1906.
November 28.

[Full Bench.]

Present : Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Wood Renton.

GUNESEKERE *v.* TEBERIS *et al.*

D. C., Galle, 7,777.

Sale for default of grain tax—Certificate of sale—Presumption—Burden of proof—Prima facie *title—Ordinance No.* 11 *of* 1878, *ss.* 22 *and* 23—*Evidence Ordinance* (*No.* 14 *of* 1895), *s.* 114.

Where a certificate of sale is given by the Government Agent under section 22 of Ordinance No. 11 of 1878 in the form prescribed by the Ordinance in respect of property sold for non-payment of grain tax, a presumption arises under section 114 of the Evidence Ordinance (No. 14 of 1895) in favour of the person relying on the certificate that the sale was duly made under the Ordinance, and that the tax, for non-payment of which the sale purported to be held, was in fact due, and that default had been made in payment of it.

Madduma Banda v. Appuruwa (1) and *Nevethehamy v. Don Andris* (2) over-ruled.

WENDT J.—The Court is not bound to draw this presumption in every case, and would be entitled to call for proof if there be anything which arouses its suspicion or suggests the probability that there was a departure from the regular and proper course of business in the particular case. Section 114 of the Evidence Ordinance itself provides that in the application of the maxims set out in the illustrations such circumstances should be taken into account.

APPEAL from a judgment of the District Judge of Galle (G. A. Baumgartner, Esq.).

The facts and the arguments sufficiently appear in the judgments.

A. St. V. Jayewardene, for the defendants, appellants.

H. A. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

(1) (1895) 6 *N. L. R.* 267.

(2) (1898) 4 *N. L. R.* 248.

28th November, 1906. HUTCHINSON C.J.— 1906. *November* 28.

The only question which has been argued before us in this case is whether the production of a certificate of purchase given by the Government Agent under section 22 of Ordinance No. 11 of 1878, raises a presumption in favour of the person relying on the certificate that the sale was duly made under the Ordinance, and that the tax, for non-payment of which the sale purported to have taken place, was in fact due, and that default had been made in payment of it.

The plaintiff alleged that by purchase for default of payment of commutation tax for 1887 against the former owners upon certificates of sale dated 13th July, 1888, under Ordinance No. 11 of 1878, he became entitled to the lands in dispute in this action; that some of the defendants forcibly and unlawfully interfered with his possession; and he also set up a title by prescription; and he claimed to be declared entitled to and quieted in the possession and damages.

Those of the defendants who are now appellants denied the plaintiff's title, denied that the lands were sold for non-payment of tax, or that any arrears of tax were due, and, even if any sales were held, they challenged them as collusive, fraudulent, and *mala fide*, and denied that they were acted on by the alleged purchasers, and they also claimed that they had acquired a prescriptive title to the lands.

The issues fixed, so far as they are at present material, were:—

(1) Were the fields sold for non-payment of grain tax?

(2) Were any arrears of tax due?

(3) If the sales took place, were they collusive and fraudulent?

At the trial evidence was given on behalf of the plaintiff as to his purchase and his cultivation of the lands since the purchase and as to the defendants' interference, and evidence was given for the defendants in support of their allegations. The plaintiff relied on the certificates of sale which he produced, whilst the defendants argued that the certificates were not enough. The certificates are all in the following form, which is the one prescribed by the Ordinance:— "Whereas the sum of Rs.———— was due for annual commutation for 1887 in respect of the produce of————and for costs, which sum has not been paid by the persons liable therefor (naming them). And whereas the said land was seized in conformity with the Grain Tax Ordinance, No. 11 of 1878, and sold also in conformity therewith on the 13th November, 1887, and the same was purchased by (plaintiff) for the sum of Rs.————which has been duly paid by the said (plaintiff)," and then the Government Agent certifies that plaintiff is the purchaser and that the lands are and shall henceforward be vested in him and his heirs.

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The District Judge found, and I think quite rightly, on the evidence that the charges of fraud set up by the defendants were not proved, and he held that a certificate of sale such as the plaintiff produced raises a *prima facie* presumption that every thing had been done leading up to such a certificate for the purpose of vesting the property embraced by it in the purchaser, and he accordingly gave judgment for the plaintiff.

