

MACHANJEERI
AHMED
v.
GOVINDA
PRAHRU.

of this there can be no doubt, but this is only in the bankruptcy.”

This decision was followed in *Ramaswami Pillai v. Govindasami Naicker*(1). The same view was held in *Sidhraj Bhojraj v. Alli Haji*(2).

We hold that the plaintiff is not entitled to exclude the time during which insolvency proceedings were pending because they have not yet been annulled.

We allow the Civil Revision Petition with costs and at the same time allow the respondent to withdraw the suit with liberty to bring a fresh suit if so advised.

K.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nair.*

MARIDU GOPAYYA (PETITIONER).*

1927,
November
29.

Local Boards Act (XIV of 1920) (Madras), sec. 221—A person erecting a pandal without obtaining a licence from a Union Board—Penalty imposed—If recoverable under sec. 221.

Where a person erected a pandal without applying for or obtaining a licence from the Union Board, and the Board agreed to license the pandal on payment of the usual fee, the Board cannot move a Magistrate under section 221 of the Local Boards Act for the recovery of the same, as it could not be said to be a licence fee within the meaning of the section.

Quare: Whether in a proper case under section 221 a defaulting party cannot by way of defence plead that no amount was due from him as he had not erected a pandal?

(1) (1919) I.L.R., 42 Mad., 319. (2) (1923) I.L.R., 47 Bom., 214.

* Case referred No. 62 of 1927.

Ramachandran Servai v. President, Union Board, Karaikudi, (1926) I.L.R., 49 Mad., 888, questioned. *Union Board, Paramakudi v. Chellaswami Thevar*, (1926) M.W.N., 676, referred to.

GOPAYYA,
In re.

CASE referred for the orders of the High Court under section 433 of Criminal Procedure Code by the District Magistrate of Kistna in his letter No. cl. 7200, dated 10th October 1927 for revision of the order of the Sub-Magistrate of Gudivada, dated 10th September 1927.

Public Prosecutor for the Crown.

No one appeared for the petitioner.

JUDGMENT.

PHILLIPS, J.—The District Magistrate of Kistna has referred an order of the Sub-Magistrate of Gudivada under section 221 of the Madras Local Boards Act for revision. PHILLIPS J.

One Gopayya had erected a pandal without the permission of the Union Board and the Board applied to the Sub-Magistrate under section 221 of the Local Boards Act for collection of the licence fee due in respect of it. Admittedly no licence was applied for or granted before the pandal was erected and it was open to the Board to take action under section 219 of the Act which provides a penalty not exceeding Rs. 50 for omission to take a licence. Under section 212 (9) the Magistrate may also recover the amount of the fee chargeable from the accused. Instead of taking this action the Board took a lenient view of Gopayya's act and agreed to license the pandal on payment of the fee. This action cannot be said to be illegal and consequently if the fee thereby became payable the Board can apply for an order under section 221 as it did. Gopayya in these proceedings raised a plea that no fee was payable as he had not erected a pandal in contravention of section 163, but in accordance with the decision in *Ramachandran*

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 PHILLIPS, J.

Servai v. President, Union Board, Karaikudi(1) the Sub-Magistrate declined to decide that point on the ground that it was not open to him to entertain such a plea. This view was taken in *Ramachandran Servai v. President, Union Board, Karaikudi*(1) by a bench of this Court consisting of DEVADOSS and WALLACE, JJ., but in a later case, *Union Board, Paramakudi v. Chellaswami Thevar*(2) WALLER, J., was of opinion that this decision was open to doubt. DEVADOSS, J., did not express the same opinion, but did not repeat the view taken by him in *Ramachandran Servai v. President, Union Board, Karaikudi*(1). Under section 221 the amount or apportionment of the sum to be recovered shall be ascertained by such Magistrate after enquiry, and it is difficult to understand why when he has that power it should not be open to him to decide that the amount is nil. The anomaly pointed out by WALLACE, J., is that such a view would amount to the Magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the Magistrate for the recovery of the dues, it is not open to the Magistrate to decide the case summarily and recover the amount without enquiry; and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under section 219, he would be able to plead that no offence had been committed by him, and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him.

However, this point need not be decided here, for Gopayya made no application for a licence and no licence has been issued. If then there has been no grant of

(1) (1926) I.L.R., 49 Mad., 888.

(2) (1926) M.W.N., 676.

licence, the licence fee payable under the Act cannot be said to be due within the meaning of section 221 and that section is inapplicable. The order of the Sub-Magistrate is therefore wrong and must be set aside, leaving the Board to take such further action as they think fit.

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MADHAVAN NAIR, J.—The question for consideration is whether the Union Board can move the Magistrate under section 221 of the Local Boards Act to recover the penalty imposed by it upon a person who erected a pandal without obtaining a licence from the Board under section 163 of the Act. It is admitted that no licence was applied for and none was granted by the Union Board.

MADHAVAN
NAIR, J.

To meet cases of this kind the Act has made provision in sections 212 (9) and 219. Acting under these sections the Magistrate after convicting the person for failure to obtain a licence can in addition to the fine which may be imposed recover and pay the Local Board the amount of fee chargeable for the licence. There is no provision in the Act empowering the Local Board to fix a penalty for erecting a pandal without a licence as there is, for example, provision for levying a fine for unauthorized encroachment under section 164 of the Act which may be recovered under section 221. Nor can the Local Board levy fees without granting a licence. No doubt under section 163, the Local Board can recover the cost of removing an obstruction on a public road, but it is not suggested that the amount sought to be recovered in this case represents such cost. In these circumstances it seems to me that the licence fee has not become due under the Act within the meaning of section 221. The Sub-Magistrate has therefore no jurisdiction to proceed under that section and recover the amount. His order must be set aside.

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In re.
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MADHAVAN
NAIR, J.

In this view, it is not necessary to consider whether in a proper case under section 221 the defaulting party can plead by way of defence that no amount is due from him as he had not erected a pandal. On this point there is a conflict of authority in this Court—see *Ramachandran Servai v. President, Union Board, Karaikudi*(1), *contra per WALLER, J., in Union Board, Paramakudi v. Chellaswami Thevar*(2). For the reasons given by my learned brother, I am inclined to hold that it is open to the defaulting party to put forward such a plea.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

1927,
November 10.

THE CHAIRMAN, MUNICIPAL COUNCIL,
CONJEEVERAM (COMPLAINANT), PETITIONER,

v.

D. R. NAGESWARA AYYAR (ACCUSED), RESPONDENT.*

*District Municipalities Act (V of 1920) (Madras), sec. 195—
Flimsy structure—if licence necessary for its continuance.*

There is nothing in the Madras District Municipalities Act (V of 1920), which requires the owner of a flimsy structure such as is contemplated by section 195 of that Act to take out a licence for its continuance as distinct from its construction or reconstruction.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary Second-class Magistrate of Conjeeveram in C.C. No. 140 of 1927 on his file.

C. Narasimhachari for petitioner.

(1) (1926) I.L.R., 49 Mad., 888.

(2) (1926) M.W.N., 676.

* Criminal Revision Case No. 490 of 1927.