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is shown in the contract that payment should be made in Rangoon. Accordingly part of the contract was performable in Rangoon so as to satisfy section 49 of the Indian Contract Act, and there was jurisdiction to entertain the suit.

Their Lordships will humbly advise His Majesty accordingly that this appeal should be dismissed with costs.

Solicitors for Appellants—*Bramall and Bramall.*

Solicitors for Respondents—*Stoneham & Sons.*

ORIGINAL CIVIL.

Before Mr. Justice Chari.

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Mar. 29.

R.M.V.V.M. CHETTYAR FIRM

v.

M. SUBRAMANIAM AND ANOTHER.*

City of Rangoon Municipal Act (Burma Act VI of 1922), ss. 80, 81, 194—Burma Land and Revenue Act (II of 1876), ss. 43 to 48—Recovery of arrears of taxes "as if they were arrears of land revenue," meaning of—Application of ss. 46 to 48 of the Burma Land and Revenue Act to sales by Municipal officer for recovery of "property-taxes"—Title of purchaser at such sales whether free from all incumbrances—Effect of collusive fraud.

Held, that section 194 of the City of Rangoon Municipal Act empowers the Corporation to recover the arrears of its taxes and other dues "as if they were arrears of land revenue," but that does not mean that sections 46 to 48 of the Burma Land and Revenue Act apply to *all* Municipal sales, so as to confer on the auction-purchaser in every case a title free from incumbrances. These sections can only apply where the dues to the Municipality are in the nature of land revenue or land rate in lieu of Capitation-tax. So far as "property-taxes" as defined in section 80 of the City of Rangoon Municipal Act are concerned, it is open to the properly authorized officer of the Municipality to direct the recovery of arrears in the manner prescribed by sections 46, 47 of the Burma Land and Revenue Act and to a sale held under these sections, the provisions of section 48 of the Act will apply, unless the purchaser acted in collusion with the owner to defraud the incumbrancer.

Chinnasami Mudalay v. *Thirumalai Pillai*, 25 Mad. 572; *Ibrahim Khan* v. *Rangasamy*, 28 Mad. 428; *Kadir Mohideen* v. *Muthukrishna Iyer*, 26 Mad

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* Civil Regular Suit No. 606 of 1926.

230; *Muthia Chetty* v. *Sheik Mohamed*, C.R. 393 of 1925, H. C. Ran.; *Ramachandra* v. *Pitchai Kauni*, 7 Mad. 434; *Sabid Ali* v. *Swaminathan Chetty*, 5 B.L.T. 108; *Sankaran* v. *Ramasami*, 41 Mad. 691—*referred to*.

Kalyanwala—for the Plaintiff.

A. H. Paul—for the 2nd Defendant.

CHARI, J.—The plaintiff in this case files a suit to enforce a mortgage dated the 7th of September 1925 whereby the mortgagor, the first defendant, mortgaged a house in Dalla as security for the repayment of Rs. 2,000 and interest thereon. The mortgagor failed to pay the Municipal tax of Rs. 10-7-0 for the very next quarter of 1926. It is significant that a mortgagor who calls himself a contractor should allow this paltry tax to remain unpaid. This tax of Rs. 10-7-0 is made up of two sums general tax Rs. 8-10-0 and lighting tax Rs. 1-13-0 The tax for the succeeding quarter Rs. 18-7-0 includes an additional conservancy tax of Rs. 8, but we are not concerned with this.

Proceedings were taken in respect of this default which became rather elaborate and may, when evidence is taken on the issue of fraud, turn out to be an elaborate farce.

On the 31st of March 1926, the Municipal Thugyi (the collector of revenue) applied to the Revenue Officer for an execution against the defaulter. The execution application prays for an attachment and sale of the moveable property of the defaulter and the notice issued to him in respect of the same is headed as notice of proceedings of execution under section 45 of the Burma Land and Revenue Act to which I shall refer later. Execution was granted and it purports to have been granted under the same section, namely, section 45 of the Burma Land and Revenue Act.

