

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NARSING PRASAD SINGH

v.

EMPEROR.*

1908

June 22.

Act XIII of 1859, (ss. 2 and 5—Contract—Criminal breach of contract—Workmen—Imprisonment—Effect of extension of the Act beyond the Presidency towns—Liability to repay money after the expiry of the term of the contract.

The effect of s. 5 of Act XIII of 1859 is to extend the whole of its provisions to the place where it is declared to be in force, and a master or employer resident or carrying on business at such place has the same rights as are conferred on masters or employers resident or carrying on business in a Presidency town.

Per STEPHEN J. The expiration of the term of the contract does not deprive the complainant of his right to ask for the repayment of the money advanced by him.

Queen-Empress v. Konda(1) followed. *Khoda Buksh v. Moti Lal Johori* (2) dissented from.

Per HOLMWOOD J. *contra*. The complainant cannot exercise an option to recover the amount advanced after the expiry of the contract. *In re Chikka Putta* (3), *In re Matha Gowandan* (4), *In re Bettay* (5) and *Khoda Buksh v. Moti Lal Johori* (2), followed.

ONE Narwanji Prasad Singh, a brick-contractor, carrying on business at Shahpur in the district of the 24-Parganas, complained against the petitioners under section 1 of Act XIII of 1859, on the 5th March last, alleging that he had contracted with them verbally in the Patna district for service as labourers in his Shahpur brickfields till the 31st May 1908, and had paid them various sums in advance on account of work to be done by them, but that they had wilfully and without lawful or reasonable excuse neglected to perform the same according to the terms of the contract.

* Criminal Miscellaneous Revision, No. 75 of 1908, against the order passed by L. Birley, Officiating District Magistrate of Alipore, dated the 11th May, 1908.

(1) (1893) I. L. R. 16 Mad. 347.

(3) (1884) 1 Weir. 704.

(2) (1906) 11 C. W. N. 247.

(4) (1884) 1 Weir. 705.

(5) (1884) 1 Weir. 706.

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Process was issued against them, and their cases were fixed before Babu Nando Lal Bagchi, a Deputy Magistrate of Alipore, for the 19th May. In the meantime the petitioners obtained a Rule from the High Court to quash the proceedings upon the ground that the trying Magistrate had no jurisdiction, and in the alternative, for a transfer of the case to Patna, and the proceedings pending before Babu Nando Lal Bagchi were directed to be stayed. The Rule came on for hearing on the 10th June, when the period of the contracts had expired.

Mr. A. Chowdhury (and *Babu Tarak Chandra Chakravarti*) for Narwanji Prasad. The remedy under Act XIII of 1859 is of a civil nature. The option of getting the money, which was advanced, returned after the expiry of the contract period still exists. The case of *Khoda Buksh v. Moti Lal Johori* (1) seems to hold otherwise, but the opinion there expressed is *obiter*. He then dealt with the case on the facts.

Mr. Mahmoodul Huq (with *Babu Atulya Charan Bose*) for the petitioners. The effect of section 5 of Act XIII of 1859 is only to give a Magistrate beyond the limits of a Presidency town the same jurisdiction as a Police Magistrate has within such limits, but subject to the same conditions as to residence of the master or employer. The contract having now expired, the complainant cannot be said to have an *option* or choice as to which of the alternative remedies provided for in the Act he would have: see *Khoda Buksh v. Moti Lal Johori* (1), *In re Chikka Putta* (2), *In re Matha Goundan* (3), *In re Bettay* (4).

STEPHEN J. The petitioners are alleged to have entered into a contract at or near Patna with one Narwanji Prasad to work for him at certain brickfields in the neighbourhood of Calcutta for a period ending on the 31st of May, now passed. It is said they received an advance of money on account of the

(1) (1906) 11 C. W. N. 247.

(3) (1884) 1 Weir. 705.

(2) (1884) 1 Weir. 704.

(4) (1884) 1 Weir. 706.

