

We consider that the order of the execution court is not correct in dismissing the execution application, as order XLI, rule 6, sub-rule (2) only empowers the court, against whose decree an appeal is pending, to stay the application for execution and not to dismiss it. And the order of costs is not justified.

Accordingly we allow this appeal to this extent that we set aside the order of the lower court dismissing the execution application with costs and instead we grant an order for stay of the execution application and we direct that that stay will be granted on such terms as to giving security or otherwise as the lower court thinks fit, having regard to the terms of order XLI, rule 6, sub-rule (2)

1933
RAM KATORI
v.
SHAFIQ
AHMAD

APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Collister

EMPEROR v. TOHFA AND OTHERS*

1933
August, 1

Indian Penal Code, section 186—Obstructing public servant in making an attachment—Threats accompanied by show of physical force—Civil Procedure Code, order XXXVII, rule 5—Warrant of attachment before judgment not accompanied by notice to show cause or furnish security—Warrant illegal—Resistance thereto no offence.

A commissioner appointed by a civil court to make an attachment before judgment went to the house of the defendant, accompanied by the plaintiff and his pairokars, to effect the attachment. The warrant of attachment, issued under order XXXVII, rule 5 of the Civil Procedure Code, neither contained nor was accompanied by a notice to the defendant to furnish security or to show cause against the attachment. When the party reached the defendant's house, he and his sons came out of the house armed with lathis; they adopted an offensive attitude and said they would never allow attachment to be made and would break the head of any one who should point out the

*Criminal Appeal No. 14 of 1933, by the Local Government, from an order of Tirloki Nath, Sessions Judge of Meerut, dated the 26th of October, 1932.

1933

EMPEROR
v.
TOHFA

property; and they removed some cattle. The commissioner, apprehending that an assault might be committed, retired.

Held that the action and attitude of the defendant and his sons amounted to obstructing a public servant, within the purview of section 186 of the Indian Penal Code, and "physical" obstruction was not necessary. Although mere threats by themselves would not in all cases amount to obstruction, they would so amount where they were accompanied either by an overt act or by a menacing attitude or show of physical force, e.g. the exhibition or flourishing of some kind of weapon capable of inflicting physical injury. *Emperor v. Aijaz Husain* (1) and *King-Emperor v. Gajadhar* (2), distinguished.

Held, further, that inasmuch as the warrant of attachment did not contain, nor even was accompanied by, a notice to the defendant to furnish security or to show cause against the attachment being made, the warrant was in contravention of order XXXVII, rule 5 and of Form No. 5 in Appendix F of the Civil Procedure Code, and was therefore illegal; and resistance or obstruction to the execution of the illegal warrant was not an offence under section 186 of the Indian Penal Code.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *Chandra Bhan Agarwal*, for the accused.

KING and COLLISTER, JJ. :—Tohfa and his two sons Harbans and Chandar were convicted by a Magistrate of the Meerut district on a charge under section 186 of the Indian Penal Code. On appeal they were acquitted by the Sessions Judge. This is an appeal on behalf of the Local Government against their acquittal.

The facts of the case are not in dispute. One Abdulla sued Tohfa in the Munsif's court at Ghaziabad on the basis of a promissory note. He filed his suit on the 10th of February, and on the 13th of February he applied to the court for attachment before judgment under order XXXVII, rule 5. The Munsif allowed the application in the following terms: "Let notice go to the defendant to show cause why the application be

(1) (1916) I.L.R., 38 All., 506.

(2) (1910) 7 A.L.J., 1174.

not allowed. Interim attachment meanwhile. Let B. Onkar Nath, vakil, do the work of attachment." Accordingly, on the 15th of February B. Onkar Nath went to Tohfa's village accompanied by the plaintiff in the suit and his pairokars. Tohfa and his sons came out of the house armed with lathis. They adopted an offensive attitude and said that they would never allow attachment to be made and that they would break the head of anyone who should point out the property. At the same time they removed three head of cattle. The commissioner, apprehending that an assault might be committed, thereupon retired; but when he had gone a short distance, he heard cries and, on looking round, he saw that one of the plaintiff's men had actually been assaulted by Chandar.

