

1896.

KADIJA UMMA v. ASSENA LEBBE.

September 28.

P. C., Kalutara, 21,060.

Order for maintenance—Amount payable under it—Recovery of—Cancellation of order—Ordinance No. 19 of 1889, ss. 3 and 10.

The monthly allowance which a person is condemned to make under section 3 of Ordinance No. 19 of 1889 can only be levied, as in the case of a fine imposed by a Police Magistrate, by distress and sale of movable property of the person condemned.

A Magistrate should not cancel an order under section 3 of Ordinance No. 19 of 1889 on the mere statement of a police vidané that the person condemned has no property. Such a statement should be on oath or affirmation, and the complainant should be allowed an opportunity of examining the person making it and disproving it, if she can.

If a person against whom an order for maintenance is made has immovable property from which he derives any rent, profit, or income sufficient to make the payments as they fall due, he must be considered as having sufficient means to pay them. If such person will not obey the order, he runs the risk of being sentenced to imprisonment for his default.

IN this case the Police Magistrate made order under section 3 of Ordinance No. 19 of 1889 that the accused should pay into Court monthly the sum of Rs. 20 for the benefit of the complainant and her children. Subsequently the accused applied

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to the Magistrate under section 10 of the Ordinance for a cancellation of the order as he had then no movable property, and his immovable property had been seized on a writ sued out by the complainant in the District Court. On a statement made to the Magistrate by a police vidané that the accused had no property apart from that seized on the complainant's writ, the Magistrate cancelled the order for maintenance. On petition to the Supreme Court by the complainant, the case was sent for and dealt with in revision.

There was no appearance of counsel for either side.

28th September, 1896. WITHERS, J.—

The question for decision in this case is whether the Magistrate's order, cancelling his former order of maintenance till further orders, should be discharged or should be sustained as a legal and proper order. The order in question was apparently made under the provision of section 10 of the Maintenance Ordinance No. 19 of 1889. It appears that the defendant was in default of payment of a monthly instalment payable by virtue of a maintenance order. In consequence of his default a warrant was signed by the Magistrate and issued for the levy of the amount by distress and sale of movable property.

The warrant was returned unexecuted on the ground that the defendant had no movable property out of which the amount could be levied. The Fiscal in his return reported that the defendant had immovable property sufficient to satisfy the levy, but the Magistrate declined to issue a warrant of distress against the defendant's immovable property. There I think he was right. The amount of the order according to section 9 ought to be levied in the manner by law provided for levying fines imposed by Magistrates in the Police Courts. Section 378 of the Criminal Procedure Code enacts that whenever an offender is sentenced to pay a fine, the Court passing the sentence may in its discretion issue a warrant for a levy of the amount by distress and sale of any movable property belonging to the offender. It further appears from the Magistrate's letter forwarding the proceedings in review that the complainant in the maintenance proceedings has recovered judgment against defendant in the District Court for a sum of Rs. 1,200. That under a writ in execution of that judgment all the immovable property of the defendant has been seized. In view of these circumstances, namely, the Fiscal's return, that the defendant has no movable property on which to levy, and that all the immovable property had been seized in execution of the civil judgment, the Magistrate made the order

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which is the subject of revision. If at the time of making the order the defendant had no means of paying the maintenance ordered in whole or in part, I think the order is a right one. It would operate until the defendant is found to have sufficient means to pay the instalments monthly as they became due. But I question if the order now in revision is founded on sufficient materials. Section 10 of the Maintenance Ordinance enacts that on the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Ordinance, and on proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made under section 3, the Magistrate may either cancel such order or make such alteration in the allowance ordered as he deems fit, &c. I cannot find the requisite proof of a change in the circumstances of the defendant. In his judgment the Magistrate records that the Police Vidané of Alutgama states that the defendant has no property apart from that sequestered by the applicant in the civil District Court case above referred to. This statement ought in my opinion to be made on oath or affirmation, either orally or by affidavit, and the complainant should be allowed an opportunity of examining the vidané, if she can, on that statement. According to the petitioner in revision the defendant has abundant means of paying the amount of maintenance ordered. I think she should be allowed an opportunity of supporting her statement. If after further inquiry into the matter the Magistrate finds that at the present moment the defendant has not the means of discharging the maintenance order, the order in revision will stand ; otherwise it will be reversed.

The mere fact that defendant has no movable property on which to levy the amount of a maintenance order which is not paid at the proper time appears to me, as at present advised, not sufficient ground in itself for rescinding the order. If he has immovable property from which he derives any rent, profit, or income sufficient to make the payments as they fall due, he must be considered as having sufficient means to pay them. If having these means he will not obey the order, he simply runs the risk of being sentenced to imprisonment for his default. The case must be remitted for further inquiry.

