and decide whether upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court.

The petition is allowed; the sentence is cancelled; the fine is ordered to be refunded; and the President is enjoined that his diary must be a plain record of fact and not a pious adaptation to circumstance.

B.C.S.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice, Mr. Justice Anantakrishna Ayyar and Mr. Justice Curgenven.

PILLA RAMASWAMI (ACCUSED), PETITIONER,

1930, April 15.

v.

THE PRESIDENT, TALUK BOARD, TADEPALLIGUDEM (COMPLAINANT), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), secs. 164 (1) and 221—Penalty under sec. 164 (1) for alleged encroachment—Proceedings under sec. 221 for recovery—Whether Magistrate competent to enquire if alleged encroachment true and justified imposition of penalty.

A magistrate acting under section 221 of the Madras Local Boards Act (XIV of 1920) in proceedings for the recovery of a penalty imposed by a Local Board under section 164 (1) of the Act in respect of an alleged encroachment is competent to enquire whether the alleged encroachment was true and justified the imposition of the penalty.

In re Raheem Sahib, (1929) I.L.R., 52 Mad., 714, approved. *Ramachandran Servai* v. *President, Union Board, Kuraikudi*, (1925) I.L.R., 49 Mad., 888, dissented from.

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* Criminal Revision Case No. 894 of 1929.

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PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment in Miscellaneous Case No. 44 of 1928, on the file of the Court of the Second-class Stationary Sub-Magistrate of Tadepalligudem at Pantapadu.

This Criminal Revision Case came on for hearing in the first instance before JACKSON J. who found that there were conflicting decisions with regard to the question at issue and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders. An order was thereupon made directing that the case be heard by a Full Bench.

The relevant sections of the Madras Local Boards Act are—

Section 164 (1).—If any person, without the previous sanction of the Local Board, occupies any land, which is not set apart for a public road, but is set apart for any other public purpose and is vested in or belongs to a Local Board, he shall be bound to pay in respect of such occupation such sum as may be demanded by the Local Board by way of penalty; such sum may be recovered in the manner hereinafter provided.

Section 221 (1).—In default of payment of any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board under or by virtue of this Act, the same may be recovered, together with any further costs that the magistrate may award, under the warrant of a magistrate. The amount or apportionment of any such sum shall in case of dispute be ascertained by such magistrate.

V. Govindarajachari for petitioner.—Under section 221 of the Madras Local Boards Act it is open to the magistrate to enquire and determine whether the ownership of the land in dispute is vested in the Local Board or not, and if it is vested, what sum is due by way of penalty. There has been a conflict of decisions in this Court with regard to the powers of a magistrate acting under the section, but the trend of recent pronouncements is in my favour. The words of the section do not warrant the construction that the magistrate is merely an instrument for the purpose of collecting money coming under

any of the heads mentioned in section 221 (1). Nor is there anything in principle to support the view that the magistrate should not enquire into the basis of liability. The Legislature could never have intended that the magistrate should act on a mere allegation by the Local Board. The last sentence in section 221 (1) tends to show rather the contrary. A proceeding under the section is in the nature of a penal proceeding and a person affected by it cannot be precluded from raising the defence that no money is due.

Ramachandran Servai v. *President, Union Board, Karaikudi*(1) held that section 221 merely prescribed the manner of recovery and did not permit the reopening of the question of liability. That decision was followed in *Rangesa Rao* v. *Swaminatha Aiyar*(2) and *Narayana Aiyar* v. *Subramania Chetty*(3).

In *Union Board, Paramakudi* v. *Chellaswami Thevar*(4) WALLER J. doubted the correctness of the view in 49 Mad., 888, and DEVADOSS J. did not repeat the view taken by him in the earlier case. *In re Gopayya*(5) questioned the correctness of 49 Mad., 888. The point again came up for consideration before WALLER and KRISHNAN PANDALAI JJ. in *In re Raheem Sahib*(6), where it was held that a party appearing before a magistrate under section 221 was entitled to allege and prove that the money claimed was not due. It is submitted that that is the better view.