On this appeal it was argued for the appellants that the onus was on the plaintiff to prove that the sales were *bona fide*, and that they took place within the time prescribed by the Ordinance and that the taxes for default in payment of which the sale took place were in fact due and unpaid. For the plaintiff it is contended that the certificates are *prima facie* evidence of all facts which the law requires to be and which are stated in them, and that the onus was on the defendants to prove that the sales were not in good faith or were irregular or that the taxes were not due and unpaid.

Each party has been able to cite in support of his view decisions or *dicta* of Judges. The appellants relied on a *dictum* of Bonser C.J. in 1895 reported in 6 *N. L. R.* 267, followed in 1898 by Browne J. in a case reported in 4 *N. L. R.* 248, and they also cited some unreported cases. The plaintiff relied on cases reported in 3 *S. C. C.* 103, 5 *S. C. C.* 150, and 2 *C. L. R.* 114, and on some unreported cases, in one of which Justice Lawrie discussed the decision in 4 *N. L. R.* 248 and declined to follow it.

The Evidence Ordinance, No. 14 of 1895, section 114, enacts:— "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case." And one of the illustrations given is:—

(*e*) That judicial and official acts have been regularly performed.

In my opinion the *dictum* of Bonser C.J. and the judgment which followed it were mistaken. They took no account of the rule laid down by the Evidence Ordinance. When those certificates were put in evidence it was right for the Court to presume, in accordance with section 114 of the Evidence Ordinance, that the sums stated in the certificates to be due and unpaid were due and unpaid, and that the lands were duly seized and sold and purchased and paid for in conformity with the provisions of the Grain Tax Ordinance. The appeal therefore fails on the only point which was argued before us.

The appellants' Advocate suggested that if we decided against him on this point he ought to be allowed now to produce evidence to rebut the presumption. I think not.

He might have produced that evidence at the trial, and I think he did produce the best evidence he could, which evidence the District Judge rightly held to be insufficient. And for the same reason I do not think the case ought to go back for any further evidence on the question of prescription. I think the appeal ought to be dismissed with costs.

WENDT J.—

The question we have to consider is, whether a certificate signed by the Government Agent of the sale of land for default of payment of paddy tax, under Ordinance No. 11 of 1878, is *prima facie* evidence of the purchaser's title as against the defaulting owner of the land, or whether the purchaser has in the first instance to establish that all the steps necessary to a valid sale had been duly taken by the Government Agent. The certificate in the present case is regular on its face and follows the form prescribed by the Ordinance. The defendants admittedly were the owners of the land at the time the alleged default in payment of the tax was made. Section 18 of the Ordinance provides that if the amount due for annual commutation, crop commutation, or grain duty is not duly paid it shall be lawful for the Government Agent to seize the land in respect of which it is due, or any movable property thereon, to whomsoever such land or movable property may belong, and if the amount due, together with the costs and charges payable under section 20, shall not be sooner paid, to sell the property so seized by public auction at any time not less than twenty days from the time of seizure. Section 18 also makes the tax a first charge upon the land. Section 19 provides for the custody pending sale of property seized, and section 20 awards certain charges to the Government Agent. Section 21 directs that any surplus realized shall be paid to the owner of the property. Section 22 then enacts as follows:—" If immovable property be sold for non-payment of annual commutation, crop commutation, or grain duty, a certificate substantially in form A in the schedule hereto signed by the Government Agent or Assistant Government Agent shall vest the property sold in the purchaser free from all encumbrances." Section 23 renders the Government Agent, in the execution of the authority entrusted to him by the Ordinance, civilly responsible in damages to any person aggrieved at anything that such Agent may do, by reason that no tax was due by such person or of any irregularity of proceeding or abuse of authority.

The provisions of Ordinance No. 5 of 1866, which this Ordinance repealed, were, so far as concerns the point under consideration,

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substantially the same, and under it the case of *Ranhamy Mohandiram v. Mudiyanse* (1) was decided. Cayley C.J. said: "It was objected that it had not been proved that the seizure and sale had been effected in conformity with the requirements of the Ordinance; but with regard to this, I think that the recitals in the certificates must be taken to be true, unless the contrary is shown." And Clarence J. added: "With regard to the regularity of the sale disclosed in the certificates which plaintiffs set up, all must be presumed *rite fuisse acta*, in the absence of evidence to the contrary." In 1883 the case of *Weerakoon Appuhamy v. Pabhewardene* (2) arose under the Ordinance No. 21 of 1867, section 39 of which was substantially in the same terms as the provision we are now considering.

