

1924
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 IMPERIAL
 TOBACCO
 COMPANY OF
 INDIA, LTD.
 v.
 BONNAN.

from the lawful manufacturers; and as such the respondents may sell them.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for the appellants: *Fred. F. Macnaghten.*

Solicitors for the respondents: *Sanderson & Orr Dignams.*

A. M. T.

CRIMINAL REFERENCE.

Before Greaves and Duval JJ.

JOGENDRA NATH LASKAR

v.

HIRALAL CHANDRA PODDAR.*

1924
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 April 2.

Witness—Warrant of arrest—Omission of the name of witness in the body of it—Legality of the warrant and conviction—Civil Procedure Code (Act V of 1908)—First Schedule, Appendix B, form No 17—Penal Code (Act XLV of 1860), ss. 225 B and 353.

A warrant issued by a Revenue Officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal, and a conviction, under s. 225 B of the Penal Code, of the witness arrested under such warrant for escaping from custody, and of others, under s. 353 of the Code, for assaulting a public servant in the discharge of his duty, is bad in law.

THE facts of the case were as follows. The attendance of one Hiralal Chandra Poddar as a witness was required in connection with certain attestation proceedings in the village of Mahatpur. The Revenue Officer of the Circle issued a summons upon him to attend the

* Criminal Reference No. 3 of 1924, by A. de C. Williams, Sessions Judge of Khulna, dated January 2, 1924.

Settlement office on the 16th July 1923. The summons was duly served, but he failed to appear, and a warrant of arrest was then issued against him on the 22nd instant. The warrant was headed "Emperor v. Hiralal Poddar, defendant." The body of the warrant did not contain the name of any person to be arrested.

The warrant was made over for execution to a settlement peon who arrested him thereunder on the 23rd. While taking him to the Settlement office Hira Lal showed reluctance to proceed and the peon seized his hand. Hira Lal then shouted out, and Jogendra Nath Chandra and Mahendra Nath Chandra came up, assaulted the peon and rescued the prisoner. The three men were put on trial before a Second Class Magistrate at Satkhira and were convicted and sentenced, on the 29th September, Hira Lal to two months, under s. 225B of the Penal Code, and Jogendra and Mahendra to four and two months, respectively, under ss. 225B and 353 of the Penal Code. Their appeals were dismissed, and they then moved the Sessions Judge of Khulna who reported the case under s. 438 of the Criminal Procedure Code. The material portion of the Letter of Reference was as follows:—

The petitioners were charged under ss. 225B and 353 of the Penal Code on the allegation that Hiralal failed to attend as a witness when summoned by the Settlement Officer, whereon the Settlement Officer issued a warrant of arrest against him [*After stating the facts the Letter continued*] :

The warrant (Ex. I) contains an obvious flaw. The name of Hiralal only appears in the heading (*Government v. Hiralal*) of the proceeding for the purposes of which the witness' attendance is required. Clearly many witnesses with various names might be wanted in a case of "*Government v. Hiralal*." The name of the witness to be arrested is the most essential part of the warrant and that is lacking.

The appellate Court held this flaw to be curable ("Hiralal could not be misled by it.") The defence is the right of private defence, and apparently the Court held that section 99 of the Penal Code applied, that the act was done in good faith though not strictly justifiable by law.

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But there is good authority for holding that section 99 applies to acts where jurisdiction is wrongly exercised, not where there is complete absence of jurisdiction.

I, therefore, recommend that the findings and sentences of the Lower Courts be reversed, on the ground that the peon acted without jurisdiction, and consequently was not a public servant within the meaning of section 353 of the Penal Code, and further that the petitioner's apprehension was not lawful, within the meaning of section 225B of the Penal Code. It thus appears that the offences were not made out against petitioners, and their conviction is not legal.

Babu Birbhusan Dutt (with him *Babu Khirode Narain Bhuiya*), for the petitioner. The warrant is illegal, as it omits the name of the petitioner. The heading refers to one Hira Lal Poddar, but the insertion of the name there does not cure the defect. The custody of the witness was not lawful within section 225B of the Penal Code; nor was the peon acting in the lawful discharge of his duty within section 353 of the Code.

No one appeared to show cause.

GREAVES AND DUVAL JJ. We accept the reference for it appears that the warrant does not contain the name of Hiralal who was to be apprehended thereunder except in a heading where he is described as a party to a suit which is non-existent. Under the circumstances the warrant clearly was bad, and we accept the reference on that ground and set aside the conviction and sentence of the accused. The bail bonds are vacated.

E. H. M.