

**Emperor Vs. Dhondu**

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**SooperKanoon Citation :** [sooperkanoon.com/327227](http://sooperkanoon.com/327227)

**Court :** Mumbai

**Decided On :** Feb-04-1904

**Reported in :** 1Ind.Cas.378

**Judge :** Chandavarkar and ;Aston, JJ.

**Appellant :** Emperor

**Respondent :** Dhondu

**Judgement :**

1. The question whether an offence under Act XIII of 1859 can be tried summarily has been answered in the affirmative by the Madras High Court in *In re Higgins* (Weir's Criminal Rulings p. 466) and by the Allahabad High Court in *Queen-Empress v. Indarjit* 11 A. 262 and in the negative by the former Court in another case, *Pollard v. Mothial* 4 M, 234. We prefer to follow the ruling last cited. A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, Sections 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any 'offence' as defined in the Criminal Procedure Code. Where there has been a wilful neglect or refusal on the part of a person to perform his part of the contract, the Statute enables the Magistrate to give at the option of the complainant to such person a locus panitentioe by ordering him either to return the advance or perform the contract. If he obeys the order, he commits no offence. It is only when the order has been

disobeyed that there is an act or omission made punishable' by the law and falling within the definition of 'offence' in the Criminal Procedure Code. The Magistrate has only then jurisdiction to deal with the disobedience of his order and sentence the person who has disobeyed to imprisonment.

2. There is, no doubt, this to be said for the contrary view that, having regard to the recital the preamble that 'it is just and proper that persons guilty of such, fraudulent breach of contract should be subject to punishment,' and to the provisions of Section 1 enabling the party aggrieved by such breach to make a complaint to a Magistrate and the Magistrate to issue a summons or warrant, it was the intention of the Legislature to treat such fraudulent breaches as 'offences,' and that, though the punishment provided is only for disobedience of the Magistrate's order, yet it is in reality punishment for the fraudulent breach. This view of the Act has been suggested in *Queen-Empress v. Kattayan* 20 M. 235. There is no express decision of this Court on the point, but had that been the intention of the Legislature they would have said that the punishment provided was for the fraudulent breach itself, not for disobedience of the order of the Magistrate.

3. The order of the Magistrate awarding the expenses of the prosecution is illegal (see *Imperatrix v. Budhu Devu* (1891) Cri. Rull. No. 20 Unrep Cri. Cas. and 342. 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.

4. 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.