The District Judge, finding that there had been no proper seizure of the land as required by the Ordinance, had nonsuited the plaintiff. Burnside C.J., in reversing this judgment, said: "The question for our decision is whether a purchaser at a sale made under the authority of the Ordinance No. 21 of 1867, who receives the certificate referred to in clause 39, is bound to inquire whether the provisions of the Ordinance have been duly complied with, or into the regularity or irregularity of such sale.

"I am clearly of opinion that he is not. . . . . .

"The policy of the Legislature evidently was that upon a purchaser obtaining a certificate his title should be complete against all the world, and the reason for it is very clear; for, if a purchaser's title at a sale made under the Ordinance was liable to be impeached on the ground of some informality which had taken place, no purchaser would be safe.

"It would scarcely be possible for him to satisfy himself that every requirement of the Ordinance had been complied with; no one would be willing to purchase on so precarious a tenure, and the land would consequently be sacrificed.

"If the owner of the land has been prejudiced by a sale not made in conformity with the provisions of the Ordinance, upon which I express no opinion, he has his remedy against the party in default, if such there be."

The *Commissioners of the Loan Board v. Ratwatte* (3) arose upon the provisions of "The Municipal Councils' Ordinance, 1877." Section 154 of that Ordinance, which followed provisions directory of the steps necessary for a sale for default of paying taxes, enacted as follows:—

"If land or other immovable property be sold under the warrant, a certificate in substantially the form contained in the schedule F

(1) (1880) 3 *S. C. C.* 103. (2) (1883) 5 *S. C. C.* 150.
(3) (1892) 2 *C. L. R.* 114.

hereunto annexed, signed by the Chairman, shall be sufficient to vest the property in the purchaser free from all encumbrances. "

Burnside C.J. said (p. 116): " As a general proposition it is safe to say that a certificate of sale in the form contained in schedule F would be *prima facie* evidence that everything had been legally done leading up to such certificate, for the purpose of vesting the property embraced by it in the purchaser. *Omnia presumuntur rite esse acta*, and the person challenging the certificate would have the burthen of establishing the contrary. In this case the defendant has produced with and pleaded as part of his answer a certificate which upon the face of it recites that the sale of the property took place under ' a warrant of distress issued in conformity with the Ordinance, ' and apart from the distinct traverses of the plaintiffs at the close of the plaintiffs' case, the defendant could have relied on his certificate as sufficient to show good title for the rents and profits of the land without going into the details how that certificate had been obtained. "

Withers J. expressed himself to the same effect. Lawrie J. upheld the purchaser's title, but did not deal specifically with the point now in hand. It will be observed that the only difference between the enactment thus construed and those of the Ordinances of 1866 and 1867 was that the one used the words: " If land be sold under the warrant "—such warrant having been provided for in the earlier sections—while the others said: " If land be sold for non-payment, " the mode of sale having been pointed out in earlier provisions. The difference, in my opinion, is not one of substance. I shall refer to it again presently.

A different view of the law was taken, for the first time, by Bonser C.J. in *Madduma Banda v. Appuruwa* (1) in construing the very section 22 which is now before us. The certificate there relied upon was defective, and it was therefore not necessary to decide the point, but the learned Chief Justice expressed the opinion that the mere production of the certificates did not dispense with proof that the duty was in arrear and that a sale took place in accordance with the Ordinance. The vesting (he said) was expressed by the Ordinance to be " subject to the condition that property be sold for non-payment of duty ", and he was inclined to think that its only effect was to dispense with a notarial conveyance, and to provide that the purchaser shall get a title free from encumbrance. The learned Judge added that if it had been intended to provide that the certificate should be evidence, either *prima facie* or conclusive, of the facts therein stated, it would have been easy to have so

(1) (1895) 6 *N. L. R.* 267.

