1886

SAHAI NAND v. MUNGNIRAM MARWARI.

ed or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." A certificate under Act XL of 1858 is one of the documents mentioned in the second schedule of the Court Fees Act. When the section says that such a document shall not be filed, exhibited or recorded in any Court of Justice, or received or furnished by any public officer, it means that a certificate cannot actually come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty. We are of opinion that the certificate under Act XL of 1858 was the very foundation of Jit Lall's title. Without it he had no authority to appear in the proceedings in the suit brought by Mungniram Marwari against the present plaintiff.

On this ground, we think that the judgment of the Subordinate Judge must be set aside, and this appeal allowed with costs.

The decree will be a decree for possession, and the Court below will be directed to enquire as to what mesne profits, if any, the appellant is entitled to under s. 212, and as to what mesne profits, if any, he is entitled to under s. 211 of the Civil Procedure Code.

J. V. W. *Appeal allowed.*

Before Mr. Justice Field and Mr. Justice Macpherson.

1886 *February* 5.

DEBENDRA KUMAR MANDEL (ONE OF THE DEFENDANTS) *v.* RUP LALL DASS AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, 1882, ss. 268, 274—*Attachment and sale of Mortgage bond—Lien of purchaser on mortgaged property after attachment under s.* 268—*Presumption of Payment of Bond.*

In execution of a decree obtained by them against *J* and *M* the plaintiffs attached a decree obtained by *J* and *M* against *D*, and on the allegation that *J* and *M*, in order to avoid the consequences of this attachment, executed a *benami* conveyance of their interest under the attached decree to *B* and *P*, and afterwards with the same object took in adjustment and satis-

* Appeal from Original Decree No. 235 of 1884, against the decree of Baboo Beni Madhub Mitter, Rai Bahadur, Subordinate Judge of Backergunge, dated the 6th June of 1884.

faction of that decree two bonds in favor of *R* and *I* respectively, by which immoveable property was pledged as collateral security, the plaintiffs attached these two bonds by prohibitory order, under s. 268 of the Civil Procedure Code, and purchased them at the sale in execution of their decree. In a suit on the bonds against *D* as the principal defendant with *J*, *M*, *B*, *P*, *R* and *I* joined as parties: *Held*, that the plaintiffs were entitled to enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made in accordance with the provisions of s. 274 of the Code; a debt secured by a mortgage lien on immoveable property not being "immoveable property" within the meaning of that section.

The presumption of payment of a bond which arises from its possession by the obligor, loses much of its force when raised, not between the original creditor and the debtor, but between the debtor and the purchaser of the debt at an execution sale.

THE facts of this case were as follows:—

The plaintiffs obtained, on the 7th of May 1880, a decree in the Court of the Subordinate Judge of Dacca against Jugut Chandra Saha and Madhub Chandra Saha, the defendants Nos. 6 and 7 for Rs. 49,165. They transferred the execution of this decree to the Backergunge district, and on the 29th of May 1880 they asked for the attachment in execution of a decree obtained by their judgment-debtors, the defendants Nos. 6 and 7 against the defendant No. 1, Debendra Kumar Mandel the present appellant. The plaintiffs alleged that the defendants Nos. 6 and 7, in order to avoid the consequences of this attachment, executed a *benami* conveyance of their interest under their decree against Debendra Kumar Mandel in favor of Banga Chandra Saha and Pyari Mohun Poddar, the defendants Nos. 3 and 4; and caused their names to be substituted as decree-holders, and that afterwards with a view to accomplish the same object they took in adjustment and satisfaction of that decree two bonds, one for Rs. 4,000 in favour of Ram Chandra Poddar, the defendant No. 2, and another for Rs. 1,250 in favour of Ishur Chandra Saha, the defendant No. 5, and caused a petition to be filed by the defendants Nos. 3 and 4 to the effect that the decree against Debendra Kumar was satisfied. Subsequently the plaintiffs having alleged this *benami* transaction, applied for the sale in execution of the debts due upon these two bonds. The procedure adopted in attachment

1886

DEBENDRA KUMAR MANDEL v. RUP LALL DASS.

of the bonds was that laid down by s. 268 of the Civil Procedure Code for the attachment of debts, *viz.*, by prohibitory order, and in execution of the decree of the plaintiffs of the 7th of May 1880 these bonds, or rather the debts due thereunder, were sold and purchased by the plaintiffs on the 29th of May 1882. After this purchase the plaintiffs instituted the present suit against the defendant No. 1, and they as purchasers of these bonds, as assignees by operation of law, sought to recover from the defendant No. 1, the amounts due under the bonds, and they also asked to enforce against the property mortgaged by these bonds the lien thereby created.

The Judge in the Court below gave the plaintiffs a decree, but he refused to allow the enforcement of this decree against the mortgaged property.

An appeal was preferred by Debendra Kumar Mandel, and a cross-appeal was brought by the plaintiffs against that portion of the Subordinate Judge's judgment, by which he refused to allow the mortgage lien to be enforced.

Baboo *Hem Chandra Bannerjee* and Baboo *Kashi Kant Sen* for the appellant.

The *Advocate General* (Mr. *G. C. Paul*) and Baboo *Lal Mohun Dass* for the respondents.

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J. (who after stating the facts as above) continued:—Two points have been argued before us upon the appeal. The first point is concerned with the service of the prohibitory order under s. 268 of the Code of Civil Procedure. The second point is concerned with an alleged payment said to have been made by Debendra Kumar Mandel in satisfaction of the two bonds.