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work that they contracted to perform, and that they subsequently wilfully and without lawful or reasonable excuse refused to perform it. A complaint was accordingly made against them by Narwanji Prasad under section 1 of Act XLIII of 1859 on the 5th March 1908, and the case was transferred to a Deputy Magistrate, who made an order against one of the persons charged, with which we are not at present concerned. A Rule has now been granted calling on the District Magistrate of the 24-Parganas to show cause why the proceedings against the other persons, who contracted to serve Narwanji Prasad, should not be quashed as being without jurisdiction. The Magistrate considers that there is no objection to the jurisdiction of the trying Court, but also offers no objection to the proceedings being quashed, as he considers it probable that the case has been falsely instituted at the instance of the petitioner's zemindar. We have, however, heard counsel on behalf of the complainant, which I consider was the correct procedure, as the present proceedings are in fact undertaken to enforce his civil right.

The argument in favour of the Rule to show that the Magistrate has no jurisdiction is two-fold. That which goes more to the root of the matter is that, as the complainant does not reside or carry on business in a Presidency town, he cannot claim any remedy under the Act. An argument of more restricted scope is that, as the term of the contract has now expired, the complainant's remedy is gone.

The first argument may be stated thus. The Act confers on certain persons, namely masters and employers residing or carrying on business in any Presidency town, the privilege of enforcing their civil rights by a penal remedy enforceable by criminal procedure. The workman, or the place where he contracts to do his work, may be anywhere, but the remedy is to be sought from a Magistrate of Police, which means a Presidency Magistrate. When the Act is extended by section 5 the only effect of the extension is to enable officers specially appointed to exercise the functions of a Magistrate of Police, and the privilege of persons residing or carrying on business in a Presidency town is not extended to any one else. I cannot agree with this argument. The curious effect attributed, and as it seems to me rightly

attributed, to the Act, of enabling a Presidency Magistrate to enforce a contract made and to be performed anywhere in British India, no doubt lends some colour to the suggestion that the extension of the Act has no effect except to provide for its enforcement at or near the place where it was made, or it is to be performed. But had this been the intention of the Legislature, I do not think they would have mentioned the extension of the Act. Also I consider that the language of section 5 shows that the extension of the Act means the extension of the whole Act, that such extension is something more than merely conferring certain powers on the officers mentioned, and that giving them those powers is merely ancillary to something else. If this is so, the only other effect that the extension can produce is to confer on persons residing and carrying on business in the area, to which the Act is extended, the privilege conferred by the Act on persons similarly situated in regard to the Presidency towns.

That a practice has been followed for nearly fifty years is no proof that it is legal. But when we find that the Act has been extended to all the Collectorates in the Bombay Presidency, to all the districts of Madras, to the town and cantonment of Rangoon, and to the tea districts of Assam and Darjeeling, it is impossible to suppose that the privileges it confers were not intended to be exercised, and were not in fact exercised by persons, who resided or carried on business in those places and did not do so in a Presidency town. And I cannot find in the numerous reports of cases that have arisen under this Act that the exercise of such a privilege has ever been challenged. Consequently I am of opinion that a master or employer residing or carrying on business in a place, to which the Act is extended, has the same rights as are conferred by the Act on masters or employers resident or carrying on business in any Presidency town; and that the first ground I have mentioned, on which we are asked to make this Rule absolute, fails.

As to the second argument in support of the Rule, apart from authority, I cannot regard it as sound. It was long ago decided in this Court that the Magistrate cannot order the workman to perform his work after the term of the contract had expired;

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In re Chikka Putta(1), *In re Matha Goundan*(2), *In re Bettay*(3), and the same view was recently taken by this Court in *Khoda Buksh v. Moti Lal Johori*(4). The reason for this I suppose to be that, after the term of the contract has expired, the workman cannot perform his contract "according to the terms of his contract." But I cannot see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced. The option between the two remedies is that of the complainant, and not of the person complained against, and the fact that one remedy would be infructuous does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced continues, till it is repaid to him, subject to the effect of the Limitation Act, of which there is no question here. This seems to me to be so particularly when, as is the case here, the complainant instituted proceedings at a time when both remedies were open to him, and it is only this Rule that has prevented him from exercising his option. This view is in agreement with that of the Madras High Court in *Queen-Empress v. Konda*(5), but the decision in *Khoda Buksh v. Moti Lal Johori*(4) seems to me to be a direct authority the other way. It is there laid down that, where the term of the contract has expired, "the contract cannot be specifically enforced" or "the money recovered." I must respectfully dissent from this view, but I do not consider the decision as *obiter*. Owing to the view taken by my learned brother the case cannot be referred to a Full Bench, and I have, therefore, no choice but to follow this decision. I, therefore, agree that the Rule must be made absolute.