On the 29th of April 1926 the Thugyi made a report that the defaulter had no moveable property

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and prays for proceedings against the house itself. The Thugyi with praiseworthy zeal asked in effect that for the non-payment of Rs 10-7-0 the house, whose rateable value according to the Municipal tax itself is Rs 41 monthly and which at that rate even on a ten-year's purchase would be worth nearly Rs. 5,000, should be brought to sale for this paltry sum. In accordance with the procedure prescribed in the rules and directions of the Burma Land Revenue Manual in respect of proceedings against property, the Revenue Officer issued a prohibitory order to the defaulter and the house was proclaimed for sale. The proclamation of sale was issued under section 47 of the Burma Land and Revenue Act. The house was sold on the 7th of June and a sale certificate was issued to the purchaser who is the 2nd defendant in the suit on the 14th of July 1926. He bought the house at the sale for Rs. 200.

In the plaint it is alleged that the sale was a collusive and a fraudulent sale and that the 2nd defendant is only a *benamidar* of the first. When the case came on for hearing, the learned advocate for the plaintiff contended that a sale for arrears of Municipal tax does not vest the property in the purchaser free from encumbrances and that irrespective of collusion and fraud the 2nd defendant cannot take the property free of the plaintiff's prior mortgage. I heard arguments on this question because, if I uphold the contention of the advocate for the plaintiff, he will be entitled to a decree irrespective of the question of fraud.

The simple question I have to decide at this stage of the case is, as I have indicated above, whether a purchaser at a sale for arrears of Municipal taxes payable to the Corporation of Rangoon takes the property free of encumbrances. The City of Rangoon

Municipal Act (Burma Act VI of 1922) provides in section 194 that any arrears of tax or any fee or other money claimable by the Corporation under that Act may be recovered "as if they were arrears of land revenue." Land revenue in this Province is recoverable in the manner provided by Part IV of the Lower Burma Land and Revenue Act. Section 43 of this Act provides generally that every sum payable under the Act whether on account of any revenue, tax, fee, duty or compensation shall fall due on such date and shall be payable at such place and by such person as the Local Government may from time to time direct. Section 44 provides for an issue of notice and ten days after the service of such notice the sum due is deemed to be an arrear and the person liable is deemed to be a defaulter. Then we come to section 45 which provides that the arrear so due may be realised as if it were the amount of a decree for money passed against the defaulter in favour of the Revenue Officer empowered to take proceedings before any other Revenue Officer appointed by the Local Government, for its realisation. The Revenue Officer before whom proceedings are taken is directed to conform to the rules of procedure prescribed for a Court executing a decree by the Code of Civil Procedure. Then instead of and in addition to the above procedure the Revenue Officer properly empowered is also given authority to proceed against the land on which such arrear accrued. If in respect of such land there exists any permanent heritable or transferrable right of use and occupancy such an officer can sell the same by public aution (Section 47). Section 48 provides that the purchaser at such a sale shall be deemed to have acquired the right free from all encumbrances created over it and all subordinate interests derived from it except such as are expressly reserved by the Revenue Officer at the

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time of the sale. I may remark that in the case before me in the proclamation of sale no encumbrance or subordinate interest was reserved and it is expressly stated that the right offered will be free from all encumbrances created over it and all subordinate interests derived from it. The question for decision now is whether the words "may be recovered as if they were arrears of land revenue" merely refer to the procedure to be followed by the officers of the Municipality claiming the arrears and directing the proceedings in execution or whether these words attract the provisions of section 48 of the Lower Burma Land and Revenue Act to such sales. The mere fact that the officer of the Municipality directing the sale and the officer who actually conducted it in the sale proclamation refer to section 47 of the above Act and the fact that the sale itself is purported to be conducted under that Act, and the inclusion in the proclamation of a statement to the effect that the rights sold are free of encumbrances cannot affect the prior mortgage or create rights in favour of the purchaser unless the provisions of section 194 of the Municipal Act by implication extends to such sales the provision of section 48 of the Lower Burma Land and Revenue Act.

I shall now shortly refer to the authorities on the point and then give my own conclusions.

In the case of *Ramachandra* v. *Pitchai Kanni* (1), the sale was held under the Madras Abkari Act (Madras Act III of 1864). Section 7 of the Abkari Act enacted that Collectors may proceed against abkari renters or other persons liable under the Act for the recovery of arrears due by them in like manner as for the recovery of arrear of land revenue.

(1) (1883) 7 Mad. 434.

