

1941

Present : Wijewardene J.

THE DEPUTY FINANCIAL SECRETARY, Appellant,
and SIRISENA *et al*, Respondents.

56—M. C. Matara, 22,207.

Maintenance—Enforcement of order of maintenance—Movable property of incorporeal nature—Cannot be distrained—Maintenance Ordinance (Cap. 76), s. 8.

Where service gratuity due under the rules regulating pensions and allowances granted to public servants was distrained under a warrant issued under the Maintenance Ordinance—

Held, that the property distrained under a warrant under the Maintenance Ordinance should be movable property of a corporeal nature.

A PPEAL against an order of the Magistrate's Court, Matara.

E. H. T. Gunasekera, C.C., for the appellant.

S. W. Jayasuriya, for the respondents.

Cur. adv. vult.

March 27, 1941. WIJEYWARDENE J.—

The first respondent obtained an order under the Maintenance Ordinance, 1889, directing her husband the second respondent to pay an allowance of Rs. 10 a month for the maintenance of herself and her two children. The second respondent was employed as a porter under the Ceylon Government Railway at the time the order was made against him. Subsequently he retired from Government Service in 1939 and became entitled to claim service gratuity under the Rules regulating the pensions and allowances granted to public servants.

As the second respondent owed a sum of Rs. 75 under the order for maintenance, the first respondent's Proctor moved for a "distress warrant to issue for seizure of the second respondent's service gratuity to the extent of Rs. 75 in the hands of the Additional Controller of Establishments". The Magistrate allowed this motion and for the purpose of the warrant adopted Form 3 in the Schedule to the Maintenance

¹ (1914) 2 *Balasingham's Notes of Cases* 58.

Ordinance but altered it to bring it into line with the motion of the first respondent's Proctor. The warrant, as issued, authorises the Fiscal to make distress by seizure of second respondent's "service gratuity to the extent of Rs. 75 in the hands of the Additional Controller of Establishments". Acting under this warrant, the Fiscal served a notice on the appellant—the Deputy Financial Secretary—requesting him to hold a sum of Rs. 75 subject to further orders of the Magistrate.

On an application made by the appellant against that notice, the Magistrate held that the service gratuity could be distrained under a warrant issued under the Maintenance Ordinance. The present appeal is preferred against that order.

In view of the objection taken by the first respondent that the order in question is not an appealable order, I propose to deal with the matter by way of revision.

The short point that has to be decided is whether under a warrant under the Maintenance Ordinance the Fiscal could deal with movable property of an incorporeal nature.

Section 18 of the Maintenance Ordinance requires the Forms given in the Schedule to the Ordinance to be used, and, therefore, there is statutory authority for the use of Form 3 when a warrant has to be issued under section 9. That Form authorises the Fiscal "to make distress by seizure of any movable property" and sell the property so "distrained". Moreover, section 9 of the Ordinance enacts that the warrant should direct "the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates"; and section 312 (2) of the Criminal Procedure Code lays down that fines should be levied by "distress and sale" of movable property.

"Distress" is defined in *Halsbury's Laws of England* (Volume 11 para. 198) as "a summary remedy by which a person, in order to minister redress to himself, is entitled without legal process to take into his possession the personal chattels of another person to be held as a pledge to compel the performance of a duty, &c." The conception of "distress" as a form of pledge appears to me to underlie the provision in Form 3 in the Schedule to the Maintenance Ordinance that a certain period of time should be allowed to the party liable to pay the allowance even after the property has been distrained before the Fiscal proceeds to sell the property. Under the English Law, the right to distrain is given either by Common Law, by Contract or by Statute, e.g., the Poor Relief Acts and the Summary Jurisdiction Acts. Under the Common Law, the right to distrain applies to goods and personal chattels and not to chattels of an incorporeal nature and money is not distrainable "unless it is in a bag or in such a closed or sealed receptacle that it can be identified" (vide *Halsbury's Laws of England*, Volume 11 para. 246). A statutory power of distress confers no further rights than those given by the Statute.

There are Indian decisions given under sections 386 and 488 of the Indian Code of Criminal Procedure, 1898, dealing with the present question. Section 488 (3) of that Code corresponds to section 9 of the

Maintenance Ordinance and provides for the issue of a warrant "for levying the amount due in manner hereinbefore provided for levying fines".

Section 386 of the Indian Code of 1898 corresponds to section 312 (2) of our Code and authorises the issue of a warrant for the levy of a fine by "distress and sale of movable property."

In the *Secretary of State v. Sengammal et al*¹, Ayling J. and Srinivasa Aiyangar J. held that the movable property referred to in section 386 of the Indian Code was "tangible and corporeal movable property". This case was mentioned with approval in a later case (vide *Pichu Vadhiar v. Secretary of State*²).

Section 386 of the Indian Code was amended in 1923 and one of the amendments was the substitution of the words "attachment and sale of any movable property" for "distress and sale of movable property". Even after this amendment it was held in *Maung Soe Hlaing v. Me Thein Khin*³ that "salary not yet drawn by a Government Servant" could not be regarded as movable property within the meaning of section 386 of the Indian Code.

I hold that the property distrained under a warrant under the Maintenance Ordinance should be movable property of a corporeal nature, and I set aside the order made by the Magistrate on October 17, 1940.

Order set aside.