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enacted. Withers J., who took part in the decision of this case, merely expressed concurrence in the result. Bonser C.J. reiterated his view in C.R., Galle, 100 (1), and it was followed by Browne A.J. in *Nevethehamy v. Don Andris* (2). In a footnote to the report of *Madduma Banda v. Appuruwa* it is stated that that case was followed by Layard C.J. and myself in D.C., Galle, 5,652 (3), but the judgments in the latter case show that neither of us expressed any opinion upon the point—the holder of the certificate having taken upon himself the onus of proving due seizure and sale, and having in the opinion of the District Judge (of which we approved) duly discharged that onus. In D.C., Batticaloa, 1,317 (4), Lawrie J. expressed the opinion that a certificate of sale (in that case one granted under the Ordinance of 1867) could not even be impeached by proof that the tax for non-payment of which the sale took place was not due—no more than a Fiscal's sale could be avoided by evidence that the debt decreed by the judgment was not due. The judgments in the case do not mention the point now before us; it appears to have been assumed. In C.R., Galle, 1,040 (5) upon which the learned District Judge bases the judgment now under appeal, the certificate was one granted under the Ordinance of 1878. It was admitted that the land was liable to the tax, and plaintiff led some evidence to show that the owners had been entered in a list of defaulters, and that there had been a seizure, followed after the proper interval by a sale, but the Court of Requests held that plaintiff was bound to prove default of payment by the owners and dismissed the action. Sir Archibald Lawrie cited with approval the opinions of the Judges in *Ranhamy Mohandiram v. Mudiyanse* and *Weerakoon Appuhamy v. Pabhewardene*, which I have quoted above, and which he said did not appear to have been laid before the Court in *Madduma Banda v. Appuruwa* and *Nevethehamy v. Don Andris;* and he also pointed out that in the latter cases there had been only a "mere" production of the certificate, without any evidence whatever. He added: "I must however say that I think the presumption in favour of official acts was not fully considered in those cases." He gave judgment for the plaintiff. In D. C. Anuradhapura, 437 (6), the certificate was one issued under section 58 of the Ordinance No. 23 of 1889, the terms of which differ materially from those construed by Bonser C.J., inasmuch as nothing is said, in the preliminary words, as to a sale for non-payment of anything, the words being "if land be sold." Layard C.J., while

(1) *S. C. Min., March* 9, 1898.
(2) 4 *N. L. R.* 248.
(3) *S. C. Min., June* 9, 1903.
(4) *S. C. Min., July* 21, 1896.
(5) *S. C. Min., January* 15, 1901.
(6) *S. C. Min., October* 16, 1905.

regarding the decisions under the Paddy Tax Ordinance as applicable, held also that there was evidence of substantial irregularities which tended to vitiate the sale. I concurred (without giving a separate judgment) in holding that the plaintiff could not succeed, and in giving him leave to withdraw from the action.

It will thus be seen that besides the uniform series of older decisions *in pari materia*, there is the express authority of Lawrie A.C.J. in favour of the view that the Court will presume that the steps antecedent to sale have been duly taken, while on the other side is the opinion of Bonser C.J. and Browne A.J. If the matter had to be adjudged according to the weight of judicial authority the scale must incline in favour of the certificates. The English Law of Evidence, under which *Madduma Banda v. Appuruwa* was decided, raised a presumption in favour of the due performance of official acts, and our Evidence Ordinance, section 114, does not, I think, go beyond the English Law. It enacts that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case, and enumerates among matters which may be presumed (illustration *e*) " that judical and official acts have been regularly done. " A sale under the Paddy Tax Ordinance is distinctly an official act done by the Government Agent in recovering a tax due to the Crown. The view of Bonser C.J. was that the clause in section 22 introduced by the word " if " constituted a condition precedent to the certificate vesting the property in the purchaser—with due deference to the very high authority of that learned Judge, I cannot take the same view. It would have been the proper view if (say) the section had run thus: " If all the hereinbefore prescribed steps preparatory to sale have been duly taken and immovable property sold, " &c. The section does not even add, after the word " sold " the words " in manner hereinbefore prescribed. " It merely says: " if property be sold for non-payment. " If then it be even necessary to show there was in fact a sale for non-payment, why should the purchaser be required to go further and show that in fact there had been a non-payment, and further still, that the tax unpaid had been justly due ? These are matters which it would be very difficult if not impossible for an intending purchaser to satisfy himself about before the sale, or to prove when his title is disputed long after the sale. He is entitled to rely, when he bids and buys, on the presumption *omnia rite esse acta*. Appellants' counsel cited the statement in Ameer Ali and Woodroffe's work on Evidence, in the-

