

CRIMINAL REFERENCE.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NARWANJI PRASAD SINGH

v.

LACHMAN HAJAM.*

1908
June 22.

Act XIII of 1859, ss. 2 and 3—Contract—Imprisonment—Legality of simultaneous orders to perform the work contracted for and to suffer imprisonment in default.

An order of imprisonment in default, passed simultaneously with an order to perform work according to the terms of the contract under Act XIII of 1859, is illegal.

ONE Narwanji Prasad Singh, a brick contractor, carrying on business at Shahpur in the 24-Parganas, filed a complaint against the accused, Lachman Hajam, on the 5th March last, stating that he had advanced various sums of money to such person, between the 8th December 1907 and 24th February 1908, for work to be performed, from January 1908 till the 1st June, on his Shahpur brick-fields, and that the latter had wilfully and without lawful cause refused to complete the same according to the terms of the contract.

The case was tried by a Deputy Magistrate of Alipore, who passed the following order: "I direct him, therefore, under s. 2 of Act XIII of 1859, to perform the work contracted for and to join the work by the 11th May next. If he fails to do it, he will suffer rigorous imprisonment for three months."

The officiating District Magistrate of Alipore referred the case to the High Court under s. 438 of the Criminal Procedure Code, recommending the reversal of the order, both on the facts and

* Criminal Reference No. 96 of 1908, by L. Birley, Officiating District Magistrate of Alipore, dated the 16th May, 1908.

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on the ground of the illegality of the order of imprisonment, on the authority of *Sew Balak Raut v. Banwari Singh**.

*Before Mr. Justice Pargiter and Mr. Justice Woodroffe.

SEW BALAK RAUT
 v.
 BANWARI SINGH.*

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 July 8.

Babu Jatindra Mohun Sen Gupta for the petitioners.

PARGITER J. This Rule was issued on the District Magistrate of the 24-Pergunnahs to show cause why the sentence passed on this applicant under section 2 of Act XIII of 1859 should not be set aside on the ground that it was not passed in conformity with law, or why such further order should not be passed as to this Court may seem fit.

The case is one in which the applicant was ordered to repay a certain sum of money, which had been advanced to him by the complainant, and the Sub-divisional Magistrate of Barrackpore, at the same time that he passed the order directing the applicant to refund the money, also ordered that he should be sentenced to rigorous imprisonment for two months in default. The section clearly implies that, after the order is passed for repayment under the first part of the section, an interval should occur in order to see whether he should comply with it or not. The Magistrate, without giving him such opportunity, has imposed the sentence, that is, he has imposed punishment for an offence, which had not been committed at the time when he passed the order. That was clearly wrong. It was so held in *Srinivasa Mudali v. Ponnambalam*(1).

Accordingly we set aside the order sentencing the applicant to imprisonment, and make the Rule absolute.

This order governs also Criminal Revision No. 506.

WOODROFFE J. I agree that these Rules should be made absolute. But I wish to add that the case in *Averam Das Mochi v. Abdul Rahim*(2), referred to in the Explanation, merely holds that the proceeding under the first clause of section 2 of Act XIII of 1859 is not a criminal proceeding. In the present case an order was passed under the second clause of section 2 concurrently with an order under the first portion of that section. The order, which was passed, awarded a term of imprisonment. In this connection we have been referred to a decision in *Queen-Empress v. Ashwini Kumar Ghose*(3) and to section 4, clause (c) of the Criminal Procedure Code under which an offence means any act made punishable by law. That being so the order before us is one, which it is within our jurisdiction to deal with.

Rule absolute.

* Criminal Revision No. 505.

(1) (1882) I. L. R. 5 Mad. 376. (2) (1899) I. L. R. 27 Calc. 131.

(3) (1896) I. L. R. 23 Calc. 421.

Mr. A. Chowdhry (Babu Tarak Chandra Chakravarti with him), for Narwanji Prasad Singh, dealt mainly with the facts of the case.

Mr. Mahmoodul Huq (Babu Atulya Charan Bose with him) for the opposite party. The order of imprisonment in default of non-compliance with the order to perform the work contracted for is illegal.

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STEPHEN J. The complainant in the case that I have just dealt with obtained an order in his favour from the Deputy Magistrate as regards one of the workmen, whom he says he contracted with. By that order the workman was ordered to perform the work contracted for under the sanction of imprisonment for a term, which exceeds the term of the contract. This order is referred to us by the District Magistrate under section 438 of the Criminal Procedure Code on the ground that it is illegal in respect of the term of the imprisonment that is imposed according to the ruling of this Court mentioned in the letter of Reference. This is so, and the order must be set aside accordingly. The District Magistrate also is of opinion that the decision is against the weight of evidence. This seems to me more doubtful, as it seems that the person complained against probably came to Shahpur to work for the complainant, which leads me to suppose that the story of the advance is more likely to be true than the District Magistrate thinks. In the view of the point of law, however, it is unnecessary to decide this point.

HOLMWOOD J. The District Magistrate in referring the conviction of Lachman Hajam to us for reversal has drawn our attention to the illegality of the Magistrate's order, on which alone I agree it must be set aside, but he has also referred the matter to us on the ground that the Deputy Magistrate has decided in favour of the contract against the weight of evidence, and, under the special circumstances of the case, has occasioned a serious miscarriage of justice.

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I must say I agree with all that the learned District Magistrate has written. It is immaterial now, as the order has in any case to be set aside as illegal, but it might have, and to my mind has, in revision a very strong bearing on the propriety of carrying the connected proceedings further.

*Rule absolute.*

E. H. M.