOLJI
v.
EMPEROR

The appellant was convicted on August 10, 1931, on two charges under section 417 of the Indian Penal Code for cheating and sentenced to pay a fine of Rs. 500 on each charge, in default to suffer three months' rigorous imprisonment. His counsel made an application for time to pay the fine. The Magistrate gave him time for payment of fine on his executing a bond which was in terms as follows:—

“WHEREAS I, Vithaldas Moolji, inhabitant of Bombay, have been convicted to pay a fine of Rs. 500 and in default of payment thereof to undergo rigorous imprisonment for three months on each of the two charges (fine of Rs. 1,000 in all) and whereas the Court has been pleased to order my release on condition of my, Vithaldas Moolji's, executing a bond for my appearance on August 24, 1931.

I, Vithaldas Moolji, hereby bind myself to appear before the Court, Presidency Magistrate, Third Court, at 11-30 o'clock on August 24, 1931, and in case of making default therein I bind myself to forfeit to His Majesty the King-Emperor of India the sum of Rs. 1,000.”

On August 19, 1931, the appellant appealed to the High Court against the conviction and sentence.

On August 24, the appellant made an application for extension of time for payment of the fine and one week's extension was allowed. On August 28, the appellant presented another application asking for six weeks' further extension and after hearing his counsel the Magistrate allowed him time till September 4. On that date the appellant failed to appear whereupon a warrant was issued and sent to Mulund for execution. The appellant continued to remain absent.

On September 17, a notice under section 514 of the Criminal Procedure Code for breach of the warrant was issued against him but could not be served.

On October 29, a distress order was issued by the Magistrate and on November 6, the accused was arrested and committed to prison for default of payment of the fine.

1932

VITHALDAS
MOOLJI
v.
EMPEROR

On November 18, the accused's appeal against his conviction and sentence was heard and allowed and he was released from prison.

On November 20, the Magistrate made an order enforcing the bond and directed that a penalty of Rs. 250 which would be one-fourth of the amount specified in the bond be imposed and in default of payment the accused should be kept in the civil jail for a period of six weeks.

Against this order the appellant appealed to the High Court.

M. A. F. Coelho and *E. Biem*, for the appellant-accused.

P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT, C. J. :—This is an appeal by the accused from an order made by the learned Presidency Magistrate, Third Court, on November 20, 1931, whereby he directed that the bond given by the accused should be enforced to the extent specified in the order.

The material facts are that on August 10 last the accused was convicted of cheating, and a fine of Rs. 1,000 was imposed and the learned Magistrate gave 10 days for the payment of the fine. That would make the fine payable by August 20, but for some reason or other everybody seems to have assumed that the date was fixed as August 24, and I will assume that that was the date fixed for the payment of the fine. On the same date as the conviction, viz., August 10, the accused entered into a bond whereby after reciting the sentence upon him to pay a fine he bound himself to appear before the Court of the Presidency Magistrate, Third Court, at 11-30 a.m. on August 24, 1931, and in case of making default therein, he bound himself to forfeit to His Majesty the King-Emperor of India the sum of Rs. 1,000. On August 21, the accused made an application for extension of the time for payment of the fine, and one week's extension was allowed. On August 28, further time was given up till September 4.

On September 4, the accused neither appeared in Court nor paid the fine, and thereupon apart from any question as to the bond the Magistrate could undoubtedly have issued a warrant for the arrest of the accused, the fine not having been paid by the last date allowed. On October 29, a distress order was issued by the Magistrate, and on November 6 the accused was arrested and committed to prison for default of payment of the fine. The accused had appealed against his sentence, and on November 18, the appeal was heard and allowed, and he was discharged from prison, and of course his obligation to pay the fine came to an end. On November 20, the Magistrate made the order enforcing the bond which is now appealed from.

On behalf of the accused it is said that the terms of the bond have not been proved to have been broken because the bond only bound the accused to appear on August 24, at 11-30 a.m. There is evidence that the accused did not appear on September 4, which was the last day fixed for the payment of fine, but there is no evidence that he did not appear on August 24. The learned Magistrate disposed of that argument in this way. He says that time given to the accused was extended on the application of the accused on two occasions, but that it was not obligatory to take a fresh bond on each occasion when extension was sought and granted. Now, whether that is so or not appears to me to turn entirely on the form of the bond. In this case the bond provided for the accused's appearance on August 24, 1931. It did not refer to the date of the payment of the fine. The bond follows the form 37A in the 5th Schedule of the Criminal Procedure Code, but those forms need not be slavishly followed. They can be adapted to meet the facts of the particular case, and I think, if there be any possibility of the date of payment of the fine being extended, the proper form of bond to take would be for the appearance of the accused on the specified date or on such other date or dates as may be fixed for the payment of

1932

VISHALDAS
MOOLJI
v.
EMPEROR*Beaumont C. J.*

1932
 VITHALDAS
 MOOLJI
 v.
 EMPEROR
 Beaumont C. J.

the fine. If that had been the form of the bond then no difficulty would have arisen. As that was not the form of the bond, I think the learned Magistrate was bound, when he extended the time, to take a fresh bond requiring the accused to appear on the altered date. It is said by the learned Government Pleader that we ought to assume that the bond was really intended to require the accused to appear on the date finally fixed for the payment of the fine, and further that, inasmuch as the accused did not appear on September 4, when the fine had to be paid, we should assume that he did not appear on August 24, when there was no reason for his appearance. But in my opinion we cannot make either of those assumptions. A bond imposing a penalty must always be construed strictly. Here the only obligation in the bond was to appear on August 24. The party alleging that the condition has been broken must prove the breach. We cannot assume a breach.

I think, therefore, the appeal must be allowed and the order of the learned Magistrate set aside.

BROOMFIELD, J. :—I agree.

Appeal allowed.

J. G. R.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

SOWKABAI PANDHARINATH RAJAPURKAR (ORIGINAL PLAINTIFF),
 APPELLANT v. SIR TUKOJIRAO HOLKAR (ORIGINAL DEFENDANT),
 RESPONDENT.*

1931
 September 10.

Practice and procedure—Civil Procedure Code (Act V of 1908), Order XIV—Preliminary issue—Issue of law—Issue of fact—"Demurrer"—Practice as to trial of.

Strictly speaking Order XIV of the Civil Procedure Code does not empower a Court to frame a preliminary issue of fact.

Where, however, a Court has framed issues which properly arise in a case, the Judge may, in a proper case, come to the conclusion that one or more of those issues

*O. C. J. Appeal No. 18 of 1931 : Suit No. 402 of 1927.