N. S. Mani for *Public Prosecutor* (*L. H. Bewes*) for the Crown.—The power of a magistrate under section 221 is restricted to issuing a warrant for collection of fee, etc., levied. He may not determine the question of liability though it may be open to him to determine the quantum of it. The wording of section 164 (1) would seem to indicate that the magistrate cannot constitute himself into an appellate authority. 49 Mad., 888 has expressed the correct view.

K. Kameswara Rao for respondent.

The JUDGMENT of the Court was delivered by

CURGENVEN J.—This Criminal Revision Case comes before this Full Bench in the following circumstances. CURGENVEN J.

(1) (1925) I.L.R., 49 Mad., 888 (2) (1927) 27 L.W., 320.
(3) (1927) A.I.R., (Mad.), 1113.
(4) (1926) M.W.N., 676. (5) (1927) I.L.R., 51 Mad., 866.
(6) (1929) I.L.R., 52 Mad., 714.

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Under sub-section (1) of section 164 of the Madras Local Boards Act the Taluk Board of Tadepalligudem imposed a penalty of Rs. 50 upon the petitioner in respect of an alleged encroachment in the village of Tadepalligudem. He is said to have erected a shed without permission upon ground belonging to the Taluk Board. The petitioner did not pay the penalty and accordingly the matter was referred to the magistrate's Court under section 221, which provides that, in default of payment of such a sum, it may be levied under the warrant of a magistrate. At the hearing of the case the point arose whether the magistrate was competent to go into the question whether the alleged encroachment was true and therefore justified the imposition of the penalty; and following certain decisions, the Court came to the conclusion that it was not open to it to enquire into an issue of this character, and accordingly although it recorded the evidence, it refused to give an opinion upon the matter and directed that a warrant should issue for the recovery of Rs. 50 together with Rs. 10 as costs. The petitioner thereupon presented this Criminal Revision Case, which came in the first instance before JACKSON J. That learned Judge found that there were conflicting decisions with regard to the question at issue and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders.

The case-law upon this subject has been laid before us and opens with the case of *Ramachandran Servai* v. *President, Union Board, Karaikudi*(1), decided by WALLACE and DEVADOSS JJ. They were of the opinion that, if a contention of this kind were allowed to prevail, the magistrate would be constituted as a sort of

(1) (1925) I.L.R., 49 Mad., 868.

appellate authority over the Local Board in the matter of deciding whether or not there had been in fact an encroachment; and they pointed out what inconveniences would arise from such a situation. Nor did they think that the language of section 221 would justify such a construction. This case was followed by DEVADOSS J., sitting alone, in *Rangesa Rao* v. *Swaminatha Aiyar*(1), and again by myself in *Narayana Aiyar* v. *Subrahmania Chetty*(2). So far as my recollection of that case goes, no cases *contra* were cited before me and, sitting singly, I was of course bound to follow the ruling of a Bench. In the (1926) Madras Weekly Notes Volume will be found two succeeding cases, *Union Board, Paramakudi*, v. *Chellaswami Thevar*(3) and *Syid Mustapha Saheb* v. *Union Board of Kaveripatnam*(4), decided by DEVADOSS and WALLER JJ. In the judgments delivered by WALLER J. he was of opinion that under the parallel procedure by which a prosecution is instituted for breach of the law regarding encroachments and which is provided for in sections 164 (2) and 207 of the Act, it was open to an accused person to raise this question of whether the alleged encroachment was indeed an encroachment or not. But he was of opinion also that, anomalous though it might be, when the case came before the Court under section 221 the decision in I.L.R., 49 Mad., 888 was right and should be followed. The first Bench which seems to have taken a contrary view was in *In re Gopayya*(5), where PHILLIPS and MADHAVAN NAIR JJ. had to deal with circumstances which gave rise to proceedings under section 221, the petitioner in that case having erected a pandal without the permission of the Union Board. The decision

(1) (1927) 27 L.W., 320.
(2) (1927) A.I.R. (Mad.), 1113.
(3) (1926) M.W.N., 676.
(4) (1926) M.W.N., 678.
(5) (1927) I.L.R., 51 Mad., 866.