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The Revenue Recovery Act (Madras Act II of 1864) governed the procedure to be adopted when revenue was being recovered. Section 42 of that Act declared that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrance. The learned Judges who decided the cases were of opinion that the words "in like manner as for the recovery of arrears of land revenue" indicated only that the same procedure as for recovery of land revenue should be followed and nothing more. They drew attention to the fact that arrears of abkari revenue is not due upon any specific land owned by the abkari renter. In *Chinnasami Mudaly* v. *Thirumalai Pillai* (1), the same question arose in regard to a sale under Land Improvement Loans Act (Act XIX of 1883). Clause 1 of section 7 of that Act contains four sub-clauses but the particular sale in question was made under clause (1*a*) of that Act. That clause provides that the loan, interest, costs, etc., shall be recoverable from the borrower as if they were arrears of land revenue due by him and it will be noticed that the wording is practically the same as the words in the City of Rangoon Municipal Act. The learned Judges followed the earlier case of *Ramachandra* and held that the difference in the wording of the two Acts did not indicate any real difference and they therefore held that the sale in question did not convey the rights sold free of encumbrance. The next case is *Kadir Mohideen* v. *Muthukrishna Iyer* (2), where a sale for the recovery of arrears of income-tax was held not to convey the property free of encumbrances. Section 30 of the Income Tax Act (II of 1886) enacted that the Collector may in default of the

(1) (1901) 25 Mad. 572. (2) (1902) 26 Mad. 230.

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payment of tax recover the amount as if it were arrears of land revenue or by any process applicable to the recovery of Municipal or local tax or may pass an order for recovery of the amount from the defaulter which order may be executed as a decree for payment of money under the Code of Civil Procedure.

In the case of *Ibrahim Khan* v. *Rengasamy* (1), which was a sale for arrears of abkari revenue, under a later Abkari Act (Madras Act I of 1886), it was held that such a sale did not have the effect of discharging the encumbrances created prior to the sale. The words of the new Act were "as if they were arrears of land revenue" and the learned Judges held that it had the same meaning as the words in the earlier Act "in like manner as for the recovery of arrears of land revenue."

In a still later case of *Sankaran* v. *Ramasami* (2), the sale was under section 7 (*1*) (*c*) of the Land Improvement Loans Act (Act XIX of 1883), and the learned Judges of the Madras High Court held that the sale conveyed to the purchaser the rights sold free of encumbrances. This ruling shows that the words "as if they were arrears of land revenue" do not by itself show that the intention of the Legislature was merely to regulate the procedure to be followed in such cases and that whether it was intended to attract also the provision relating to the substantive right of a purchaser depends upon a consideration of the wording of the Act and the nature of the tax. This is made clear in the judgment of Mr. Justice Seshagiri Aiyar at page 698 where, after referring to the passage in *Ramachandra's* case, I have already cited, the learned Judge says that to

(1) (1904) 28 Mad. 428. (2) (1918) 41 Mad. 691.

his mind that passage is the key-note to the construction of similar provisions in other Acts, *i.e.*, that the fact whether the tax is payable out of any particular or specified land must have a material bearing on the construction of the words.

There can be no doubt, whether the distinction thus drawn in the Madras case does or does not apply to other Acts, that it does apply, as can be seen from the wording of the Acts themselves, to the two Acts which are now under consideration. Some such distinction must obviously be drawn.

Section 45 of the Burma Land and Revenue Act applies to the recovery of all arrears due to the Government of whatever kind they may be.

Section 46 of the Act only applies to arrears of land revenue or land rate in lieu of capitation-tax ; that is, they are inapplicable to the arrears due to the Government other than the two specified in the section. If the words in the City of Rangoon Municipal Act, " as if they were arrears of land revenue " be construed as attracting the operation of sections 46 to 48 of the Burma Land and Revenue Act to all Municipal sales then the anamalous result would be that the Rangoon Municipality is in a position to recover its dues in a manner, in which, under the Revenue Act itself, ordinary revenue officers cannot recover ; that is, the operation of section 46 of the Act will be enlarged in the case of sales under the Municipal Act. I am certain that this was not the intention of the Legislature and that section 46 can only apply where the dues to the Municipality are in the nature of land revenue or land rate in lieu of capitation-tax. The distinction drawn by the Madras High Court is, therefore, sound so far as these Acts are concerned. Bearing this distinction

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in mind, I turn to the City of Rangoon Municipal Act (Burma Act VI of 1922), and there I find that section 80 provides for the levying of what are called " property-taxes." That section begins as follows : " The following taxes shall, subject to the limitation hereinafter provided, be levied on buildings and lands and shall be called ' property-taxes.' "

Section 81 provides that out of the four taxes classed together as " property-taxes " in section 80, the " general " tax shall be levied in respect of all buildings and lands. Similarly the succeeding sections provide for the levying of the other kinds of " property tax," and prescribes when they are so leviable.