HOLMWOOD J. I think this Rule should be made absolute. It is unnecessary to recapitulate the facts, which are sufficiently set out in the judgment of my learned brother.

In my opinion the remedies under section 2 of Act XIII of 1859 are interlocked and interdependent, and if one has lapsed, the other has lapsed also.

(1) (1884) 1 Weir. 704.

(2) (1884) 1 Weir. 705.

(3) (1884) 1 Weir. 706.

(4) (1906) 11 C. W. N. 247.

(5) (1893) I. L. R. 16 Mad. 347.

This is the view that was taken by this Court (Mitra J. and Holmwood J.) in the case of *Khoda Buksh v. Moti Lal Johari* (1), to which I was a party. The law has, it is true, been much more stringently interpreted in Madras, Bombay and Allahabad, but I prefer to follow the spirit of the rulings of this Court.

The offence created by the Act is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract: *King-Emperor v. Takasi Nukayya* (2). The complainant has the option of repudiating the contract and getting the money back or of keeping to the contract and getting the work done. Imprisonment is imposed as the punishment of refusing either of these remedies, but no fine or imprisonment is provided as a punishment after the contract has been broken and expired. The option being the return of money advanced or the performance of the contract, while it is still running, it seems to me that the Magistrate's jurisdiction is gone, if the option has become impossible. The complainant must exercise that option within the time the contract is running. He cannot come after the contract has expired and say: "Now I have no option, but I want my money back." The very fact that he has no option throws him on his ordinary civil remedy.

As regards the enforcing of the remedy, if it has been duly sought within the time before the contract has expired, I do not think any hard and fast rule can be laid down, but as to the exercise of the option I am clear, and the circumstances of this case fully bear me out.

In the case that has been tried out, and which forms the subject of another Rule, the option chosen by the complainant was that the work should be completed, but now that the time has expired in the other cases, the complainant merely wants his money back, or rather wants to punish the accused with imprisonment for failing to return the money. The Magistrate of the District, in showing cause for the Crown, considers that the case is a more than doubtful one, and recommends the quashing

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(1) (1906) 11 C. W. N. 247.

(2) (1901) I. L. R. 24 Mad. 660.

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of the proceedings. We have heard the learned counsel for the complainant very fully, and the impression left on my mind was that these cases are now being pursued to secure the punishment of the accused, and not to secure the legal remedies under the Act.

There is ample authority for holding that the enforcement of the contract cannot be asked for after the time fixed has expired. *vide, In re Chikka Putta*(1), *In re Masha Goundan*(2), *In re Bettay*(3), and the *dictum* in *Rhoda Buksh v. Moli Lal Johori*(4), extending this doctrine to the recovery of the money has my fullest concurrence.

It was pressed upon us by learned counsel for the applicants for revision that the extension of the Act by a notification under section 5 does not extend the place of residence of the complainant, which is fixed by the Statute within the Presidency towns, and the limits of a Presidency town cannot be extended by extending the Act. But it appears that this Act has, as a matter of fact, been working in Bombay, Madras, Assam and elsewhere throughout the districts for many years without objection, and however sound this technical objection may be, as a question of drafting, it is too late to raise it now. The doctrine of *factum valet* appears to apply, and the ordinary rules for the interpretation of Statutes also seem to favour the contention that the extension of the Act extends all its incidents; even though in terms the extension of the residence of the complainants is impossible.

But for the reasons I have already given I am of opinion that these Rules should be made absolute, and further proceedings dropped.

Rule absolute.

E. H. M.

(1) (1884) 1 Weir. 704.

(2) (1884) 1 Weir. 705.

(3) (1884) 1 Weir. 706.

(4) (1906) 11 C. W. N. 247.