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a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It seems to me that we are not at liberty to read into the Code any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of an appeal against the preliminary decree. I would allow the appeal.

BY THE COURT :—We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit the appeal under its original number in file and proceed to determine it according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

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June, 3.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Chamier.

CHUNNI BIBI (DEFENDANT) *v.* BASANTI BIBI AND ANOTHER (PLAINTIFFS).*

Act No. I *of* 1872 *(Indian Evidence Act), section* 92, *proviso* (1)——*Evidence ——Consideration—Admissibility of evidence to prove that the true consideration is other than that which appears from the deed embodying the transaction.*

If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to section 92 of the Indian Evidence Act, 1872, and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction.

Hanif-un-nissa v. *Faiz-un-nissa* (1) followed. *Jadu Nath Roy v. Sarbik Roy* (2) *Shah Mukhun Lall* v. *Baboo Sree Kishen Sing* (3) *Lala Himmat Sahai Singh* v. *Llewhellen* (4); *Hukumchand* v. *Hiralal* (5); *Inderjit* v. *Lal Chand* (6); *Kailash Chandra Neogi* v. *Harish Chandra Biswas* (7); *Nathu Khan* v *Sewak Koeri* (8); *Muhammad Yusuf* v. *Muhammad Musa* (9) and *Adityam Iyer* v. *Ramakrishna Aiyar* (10), referred to.

THE facts of this case were as follows:—

* First Appeal No. 293 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 23rd of June, 1913.

(1) (1911) I. L. R., 33 All., 340.
(2) (1886) I. L. R., 17 Calc., 176 (note).
(3) (1868) 12 Moo. I. A., 157.
(4) (1885) I. L. R., 11 Calc., 486.
(5) (1876) I. L. R., 3 Bom., 159.
(6) (1895) I. L. R., 18 All., 168.
(7) (1900) 5 C. W. N., 158.
(8) (1911) 15 C. W. N., 408.
(9) Weekly Notes, 1907, p. 181.
(10) (1913) 25 M. L. J., 602.

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The plaintiffs respondents sold certain property to the defendant appellant. The consideration for the sale was stated in the sale deed to be Rs. 40,000. The deed contained a recital that the executants had received the whole of this consideration. At the time of the registration of the deed Rs. 2,400 were paid to the plaintiffs in cash and the balance, Rs. 37,600, was acknowledged to have been already received by them. They executed a receipt for Rs. 37,600 in favour of the defendant appellant. In 1912 the plaintiffs brought a suit on the allegations that they had been induced by the vendee's agents to acknowledge receipt of the whole of the consideration and to execute the receipt for Rs. 37,600, although that sum had not been paid to them; that the agents had represented that the said sum should be left with themselves in order to pay off certain creditors of the plaintiffs and promised that any balance left over after payment to the creditors would be paid to the plaintiffs; that they had paid Rs. 11,726 to one creditor, and had also spent Rs. 1,000 in connection with the execution of the sale-deed in suit, but had not paid the balance, Rs. 24,874, either to any creditor or to the plaintiffs. Thus, according to the plaintiffs, out of the consideration of Rs. 40,000, only Rs. 15,126 had actually been paid; and they sued to recover the balance, Rs. 24,874, with interest thereon. The defence to the suit was that the real price agreed upon for the sale was only Rs. 15,126 and had been fully paid as set forth above; that the remainder of the consideration stated in the deed was merely fictitious; that at the time of the sale the plaintiffs had said that certain relatives of theirs were keen to purchase the property, but they did not like to sell to them, and that as the plaintiffs wanted to avoid giving open offence to those relatives they persuaded the defendant vendee to agree to the entry in the sale-deed of the fictitious price of Rs. 40,000, so that the relatives might believe that the property was sold for a price which they would not like to pay for it.