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proceeded substantially upon other grounds, but both the learned Judges, while acknowledging that this point did not really have to be decided, expressed their inability to follow I.L.R., 49 Mad., 888. PHILLIPS J. observes with reference to the alleged inconveniences mentioned by WALLACE and DEVADOSS JJ. in that decision:

> "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 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."

That, in other words, of course, is the anomaly detected by WALLER J. in (1926) M.W.N., 678. A similar case came before WALLER and KRISHNAN PANDALAI JJ. in *In re Rakeem Sahib*(1) and there, after referring to all the previous decisions, the conclusion was come to that I.L.R. 49 Mad., 888 had been wrongly decided and the view was expressed that a magistrate should go into the question of the merits of the Board's action before enforcing the payment of the penalty. The same point has been decided in the same sense by WALLER and ANANTAKRISHNA AYYAR JJ. in Criminal Revision Case No. 1089 of 1928. As I have already said, it has not been disputed before us that, where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court in disposing of the case under section 207 to undertake an enquiry of this character. This has been recently decided by a Bench

(1) (1929) I.L.R., 52 Mad., 714.

composed of the learned Chief Justice and CORNISH J. in a case so far unreported, Criminal Revision Case No. 247 of 1929.

It appears then that the recent trend of authority has been distinctly in the direction of holding that the nature of an alleged encroachment may be investigated. Mr. Mani, however, for the Crown has asked us to hold on the language of the Act itself that this view of the matter is incorrect. Under section 164 (1) the land which is occupied must be vested in or belong to a Local Board. It is only then that the occupant shall be bound to pay such sum as may be demanded of him by the local authority by way of penalty and, "such sum", the section goes on, "may be recovered in the manner hereinafter provided". This seems clearly to mean that the recovery of the sum must be contingent upon satisfaction of the conditions which the section lays down, namely, that the land must be vested in or belong to a Local Board, and, accordingly, it would be illegal for the Board to levy a penalty in respect of a so-called encroachment upon any land which does not satisfy that condition. Whether or not, however, it is open to the Court, which has to enforce this order under section 221, to enquire into whether the land was so vested or not must, of course, depend upon the terms of that section. It may be conceded that they are not very clear. The last sentence of sub-section (1) provides that "the amount or apportionment of any such sum shall in case of dispute be ascertained by such Magistrate". It is possible to give a narrow and also a broad meaning to that direction. But we think that it would be very reasonable to give it the construction which has been adopted by the learned Judges who decided *In re Gopayya*(1), namely, that where the

(1) (1927) I.L.R., 51 Mad., 866.

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Court has power to decide upon the amount or the apportionment of the sum "it is difficult to understand why it should not be open to it to decide that the amount is nil." It seems undesirable to go into the relative advantages and disadvantages of the two constructions. In the one case, it has been suggested that the magistrate would be converted into a Civil Court if he had to go into the difficult questions of title upon which many of these encroachment cases are founded; on the other hand, there is the disadvantage that, under section 164 a Local Board may, perhaps without due enquiry, impose and demand a penalty in respect of an alleged encroachment, and that if the power of the magistrate to enquire into the truth of the prosecution allegations is withheld, the party has no remedy except that of a slow and troublesome civil suit. The clear preponderance of opinion is in favour of the view that the magistrate has such a power, and we are of the opinion that it is the correct view.

In these circumstances, we set aside the order of the trial Court and remand the case for a finding on the evidence whether the alleged encroachment is true, and for disposal accordingly. Meanwhile, the fine and costs paid, if any, will be refunded.

B.C.S.