1942 *Present :* **Hearne J.**

VIVIENNE GOONEWARDENE *v.* WIJEYESURIYA.

449—M. C. Colombo, 40,959.

Order of attachment—Order for arrest of person by Governor—Person absconding—Attachment of property—Application by attorney to cancel order—Defence (Miscellaneous) Regulations, No. 3.

On a report by a Police Officer to the Magistrate of Colombo that "His Excellency the Governor had made an order against Mrs. G— in pursuance of the powers vested in him by the Defence (Miscellaneous) Regulations—which was deemed to be a warrant for the arrest to Mrs. G and that she had absconded or was concealing herself so that the warrant could not be executed", the Magistrate published a proclamation requiring Mrs. G to appear at a specified place and time and also, in terms of section 60 (1) of the Criminal Procedure Code, issued an order for the attachment of her property. Thereupon the attorney of Mrs. G filed an affidavit in the Magistrate's Court to the effect that Mrs. G had told him, in November, 1941 (five months prior to the Governor's order), that she was leaving Ceylon immediately and that he had not seen or heard from her since that date. He verily believed that she carried out her intention of leaving the Island and moved the Court to cancel the order of attachment.

Held, that the attorney had no status to move the Court to rescind the order, as Mrs. G must be deemed to be in contempt till she comes forward in response to the proclamation.

APPEAL from an order of the Magistrate, Colombo.

Crown Counsel raised the preliminary objection that there was no right of appeal from the order of the Magistrate.

H. V. Perera, K.C. (with him *N. Nadarajah, K.C., V. Mendis,* and *H. W. Jayawardene*), for appellant.—Even if there is no right of appeal the Court can exercise its revisionary powers. It is submitted that there is no legal foundation for the attachment order. Before a proclamation and an attachment order are issued, it must be shown that an accused is absconding; knowing of the warrant, or is in concealment. See *In re Ramjibhai*[1] and the case reported in *29 A. I. R. (Madras) 289.* There must be some material to satisfy the Magistrate that the accused was absconding—*(1935) 35 Cr. L. J. 1286.* "Absconding" means evading process, i.e., the order of detention. One must be aware of process and keep away—*(1942) A. I. R. (Madras) 289.*

The order of detention is "deemed to be a warrant" only for limited purposes, namely, for purposes of execution, not for purposes of contempt. For the effect of the phrase "deemed to be . . . .", see *Arthur Hill v. East and West India Dock Company.*[2]

E. H. T. Gunasekera, C.C., for respondent.—It is submitted that the petitioner had no "status" to move the Magistrate to rescind his order of attachment. The property belongs to Mrs. G., not to her attorney. The attorney has no interest, apart from the interests of Mrs. G. If

[1] *13 Cr. L. J. 796.*

[2] *(1884) 9 A. C. 448 at p. 456.*

her interests are infringed the proper remedy is a civil action. See *In re Chunder Bhon Singh.*[1] If the petition is on behalf of Mrs. G. the Court cannot entertain it, for an absconder is in contempt and cannot be heard. The words "deemed to be a warrant" indicate that the powers of a Magistrate's Court are to be used for executing a detention order.

Cur. adv. vult.

July 30, 1942. HEARNE J.—

An Officer of the Criminal Investigation Department reported to the Magistrate of Colombo that "His Excellency the Governor had made an order against Mrs. V. Goonewardene, in pursuance of powers vested in him by the Defence (Miscellaneous No. 3) Regulations, that the order was deemed to be a warrant for the arrest of Mrs. Goonewardene (Regulation 1 (9)) and that she had absconded or was concealing herself so that the warrant could not be executed". He asked the Magistrate to publish a proclamation, requiring her to appear at a specified place and time and also asked, in terms of section 60 (1) of the Criminal Procedure Code, for an order of attachment of any property belonging to her. Both the applications were allowed.

Mr. C. E. Jayewardene, a Proctor, then filed an affidavit in the Magistrate's Court to the effect that Mrs. Goonewardene had appointed him her attorney by deed, that she had told him in November, 1941 (five months prior to the Governor's order), she was leaving Ceylon "immediately" and that he had not seen or heard from her since that date. "He verily believed that she had carried out her intention of leaving the Island" and moved the Court to cancel the order of attachment of the property of Mrs. Goonewardene. This was refused. It was conceded that there was no right of appeal from the order of refusal and this Court has been asked to exercise its revisional jurisdiction in respect of the said order by setting it aside and releasing Mrs. Goonewardene's property from attachment.

It is necessary to decide, in the first place, whether the petitioner had any status at all to move the Magistrate to rescind his order. I agree with Crown Counsel that *prima facie* he had no status. A proclamation having been issued, requiring Mrs. Goonewardene to appear, she must, till she does so, be *deemed* to be in contempt. It may be she is not, for the reason that she has had no notice of the proclamation. If, later on, she comes forward and offers an explanation it will be the duty of the Magistrate to determine judicially whether her explanation is satisfactory. If it is held that it is, she may, if so advised, apply for a suspension of the attachment order. But till she comes forward in response to the proclamation she must be regarded as in contempt, and no Court will ordinarily entertain an application on behalf of a person who is in contempt of its authority.

Counsel for the petitioner appreciated this and, in the argument before me, submitted that his client would be accorded a hearing, at least as *amicus curiae,* when he could show, as he claimed to be able to show, that there was in fact no legal foundation for the attachment order, in other words that the Magistrate had acted without jurisdiction.

[1] *(1872) 17 Suth. W. R. (Cr.) 10.*

In this connection, he cited two cases. In one of them, reported in *13 Cr. L. J. 796,* a Magistrate issued a warrant for the arrest of a person in his district when the only information he had was that he had left the district. Upon the intervention of a third party the matter was referred to the High Court, which declared the warrant as well as the proclamation and attachment which followed to be illegal. In the other reported in *(1942) 29 A. I. R. 289,* an affidavit was filed on behalf of the petitioner that the accused had left India for the Federated Malay States before the warrant for his arrest had been issued and the complainant did not contradict the statement. It was held that the proclamation and attachment were bad.

The facts in this case are very different. The petitioner, so far from being able to show affirmatively that Mrs. Goonewardene has left Ceylon, does not really know where she is. What she is alleged to have told him, if she did, may not be the truth. There is no proof, as the Magistrate pointed out, that she obtained a passport, booked a passage or was seen off at a Railway Station. The sum total of reliable information placed before him by the petitioner was that she was in the Island in November, 1941.

Even if I accept the Indian cases as a guide (they do not bind this Court) and hold that a stranger may, in certain proved circumstances, invite a Court to revise an order it has made, those circumstances have certainly not been shown by the petitioner to exist.

I uphold Crown Counsel's objection that the petitioner had no status and the application in revision is dismissed.

Application refused.