The learned Sessions Judge has disagreed with the Magistrate and has acquitted the three respondents on the ground that for a conviction under section 186 of the Indian Penal Code it must be shown that there was "physical" obstruction. He has relied on three rulings. The first is a single Judge ruling of the Lahore High Court, *Mt. Darkan v. Emperor* (1); but the facts of that case were quite different from the facts of the case before us. All that happened in that case was that a woman against whom a warrant of attachment had been issued abused the process server and said that she would not allow him to attach her cattle. There is nothing to show that her attitude was such as to give rise to an apprehension of assault; nor does the judgment show that she actually stood in the way of the process server in order to bar his advance and prevent him from carrying out his duty. The next case is a single Judge case of this Court, *Emperor v. Aiaz Husain* (2). That was a case under section 225B of the Indian Penal Code. All that was proved in it was that the person whose arrest was being sought said to

1933

EMPEROR
v.
TOHFA

(1) A.I.R., 1928 Lah., 827.

(2) (1916) I.L.R., 38 All., 506.

1933
 EMPEROR
 v.
 TOHFA

the process server : "Take me if you can to the tahsil; I won't go." The Court remarked in its judgment that "something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest is required." The third case on which the Sessions Judge has relied is the case of *Matu Ram v. Emperor* (1). That was a single Judge decision of the Lahore High Court and the facts of the case were quite distinguishable from the case before us. The naib-tahsildar of income-tax invoked the aid of some lambardars against certain mahajans. The latter assaulted the lambardars and it was held that there was no obstruction to the naib-tahsildar within the meaning of section 186 of the Indian Penal Code. Another case to which our attention has been drawn in this connection is the case of *King-Emperor v. Gajadhar* (2). In that case a warrant had been issued for the arrest of the accused. The accused did not allow the chaprasi to execute the warrant and ran inside his house and locked the door. It was held that this was merely an act of passive resistance and did not amount to obstruction. The learned Government Advocate has drawn our attention to a ruling of the Calcutta High Court in the case of *Nafar Sardar v. Emperor* (3). At page 160 the learned Judge remarked as follows : "It seems to me, however, that the question of whether an offence under section 186 of the Penal Code has or has not been committed must depend upon the peculiar facts and circumstances of each case. No doubt, in some instances mere threats may not of themselves be sufficient. The real question is whether the action or attitude on the part of the persons alleged to have obstructed a public servant in the performance of his functions was of such a nature as to obstruct, that is to say, to stand in the way so as

(1) (1922) 73 Indian Cases, 338. (2) (1910) 7 A.L.J., 1174.

(3) (1932) I.L.R., 60 Cal., 149.

to prevent him in carrying out the duties which he had to discharge. Where it is solely a matter of threats, they must be of such a nature as so to affect the public servant concerned as to cause him to abstain from proceeding with the execution of his duties. It seems to me obvious that threats of violence, made in such a way as to prevent a public servant from carrying out his duty, would easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hand must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty.''

1933
EMPEROR
v.
TOHFA

In our opinion the above quotation correctly states the principle to be applied to cases of this sort. It may be accepted that mere threats by themselves would not in all cases amount to obstruction unless they were accompanied either by an overt act or by a show of physical force.

Counsel for the respondents has accepted this position. He concedes that if the evidence proves that the menacing attitude of the respondents and their threats were directed against the commissioner, the conviction would be legal; but he pleads that the threats were made to persons other than the commissioner and that therefore there was no obstruction to a public servant within the meaning of section 186 of the Indian Penal Code. B. Onkar Nath's evidence, which is accepted by the defence as correct, shows that Tohfa and his sons were armed with lathis, that they threatened to break the head of anyone who pointed out the property and

1933
EMPEROR
v.
TORFA

that they told witness and the others that they would not allow attachment to be made. They were apparently confronting the commissioner and his party and opposing their advance and the latter had reasonable grounds for anticipating resistance; and the only reasonable inference which can be drawn from the evidence is that they were obstructing the commissioner from executing his warrant. This conclusion is in accordance with common sense and the plain meaning of words. We are therefore clearly of opinion that in the absence of some other reason to the contrary, the respondents would have to be convicted under section 186 of the Indian Penal Code.

