ALLAHABAD HIGH COURT

Emperor

Vs

Tohfa

(King, J.)

01.08.1933

JUDGMENT

King, J.

1. Tohfa and his two sons, Harbans and Chandar were convicted by a Magistrate of the Meerut district on a charge under Section 186, 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 pronote. He filed his suit on 10th February, and on 13th February, he applied to the Court for attachment before judgment under Order 38, Rule 5. The Munsif allowed the application in the following terms:Let notice go to the defendant to show cause why the application be not allowed. Interim attachment meanwhile. Let B. Onkar Nath. vakil do the work of attachment.

2. Accordingly on 10th 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 attitute and said that they would never allow the 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, 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 mot 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 docs the judgment show that she actually stood

in the way of the process-server in order to bar his advance and prevent him carrying out his duty.

3. The next case is a Single Judge case of this Court, *Emperor v. Aijaz Hasain* [2]That was a case under Section 225(b), Penal Code. All that was proved in it was that the person whose arrest was being sought said to 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.

4. The third case on which the Sessions Judge has relied is the case of Matu Ram v. Emperor AIR 1921 Lah 238. 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, I.P.C. Another case to which our attention. has been drawn in this connection is the case of *Emperor v. Gajadhar*[3] 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 *Nafur Sardar v. Emperor reported in*[4] the learned Judge remarket as follows:

It seems to ma however that the question of whether an offence under Section 186, I.P.C., 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 obstract, that is to say, to stand in the way so as to prevent him in carrying out the duties which he had to discharge. If 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 might 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 person 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 hands 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.

5. 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, Penal Code. B. Onkar Nath's evidence Which is accepted by the defence as ceorrect-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 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, Penal Code.

6. 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, resistence or obstruction to the execution of an illegal warrant is not an offence under Section 186, Penal Code. The most recent case is that of *Fattu v. Emperor*[6]

7. 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.

8. 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 38, Rule 5 and of form No. 5 in Appendix F show that the 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 ton the record in pursuance of the Munsif's order of 13th 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 13th 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 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 Dayal v. King-Emperor (1905) 49 PE 1905 C, 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 Section 186, Penal Code. This view is in accordance with the view which we take in this case.

9. Since we have found that no legal warrant was issued under Order 38, 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, Penal Code, and that the grounds on which the Sessions Judge allowed the appeal were wrong. We accordingly dismiss this appeal. The bail bonds of those respondents who are on bail will be cancelled. Tohfa who is in jail, will be forthwith released.

Cases Referred.

1A.I.R. 1928 Lah. 827
2(1916) 38 All 506
3(1910) 11 CrLJ 721
4A.I.R. 1932 Cat.871. At p. 876
5A.I.R. 1932, All. 692