

Present : Schneider J.

1925.

SILVA v. APPUHAMY *et al.*

522—P. C. Gampola, 11,954.

Vehicles Ordinance—Distress warrant for non-payment of hire—Neglect or refusal to pay—Wrongful issue of warrant—Magistrate's power—Irregular affidavit—Ordinance No. 4 of 1916, s. 49.

A distress warrant to recover payment of a sum due for the hire of a vehicle can issue under section 49 of the Vehicles Ordinance only upon the refusal or neglect of the defaulter to pay the sum after it has been awarded by the Court.

A Magistrate has power to recall a warrant that has been irregularly issued.

A PPEAL from an order made by the Police Magistrate of Gampola.

The proceedings in the case were initiated by an affidavit from a person who styled himself complainant. Three persons were named as accused in the caption to the affidavit, which stated that a sum of Rs. 194 was due to the complainant for the hire of a vehicle to the accused who had failed and neglected to pay the sum. On the affidavit being filed, the Magistrate directed the issue of a distress warrant returnable on August 27, 1925.

On August 18 a Proctor filed an affidavit from the first accused to the effect that he had received information of the issue of the warrant but had no notice of the proceedings. The Proctor moved for the recall of the warrant which the Magistrate disallowed.

N. K. Choksy, for accused, appellant.

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The question raised by this appeal is of great practical importance and calls for careful consideration. The proceedings in the case appear to have been initiated by an affidavit by one Silva who styles himself "complainant" and three persons "accused" in the caption of the affidavit. It is to the effect that a balance sum of Rs. 194 was due to the complainant for the hire of a vehicle to the accused and that the accused had failed and neglected to pay that sum. There is nothing to show how this affidavit came on the record, or what the court was invited to do. The date of the affidavit is August 13, 1925. An entry by the Magistrate on the same date at the bottom of the affidavit shows that Mr. Jonklaas had appeared for the complainant and that the Magistrate had directed the issue of a distress warrant returnable on August 27. The warrant appears to have been issued on the very day the Magistrate made his order. The affidavit is headed "In the Police Court of Gampola," but there is no indication that an application was made under some special provision of the law. It seems to me desirable that in special applications of this kind the caption should indicate under what special law or rule the application is being made. In this case the caption of the affidavit should have been "In the matter of the application of A B under the provisions of section 49 of the Vehicles Ordinance, No. 4 of 1916. The proceedings are intended to be under section 49 of the Vehicles Ordinance, No. 4 of 1916. Before proceeding to consider the provisions of that section I would follow the history of the case. On August 18 a Proctor filed an affidavit from the first accused to the effect that he had received information of the issue of the warrant, and that he had no notice of the proceedings and had a "valid defence to the charge." The Proctor moved for the recall of the warrant, and an inquiry. The Magistrate disallowed this motion stating that he did not know "under what section the application was made." On August 24 the accused's Proctor filed a petition of appeal against the order of the Magistrate, and once again moved that the court would be pleased to withdraw the warrant pending the decision of the appeal. On this occasion the Magistrate heard the appellant's Proctor who appears to have argued that the recovery of a fine is suspended by an appeal and so the warrant should also be suspended. The Magistrate refused to order the recall of the warrant. The petition of appeal is in the ordinary form of such a petition in a criminal case. It bears a certification as to the matter of law stated in it to satisfy the requirements of the Criminal Procedure Code.

I shall now proceed to consider the section in question. Apparently the provisions in this section fall into two distinct parts. It first provides that upon the refusal or omission to pay the sum

“justly due” for the hire of a vehicle and upon complaint “and summary proof of the facts” a Police Court or a Municipal Court having jurisdiction shall award—(1) “reasonable satisfaction” for the complainant’s “fare and costs” and also (2) “reasonable compensation for loss of time in attending to make and establish such complaint.”

It then provides that upon the “neglect or refusal” of “the defaulter” to “pay the same” (that is the sum or sums awarded according to the provisions in the earlier part) “it shall be recovered as if it were a fine imposed by such court.”

The procedure for the recovery of a fine is to be found in section 312 (2) of the Criminal Procedure Code. It is by way of a warrant issued to the Fiscal for the levy of the amount by distress. The powers of the Fiscal under such a warrant are prescribed in that section. I searched the record in this case, but in vain, to find what the warrant was which the court had issued to the Fiscal. There is no special form for such a warrant to be found among the forms given in Schedule III. of the Criminal Procedure Code. Unless the court in this case had been careful to indicate to the Fiscal that the warrant was one issued under section 312 of the Criminal Procedure Code, it is probable that the Fiscal might fail to observe the restrictions imposed by that section. In all the circumstances the Magistrate would have acted more wisely if he had instructed the Fiscal not to enforce the warrant till the appeal had been decided.

The language of the section is plain that the warrant is to issue only upon the neglect or refusal to pay the sum awarded by the court. In this case even if the proceedings be regarded as that the Magistrate had awarded the sum mentioned in the affidavit, although there is no express order to that effect, he should not have issued the warrant as no demand for payment had been made after the sum had been awarded, and consequently, there had been no “neglect or refusal” to pay. As the warrant had “*improvidè emanavit*” he had the power to recall it, and should have done so when he was moved to do it. The obligation to pay hire for a vehicle taken on hire is purely civil and contractual. Nowhere is it declared to be an offence to make default in payment of such hire. Section 49 only seeks to provide a speedy means of enforcing a purely civil right. An analogous provision is to be found in the Maintenance Ordinance, 1889 (No. 19 of 1889). The Magistrate in this case appears to have been of opinion that the person to whose prejudice an order is made under the provisions of the section had no right to be heard at all. Unless there is a clear indication to the contrary, a person is entitled to be heard before an order to his prejudice can be made. I see nothing in the provisions of this section to indicate that the person against whom the order has to be made is to be denied his ordinary lawful right of being heard in this defence. The language of the section suggests that the procedure should be an adaptation

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of the procedure prescribed for summary trials before a Police Court or a Municipal Court. The section speaks of "complaint," "acts committed," "defaulter," "offender." If upon material placed before the Magistrate he is satisfied that there is "justly due" some sum for the hire of a vehicle he should issue a summons on the person against whom the complaint is made and, if necessary, try summarily the issue between the parties, and then upon summary proof he should enter his award. If this award is entered in the presence of the person against whom the claim is made the Magistrate might then and there direct that payment should be made by a particular date. Non-payment by such a date would then be evidence of the "neglect" or "refusal" spoken of in the section, which would give rise to the procedure for the recovery of the sum as a fine. It is worthy of note that in speaking of the compensation which might be awarded the section speaks of the compensation awarded for loss of time, not only in attending to make the complaint but also to establish it, which might be regarded as suggesting an attendance after the complaint had been made.

On the question whether a person had the right to be heard in a proceeding under an analogous provision, namely, section 51 of the Excise Ordinance, No. 8 of 1912, I held that as a matter of sound judicial discretion an order should not be made without hearing the person who would be affected by the order, see *Sinnemamby v. Ramalingam*.¹

In the present case the Magistrate does not appear to have followed the correct procedure.

I think the complainant's Proctor should have filed a motion with the affidavit, or submitted some pleading to indicate what relief he was seeking. I direct him to do that now.

I set aside all the proceedings since the filing of the affidavit, and order that the warrant be recalled forthwith. The case will be remitted to the Magistrate for proceedings in due course after the complainant's Proctor has submitted what I have directed him to submit to the court.

The appellant will have his costs of this appeal taxed as in an action in the Court of Requests for the recovery of the sum of Rs. 194.

Set aside.

¹ (1924) 23 N. L. R. 371.