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note to illustration (*e*) to the effect that under section 114 no presumption will be made in favour of the existence of a condition precedent to the attaching of a liability which it is sought to enforce. The cases on which that *dictum* is founded make clear what is meant. They were actions to recover cesses due in respect of land, on the footing of an assessment made under a statute. The statute provided that where the assessing authority had made its assessment notice thereof should be served upon the landowner to enable him to object to it if so advised, and a procedure was provided for dealing with the objection. The Courts held that the assessment was not conclusive upon the landowner until after the notice, and that as the actions were based on the conclusiveness of the assessment, the plaintiffs must show that the notice had been served—that being a condition precedent to the liability. Note, that there was no question as to the regularity of the assessment itself, but of something which was to follow it. Had there been such a question, I venture to think the presumption *omnia presumuntur* would have been given effect to in favour of the public body which made the assessment. And so indeed it was held in one of the cases just mentioned, *Municipality of Sholapur v. Sholapur Spinning and Weaving Co.* (1), where the Court presumed that the notice which the law required to be given to all the Commissioners of the Municipality of the meeting for resolving upon the levy of a cess had been duly given. In the cases cited by appellants relating to the sale of *patni tallugs* under regulation VIII. of 1819, the sales were not sales conducted by any public officer or authority, but by the Zemindar for his own private benefit, and the giving of the notices (the due service of which the Court was asked to presume) was in no sense an official act.

I think, therefore, that the Court was entitled to presume that the facts stated in plaintiff's certificate were true, and that the sale to him was regularly carried out. The Court is, however, not bound to presume that in every case, and would be entitled to call for proof if there be anything in the circumstances which aroused its suspicion or suggested the probability that there was a departure from the regular and proper course of business in the particular case. Section 114 of the Evidence Ordinance itself provides that in the application of the maxims set out in the illustrations such circumstances should be taken into account. The presumption having been rightly raised, there was nothing to rebut it. I see no reason for giving the defendants another opportunity of calling evidence

(1) *I. L. R.* 20 *Bom.* 732.

to rebut it. I agree with my Lord and my brother Wood Renton, whose judgments I have had the advantage of perusing, in holding that the appeal should be dismissed with costs.

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WOOD RENTON J.—

I agree. Numerous authorities were cited to us by the appellants' counsel with the view of showing that no presumption arises in favour of conditions precedent having been complied with [*cf. Maharajah of Burdwan v. Tarasundari Debi* (1); *Mohamed Zamir v. Abdul Hakim* (2); *Hurro Doyal Roy Chowdry v. Mahomed Gazi Chowdhry* (3)]; and it is on the same ground that the *dictum* of Bonser C.J. in *Madduma Banda v. Appuruwa* (4), followed by Browne J. in *Nevethehamy v. Don Andris* (5), rests. But, before this principle becomes applicable, we must be satisfied that section 22 of Ordinance No. 11 of 1878 enacted a condition precedent. I have come to the conclusion that it did not, and that, therefore, the maxim *omnia rite esse acta presumuntur*—embodied in effect in section 114 (*e*) of the Evidence Ordinance (No. 14 of 1895), holds good. The Indian cases above cited are clearly distinguishable on the facts from the present case. They deal with sales for arrears of rent by a Zemindar and not with sales by a public officer for default in payment of a tax. And, in the next place, under the Bengal Regulation VIII of 1819, on which they turn, the observance of certain prescribed forms was by necessary implication from the language of the regulation itself an essential preliminary to the validity of the sale, and the Zemindar was made "exclusively answerable" for their being complied with. There is nothing in Ordinance No. 11 of 1878 which at all corresponds to these latter provisions, and I do not see that either section 22 or section 18 to which Browne J. referred in *Nevethehamy v. Andris* displaces section 114 (*e*) of the Evidence Ordinance. The balance of convenience is certainly in favour of our present decision. Indeed the mere fact that the appellants' construction of section 22 of the Ordinance of 1878 would throw on the purchaser the burden of proving not only the regularity but also the *bona fides* of the sale, to which the statutory certificate relates, has gone far to convince me of its unsoundness.

Appeal dismissed.

(1) (1882) *I.L.R.* 9 *Cal.* 619, *at page* 624.
(2) (1885) *I. L. R.* 12 *Cal.* 67.
(3) (1891) *I. L. R.* 19 *Cal.* 699.
(4) (1895) 6 *N. L. R.* 267.
(5) (1898) 4 *N. L. R.* 248.