

1893
January 27

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Atkman.

KARIM-UN-NISSA AND OTHERS (DEFENDANTS) v. PHUL CHAND (PLAINTIFF).*

Civil Procedure Code, ss. 268, 274—Mortgage-bond—Attachment.

Where the rights and interests under his mortgage of a mortgagee out of possession are attached in execution of a decree, the procedure by which such attachment must be effected is that prescribed by s. 268 of the Code of Civil Procedure. Section 274 of the Code cannot be applied in such a case. *Bhawani Kuar v. Gulab Rai* (1) distinguished.

IN this case the plaintiff, Phul Chand, held a simple money-decree against one Ismail Khán. In execution of that decree he attached a mortgage-bond held by Ismail Khán upon certain property belonging to one Faiz Muhammad Khán. Under that attachment the mortgage-bond was brought to sale and purchased by the decree-holder. The decree-holder then proceeded to bring a suit upon the mortgage-bond against the mortgagor and other persons who were said to have been interested in various ways in the mortgaged property. The suit was defended on several grounds, but mainly on the ground that, as the attachment of the mortgage-bond had been effected under s. 268 and not under s. 274 of the Code of Civil Procedure, such attachment was illegal, and consequently no rights under the mortgage had passed to the decree-holder, purchaser, by the subsequent sale. The Court of first instance (the Subordinate Judge of Meerut) held that the plea above-mentioned was fatal to the plaintiff's case and dismissed his suit accordingly. On appeal the District Judge agreed in holding that the attachment should have been made under s. 274 of the Code of Civil Procedure; but, considering that this defect in the mode of attachment was cured by the subsequent grant of the sale-certificate, decreed the plaintiff's appeal and remanded the case under s. 562 of the Code to the first Court. From this order of remand the defendants appealed to the High Court.

Mr. *Amir-ud-din* and Mr. *Abdul Majid*, for the appellants.

Mr. *D. Banerji*, for the respondent.

* First Appeal No. 85 of 1892 from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 16th April 1892.

EDGE, C. J., and AIKMAN, J.—This is an appeal from an order of remand made under s. 562 of the Code of Civil Procedure. The plaintiff brought his suit upon an hypothecation-bond. He was not the original mortgagee; he became the purchaser of the bond at an auction-sale under a decree against the mortgagee.

The defendants in this suit brought this appeal. On their behalf it has been contended by Mr. *Amir-ud-din* that the plaintiff derived no title to the bond under the auction-sale at which he purchased the debt secured by it. The ground of that contention is based on the attachment which preceded the sale having been made under s. 268 and not under s. 274 of the Code of Civil Procedure, it being contended that s. 268 is inapplicable to the case.

Mr. *Amir-ud-din* contends that as the bond charged immovable property it created a benefit in that immovable property, and that the attachment to have been good should have been made under s. 274. He refers to a decision of this Court in *Bhawani Kuar v. Gulab Rai* (1). That was a case of a sale of a decree under Act VIII of 1859. Act VIII of 1859 did not contain a section similar to s. 273 of the present Code which provides the mode in which decrees are to be attached. It appears to us that it would have been impossible to have proceeded under s. 274 of the Code of Civil Procedure in this case. The thing which was sold was the debt due to the mortgagee who was not in possession of, and apparently at the date of the sale had no right to the possession of, the mortgaged immovable property. We fail to see how s. 274 could have been applied. Where was the order to be proclaimed and where was the order to be fixed up? There would have been no right to go upon the property to fix up the order. Section 274 hardly means that a copy of the order under that section was to be fixed up on a conspicuous part of the bond, or that the order was to be proclaimed on some part of the bond or adjacent thereto, and yet something of the kind would be necessary if s. 274 applied.

It appears to us that s. 268 does apply. What was attached was a debt not secured by a negotiable instrument. The security

(1) I. L. R., 1 All. 348.

1893

KARIM-UN-
NISSA
v.
PHUL CHAND.

1893

KAHIM-UN-
NISSA
v.
PHUL CHAND.

PHUL CHAND.

passed on the sale of the debt. We are consequently of opinion that the right and interest of the mortgagee under that bond vested in the plaintiff on the sale at auction under the decree.

We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Tyrrell and Mr. Justice Aikman.

QUEEN-EMPRESS v. RAM LAL.

*Criminal Procedure Code, ss. 268, 428, 537—Material irregularity—
Assessors, statement of deceased person not proved in their presence.*

Where in a trial for murder held with assessors the Court relied on a statement made by the deceased, and the evidence necessary to prove such statement was not recorded until after the close of the trial and the discharge of the assessors. *Held* that this amounted to a material irregularity which was not covered by s. 537 of the Code of Criminal Procedure.

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. *A. Strachey*) for the Crown.

The appellant was not represented.

TYRRELL and AIKMAN, JJ. In this case one Ram Lal was convicted by the Additional Sessions Judge of Farakhabad of murdering a man named Baldeo by shooting him in the back, and was sentenced to transportation for life.

Against this conviction and sentence he appeals.

For the prosecution five witnesses were called who are alleged to have been present when Baldeo was shot. These witnesses were discredited by the Additional Sessions Judge for reasons the validity of which, in view of the order we think it necessary to pass, we will not now discuss. The Additional Sessions Judge based his judgment mainly on a statement made by the deceased. Evidence to prove that statement was not recorded by the Additional Sessions Judge until after the assessors had been discharged. We consider this an error which vitiates the trial. Section 268 of the Code of