Section 86 provides that " property-taxes " in respect of any building or land shall be leviable jointly and severally from all persons who have been either owners or occupiers of the building or land at any time during the period in respect of which any instalment of any property-tax is payable under the Act. There is no special provision anywhere in the City of Rangoon Municipal Act that any property shall be deemed to be charged with any tax ; nor does the wording of the sections above referred to lead to such an inference. At the same time, those sections show that in the contemplation of the Legislature the so-called " property-taxes " were a special kind of tax leviable on lands and buildings.

I am therefore, of opinion that, so far as " property-taxes, " as defined in section 80 of the City of Rangoon Municipal Act, are concerned, it is open to the properly authorised officer of the Municipality to direct the recovery of arrears in the manner prescribed by sections 46, 47, of the Burma Land and Revenue Act, and that, to a sale held under these sections, the provisions of section 48 of the Act

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will apply. I am strengthened in the conclusion I have arrived at by the fact, to which my attention has been drawn by the learned advocate for the 2nd defendant, that the provisions of the Burma Municipal Act and Burma Town and Village Lands Act whereby lands paying Municipal taxes are exempted from land tax, in lieu of the capitation-tax, show that the Municipal "property-taxes" were meant as a kind of substitute for land tax, and that the Legislature intended to put the Municipal "property-taxes" in the same position as land taxes.

I shall now refer to the two Burma cases to which my attention was drawn.

In *Sabid Ali* v. *Swaminathan Chetty* (1), it was found that there was fraud and collusion between the purchaser and the person who allowed the property to be brought to sale. It is assumed in that case that but for the fraud the purchaser would have taken the property free of encumbrances. This is an assumption merely and was not necessary for the decision of the case.

In Civil Regular No. 393 o 1925 of this Court, *Muthia Chetty* v. *Shaik Mohamed*, Mr. Justice Das held that a purchaser at a Municipal sale for arrears of Municipal revenues does not take free of encumbrances. The sale was apparently one under section 45 of the Lower Burma Land and Revenue Act; whereas, in the present case the procedure prescribed in sections 46 and 47 was followed. The sale proclamation itself shows that the property was being sold under the provisions of section 47. The tax in respect of which the present sale was held was, undoubtedly, as can be seen from the revenue receipt, a property-tax, and it was, therefore, within the competence of

(1) 5 Burma Law Times 108.

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the Revenue Officer of the Municipality to direct the sale of the property under that section.

Referring to the Notifications by the Local Government, I find that in No. 80, dated the 13th February 1908, the President of the Rangoon Municipality is authorized to do the acts required to be done by revenue officers under various sections of the Burma Land and Revenue Act. One of the sections specifically mentioned in that Notification is section of the Act which clearly indicates that the Legislature contemplated the applicability of that section 48 to some of the sales held by the officers of the Municipality, under the powers conferred on them.

It is not without a great deal of hesitation and reluctance that I have come to the above conclusion. It is a matter of common knowledge to persons connected with the administration of law that section 48 of the Burma Land and Revenue Act is a fruitful source of fraud. The extension of the applicability of that section to sales under the local Acts means nothing more than increasing the opportunities for fraud. The remedy, however, is in the hands of the Legislature, and I have got to administer the law as I find it. One would have thought that the interests of public revenue would be sufficiently safeguarded by a provision that such revenue should be a first charge on the land.

It thus becomes necessary to raise an issue on, and decide, the question of fraud alleged in the plaint. The plaintiff will have also to call an attesting witness to prove the mortgage and will also have to prove his claim since, though the 1st defendant has confessed judgment, the 2nd defendant has put the plaintiff to proof of the mortgage and the amount due.