The Judge in the Court below has found that the prohibitory order was served, and after hearing the evidence we think that there is no ground upon which we ought to interfere with his decision upon this point. We may further observe that no question has been raised as to whether the order, required by s. 301 of the Code of Civil Procedure, was served. The presumption, therefore, is that this order was served; and it may be a

question whether, if the order after sale required by s. 301 were served, the service of the prohibitory order, which is the form of attachment before sale required by the Code, is material or is wholly immaterial.

Then as to the second point it is urged by the defendant-appellant that he paid a sum of money in satisfaction of two bonds before the service upon him of the prohibitory order. We have heard the evidence upon this point, and we concur in the conclusion at which the Subordinate Judge has arrived. We do not believe that this money was paid. We think it improbable that it would have been paid before the due date of payment provided in the bonds themselves; and we think that the account given by Debendra Kumar Mandel as to the mode in which he raised this money is improbable and untrustworthy.

But then it is said that it is an admitted fact that the bonds were in the possession of Debendra Kumar Mandel, and that from this arises the presumption that the bonds were satisfied. It must be borne in mind that this presumption is not urged as between the original creditor and his debtor; but is urged on the present occasion as between the person who has purchased the debt at an execution sale and the debtor; and we think that in this latter case the presumption has much less force than it would have as between the original creditor and his debtor. In order to rebut the presumption arising from the possession of the bonds by Debendra Kumar Mandel, the plaintiffs have produced a large amount of evidence to show that the sum of Rs. 1,250 was paid by Debendra Kumar Mandel to Jagat in Joisti 1289, that is after the service of the prohibitory order. The fact of this payment, if it had taken place, would, it may be observed, be wholly immaterial, as regards the defendant's liability to pay the amount to the plaintiffs; and the only importance attached to the evidence is in connection with the presumption already referred to. If the evidence is true, if we believe that this payment of Rs. 1,250 was made in Joisti 1289, and that upon this payment an antedated endorsement of satisfaction was made upon the bonds, and they were handed over to Debendra Kumar Mandel, we have a complete explanation of Debendra Kumar Mandel's possession of the bonds which

1886

DEBENDRA KUMAR MANDEL v. RUP LALL DASS.

satisfactorily rebuts the presumption. There are, undoubtedly, discrepancies in the evidence, there are traces of ill-feeling, which, in all probability, have led to much exaggeration; but looking at the evidence, as a whole, we are not prepared to dissent from the conclusion at which the Subordinate Judge has arrived,—namely, that a sum of money was paid after the service of the prohibitory order, and that upon the payment of this sum of money the bonds were handed over to Debendra Kumar Mandel.

This disposes of the appeal.

The question raised upon the cross-appeal may be briefly stated thus: It is said that inasmuch as the attachment was made under the provisions of s. 268 of the Code of Civil Procedure, and as no attachment was made in accordance with the provisions of s. 274, the sale in execution carried with it the debt merely without the lien. In other words, that in order to make the sale carry the lien as well as the debt, there ought to have been an attachment under the provisions of s. 274. We are not prepared to concur in the contention so raised. Section 266 of the Code provides that the property therein mentioned is liable to attachment and sale in execution, and amongst the property so mentioned we have "bonds or other securities for money-debts, &c." Section 268 provides that in the case of (*a*) a debt not secured by a negotiable instrument, the attachment shall be made in a certain manner. Section 274 provides for the making of an attachment in the case of immoveable property. Now there can be no doubt that the debt in the present case is, within the meaning of s. 268, a debt not secured by a negotiable instrument. There is no special provision in the Court for a debt secured by a mortgage; and this being so, unless such debt comes within the provisions of s. 268, there is no other provision specially applicable, unless we are of opinion that such debt is immoveable property within the meaning of s. 274. We think that it is impossible to say that a debt secured by a mortgage, by a lien upon immoveable property, more especially when the mortgagee is not in possession, can be regarded as immoveable property within the meaning of s. 274. We are, therefore, of opinion that the debt which was sold in this case after an attachment, made under s. 268 carried with it the lien.

1886

DEBENDRA KUMAR MANDEL v. RUP LALL DASS.

In this view we think that the plaintiffs are entitled to enforce the lien created by the two bonds as against the immoveable property specified in those instruments.

The appeal will be dismissed with costs, and the cross-appeal will be decreed without costs, the learned Advocate General consenting to this.

Appeal dismissed.
Cross-appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

1886 *March* 11.

GARDEN REACH SPINNING AND MANUFACTURING CO., LD., (PLAINTIFFS) *v.* EMPRESS OF INDIA COTTON MILLS CO., LD., (DEFENDANTS).*

Practice—Costs—Attorney and Client—Taxation—Refreshers to Counsel—Fees—Counsel's fees—Rules of Court 707, 708.

Refreshers are not, as a general rule, to be allowed on motion heard by affidavit; but the Court hearing the motion can, in its discretion, and if applied to for the purpose, give special directions allowing costs as on the hearing of a case. In the absence of such special directions refreshers should not be allowed.

OBJECTIONS made by plaintiffs' attorney to the decision of the taxing master, disallowing the plaintiffs as against the defendant Company the amount of certain fees paid to counsel charged in plaintiffs' bill of costs, taxed on the 11th February 1886 under a decree made with the consent of the defendant Company on the 11th December 1885, and thereby directed to be paid as between attorney and client.

It appeared that in the above case two briefs were delivered to the plaintiffs' counsel for the argument of a rule calling on the defendants to show cause why an injunction should not issue against them; one of such briefs (the senior) was marked with a fee of five gold mohurs, and the other (the junior) with a fee of four gold mohurs. The hearing of the rule occupied from 2-30 P.M. to 5 P.M. on the first day, and from 4-30 P.M. to 5-30 P.M. on the second day. On the second day additional fees

*Suit No. 290 of 1885.