

## CRIMINAL REFERENCE.

*Before Edgley and Lodge J.J.*

EMPEROR

v.

SAROJINI DE CHAUDHURI.\*

1939

Jan. 8.

*Distress-warrant—Reasons, when must be recorded—Claims of third party, how to be investigated—Code of Criminal Procedure (Act V of 1898), s. 386—Rule framed by the Local Government.*

Rule 117(4) framed by the Government of Bengal under s. 386(2) of the Code of Criminal Procedure, contained in High Court's Circular Order No. 6 (Criminal) of 1925, lays down the procedure to be adopted by a Magistrate in Bengal for the enquiry into claims of third parties to properties seized in execution of a distress-warrant issued under s. 386(1) of the Code. He is not required to follow the procedure laid down in O. XXI, r. 58 of the Code of Civil Procedure. He is, however, not entitled to utilise the services of a police officer in investigating such claims nor to rely simply on the report of such officer.

*Harimal v. Emperor* (1) distinguished.

Section 381(1)(b) proviso requires a Magistrate to record his reasons for issuing a distress-warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default of payment of fine. The law does not also require that reasons should be recorded for selling the attached property after the disposal of claims. The issue of a distress-warrant without recording any reasons, prior to the accused serving out the full sentence of imprisonment in default, is not illegal nor is the sale of the properties attached under the warrant.

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The material facts of the case appear sufficiently from the judgment.

No one appeared for either party.

The judgment of the Court was as follows:—

This is a Reference under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Dacca recommending that an order under s. 386 of the Code be set aside.

The material facts are as follows:—

One Mohanta Lal De Chaudhuri was convicted and sentenced under s. 420 of the Indian Penal Code to

\*Criminal Reference, No. 221 of 1938, made by W. McC. Sharpe, Sessions Judge of Dacca, dated Dec. 8, 1938.

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undergo rigorous imprisonment for one year and in addition to pay a fine of Rs. 200. In default of payment of fine he was sentenced to undergo rigorous imprisonment for a further period of six months.

The fine was not paid. The prisoner surrendered on January 22, 1938, and was released on August 29, 1938, after serving the full sentence including the period of imprisonment in default. On July 2, 1938, an order was passed for realization of the fine by distress-warrant. In execution of that warrant certain items of moveable property were seized. On August 29, 1938, the wife of the prisoner made a claim to these properties. The matter was referred to a Sub-Inspector of Police for report. The Sub-Inspector reported against the claimant. Without further enquiry, the Magistrate rejected the claims and sold the property attached. The learned Sessions Judge has taken the view that the Magistrate had no right to sell the attached property, after the prisoner had served the full period of imprisonment in default, without recording the reasons which in his opinion rendered it necessary to direct that the fine should be so realised. The learned Sessions Judge has further observed that the Magistrate was bound to follow the procedure laid down in O. XXI, r. 58 of the Code of Civil Procedure in disposing of the wife's claim, and his failure to do so was an error of law.

In support of this view the learned Sessions Judge has relied on the ruling in *Harimal v. Emperor* (1). That decision is a decision of the Allahabad High Court. Section 386 of the Code of Criminal Procedure, as it stood before 1923, made no provision for an enquiry by a Magistrate into the claims of third parties. In 1923, s. 386(2) was enacted enabling Local Governments to make rules for the summary determination of claim. The decision in *Harimal v. Emperor* (1) is based on the fact that the Local Government had made rules under s. 386(2) directing that the procedure laid down in O. XXI, r. 58 of the

(1) [1933] A. I. R. (All.) 135.

Code of Civil Procedure be observed in investigating such claims. The Government of Bengal framed rules in the year 1925 which are contained in Circular Order No. 6 (Criminal) of 1925. The relevant rule is 117(4) which reads:—

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If any person makes any claims in respect of the property attached, then the ownership of such property shall be determined by the Magistrate who issued the warrant, or his successor-in-office or the Magistrate in charge of accounts. The services of a junior Deputy Magistrate or Sub-Deputy Magistrate or Circle Officer may be utilised, if necessary, for the investigation of such claims.

There is accordingly no necessity for a Magistrate in Bengal to follow the procedure laid down in O. XXI, r. 58 of the Code of Civil Procedure; but, on the other hand, he is not entitled to utilise the services of a police officer in investigating such claims, nor is he entitled to rely simply on the report of a police officer.

Section 386 (1) (b), proviso, requires the Magistrate to record his special reasons for issuing a distress-warrant only when the warrant is issued after the offender has undergone the whole of the imprisonment in default. It cannot, therefore, be said that the issue of the warrant in the present case was illegal or that the sale was illegal, merely because reasons were not recorded for issuing the warrant. The warrant was issued before the whole of the imprisonment in default had been undergone.

The law does not require that reasons should be given for selling attached property after the disposal of claims.

In view of the fact that no proper enquiry was made into the claim of the wife, we accept the reference and set aside the order rejecting the claim of the offender's wife to the property attached. The Magistrate is directed to dispose of that claim according to law.

*Reference accepted.*