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On the evidence the learned Judge held that Subramaniam's object was to defraud the mortgagee and that the purchaser bought the property in collusion with Subramaniam and on his behalf. The property therefore remained subject to the mortgage. The purchaser appealed.* The Bench composed of Heald and Mya Bu, JJ., summarily dismissed the appeal. The judgment of the Bench was delivered by—

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July 4.

HEALD, J.—On the 7th of September 1925, one Subramaniam mortgaged his house to respondent for Rs. 2,000 with interest at Rs. 1-8-0 per cent. per mensem. The house was subject to Municipal taxation, and the taxes for the first quarter of 1926, which were payable on the 1st of January 1926, amounted to Rs. 10-7-0. Subramaniam failed to pay that amount and on the 31st of March the Municipal Tax Collector applied to the Revenue Officer for recovery of the taxes by the sale of the house. Notice of the application was duly served on Subramaniam but he took no action, and the Revenue Officer ordered execution to issue for the amount due, which including the costs of the application was then Rs. 11-7-0. The tax collecter then reported that Subramaniam had no moveable properties whatever in his possession which could be attached and applied for the attachment of the house which, it may be noted, he valued at Rs. 500. The attachment was effected and sale was ordered. The house was sold to appellant for Rs. 200 and a sale certificate was granted to him.

Under section 48 of the Burma Land and Revenue Act the purchaser at a revenue sale is deemed to

* Civil First Appeal No. 181 of 1927, Mohamed Salay *v.* R.M.V.V.M. Chettyar Firm.

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have acquired the right offered for sale free from all encumbrances except such as may have been expressly reserved by the Revenue Officer at the time of the sale, and as no encumbrances were reserved and the house was sold as being the unencumbered property of Subramaniam, *primâ facie* appellant became owner of a house which was probably worth at least Rs. 4,000 for Rs. 200 and respondent lost the benefit of his mortgage.

Respondent however filed a suit on his mortgage against Subramaniam and impleaded appellant on allegations that Subramaniam's default in payment of the Municipal taxes was deliberate and was a mere device to defraud him of the benefit of his mortgage, and that appellant was a party to that fraud.

We who spend our days in the Courts know that deliberate default in the payment of revenue with the intention that property may be sold free of encumbrances is a common device to defraud mortgagees, and it is obviously essential to the success of that device that the purchaser should a mere *benamidar* for the defaulter, since no man is likely to allow his property to be sold for an inadequate price except to himself or to some person representing him. I have seen a considerable number of such cases and I have never seen one in which the purchaser did not in fact represent the defaulter. When therefore it is proved that this device has been adopted I think that there is a fair initial presumption under section 114 of the Evidence Act that the purchaser represented the defaulter.

In this case there is no possible room for doubt that Subramaniam deliberately adopted this device, and that he would not have allowed the house which presumably was worth well over Rs. 2,000 to be sold for Rs. 200 unless he had already arranged that

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it should be bought on his behalf. There is therefore a presumption that appellant was a party to the plot and that he bought on Subramaniam's behalf. There is also in the present case direct evidence that this was so, and there was nothing to rebut either the evidence or the presumption except appellant's bare word.

In these circumstances I have no hesitation in finding that the learned Judge on the Original Side was right in holding that appellant was a party to the fraud and bought the house on Subramaniam's behalf, and that since the house still belonged to Subramaniam it was still subject to respondent's mortgage.

I would therefore dismiss the appeal summarily.

MYA BU, J.—I concur.

APPELLATE CIVIL

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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May 17.

M. A. MAISTRY
v.
ABDUL AZIZ RAHMAN.*

Fraud, suit to set aside decree as obtained by—Dismissal of application to set aside an ex parte *decree when a bar to suit—Dismissal not on merits is not a bar.*

Held, that the dismissal of an application to set aside an *ex parte* decree for failure to furnish security does not bar a suit to set aside the decree as having been obtained by fraud.

K. E. Musthan v. *Babu Mohendra Nath Singh*, 1 Ran. 500—*distinguished.*

Radha Raman Saha v. *Pran Nath Roy*, 28 Cal. 475, P.C.—*followed.*

M. A. Maistry v. *Abdul Aziz Rahman*, 5 Ran. 46—*set aside.*

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* Civil First Appeal No. 18 of 1927.