A plea has been raised before us, however, by counsel for the respondents that the warrant which was issued to B. Onkar Nath was illegal and it is therefore pleaded that the respondents committed no offence. This plea was contained in the memorandum of appeal before the Sessions Judge, but it has not been referred to in his judgment and it is not therefore clear whether it was actually argued before him or not.

The learned Government Advocate concedes that, according to the recent rulings of this Court, resistance or obstruction to the execution of an illegal warrant is not an offence under section 186 of the Indian Penal Code. The most recent case is that of *Emperor v. Fattu* (1). In that case a warrant of arrest had been issued against a certain person, but his name and description had not been given in the warrant. He resisted arrest and it was held by a Bench of this Court that no offence had been committed, even though he did not know of the omission of his name and description from the warrant.

The point for us to decide, therefore, is whether the warrant which was issued to B. Onkar Nath was or was not illegal. The wording of order XXXVII, rule 5 and of Form No. 5 in Appendix F shows that the

1933

EMPEROR
v.
TOHFA

legislature intended that the notice to the defendant to furnish security or to show cause against it, and the order for the conditional attachment of his property, should be issued simultaneously and on one and the same form. In the present case the only document on the record in pursuance of the Munsif's order of the 13th of February is a manuscript warrant to the commissioner for the attachment of Tohfa's property. The learned Government Advocate argues that it must be assumed from the Munsif's order of the 13th of February that a separate notice was issued to Tohfa calling upon him to give security or to show cause against doing so. In the order sheet we find the words "nawishta shud", from which we are asked to presume that both the warrant of attachment and also the notice about security were separately written and issued in accordance with the Munsif's order. It is argued that the issuing of separate orders, though irregular, would not be illegal. But there is no copy on the record of any such notice to the defendant about security. The words "nawishta shud" may therefore have referred only to the warrant of attachment. Moreover, we observe that in the Munsif's order in the order sheet it was stated that notice should be issued to the defendant to show cause *why the application for attachment before judgment should not be allowed*; it does not appear that any notice was to be issued to him about the furnishing of security. In our opinion this omission and the doubt which exists as to whether in fact anything was done in pursuance of the order of 13th February except the issuing of a warrant of attachment to the commissioner must be held to render the warrant illegal. Even if a notice relating to security was in fact issued to the defendant, it is clear that it was not consolidated with the order of attachment and therefore the requirements of the law were not fulfilled. The reason why the order about security and the order of attachment are required to be on the same

1933
EMPEROR
v.
TOHFA

form is obvious. It is that the defendant may know at one and the same time (1) that he is required to give security, or show cause against it, (2) that his property is being meanwhile attached as security, and (3) that he may have the attachment raised by complying with the court's order about furnishing security or showing cause. It was held in a Punjab case, *Prabh Dyal v. King-Emperor* (1), that when a warrant of attachment was issued which was defective in certain respects, one defect being the omission to state the amount of security which was demanded from the defendant, resistance to the execution of such warrant did not amount to an offence under section 183 or 186 of the Indian Penal Code. This view is in accordance with the view which we take in this case.

Since we have found that no legal warrant was issued under order XXXVII, rule 5, it follows that on this technical ground the acquittal must be upheld; although we are clearly of opinion that the facts which have been proved would otherwise have amounted to an offence under section 186 of the Indian Penal Code and that the grounds on which the Sessions Judge allowed the appeal were wrong. We accordingly dismiss this appeal.

(1) [1905] Punj. Rec. (Crl. J.), No. 49.