The court trying the suit held that the defendant was debarred by section 92 of the Evidence Act from giving any oral evidence in support of her allegation that the consideration was other than Rs. 40,000, and decreed the plaintiffs' claim. The defendant vendee appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, (with him Babu *Harendra Krishna Mukerji*), for the appellant :—

The defendant's case is that the real agreement between the parties was that the property was to be ostensibly sold for Rs. 40,000 but the real consideration was to be only Rs. 15,126. The sale deed which states that the sale took place for Rs. 40,000 does not contain the whole of the agreement between the parties. Where the parties did not intend to reduce all the terms of the contract into writing, and the writing, therefore, does not constitute the whole of the contract, parol evidence is admissible to prove the terms which were not intended to be included in the writing; *Jumna Doss* v. *Srinath Roy* (1). Where a portion of the contract is not embodied in the deed the defendant is entitled to prove the real transaction by oral evidence; *Nathu Khan* v. *Sewak Koeri* (2).

Sections 91 and 92 of the Evidence Act do not apply to such a case. Even supposing that these sections apply, the case falls within proviso (1) of section 92; for the allegation of the defendant is such that, if proved, it would entitle her to a decree for rectification or rescission of the sale-deed. Further, the case may be regarded as one of mistake of both parties. Besides this, the case comes within the principle of law that where one party to a written contract is allowed to go behind his own recital stating that he has received the consideration entered therein, the other party is entitled to give parol evidence that the real and true consideration was something other than what is recited in the deed. For a party cannot both affirm and disaffirm the same transaction; he cannot show its true nature for his own relief and at the same time insist on its apparent character to prejudice his adversary; *Shah Mukhun Lall* v. *Baboo Sree Kishen Sing* (3); *Lala Himmat Sahai* v. *Llewhellen* (4). Therefore, if the plaintiffs want to show that the recital as to their having received the whole of Rs. 40,000 is not correct and they have received some other amount, the defendant is also entitled to show that the recital of Rs. 40,000 being the consideration is not correct and that the true consideration was a different amount. So, too, in the following cases it was held that it was open to a

(1) (1886) I. L. R., 17 Calc., 176 (note)
(2) (1911) 15 C. W. N., 408.
(3) (1868) 12 Moo. I. A., 157.
(4) (1885) I. L. R., 11 Calc., 486.

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party to show, notwithstanding the recitals in the deed, that the actual consideration was different from that stated in the deed; *Indarjit* v. *Lal Chand* (1), *Hukumchand* v. *Hiralal* (2) and *Kailash Chandra Neogi* v. *Harish Chandra Biswas* (3). Evidence is always admissible to show what the real transaction or agreement between the parties was. For example, it has been held that it was open to a party to show that an ostensible sale for a stated price was in reality a free gift; or that two sales for stated prices were in reality a mutual exchange of properties and that no payment in cash was contemplated; or that a professed sale for a stated price was really a conveyance in consideration of certain services rendered; *Hanif-un-nissa* v. *Faiz-un-nissa* (4), *Muhammad Yusuf* v. *Muhammad Musa* (5), *Krishna Bai* v. *Rama Bala* (6) and *Ansa Tuka* v. *Kenchappa Satappa* (7).

The present case comes within the principle of the rulings in the above cases.

Dr. *Satish Chandra Banerji*, (with him Babu *Sarat Chandra Chaudhri*), for the respondents :—

The first contention of the appellant is that the whole of the contract has not been embodied in the sale-deed. The terms of the sale have been reduced to writing. The consideration or price is a term and an essential term of the contract of sale. Whatever other term of the contract may have been left out of the deed the term relating to the amount of the consideration was clearly and expressly entered, and section 92 of the Evidence Act bars any oral evidence for the purpose of varying or contradicting it. The distinction between a recital of a term of the contract, for example, the price, and a recital of certain other facts, for example, the mode of payment, was pointed out in the case of *Indarjit* v. *Lal Chand* (1). Then, it cannot be said that any of the parties was under a mistake. Both parties understood exactly what they were doing. There exists no ground which can bring the case within proviso (1) of section 92. The "want or failure of consideration" mentioned in that proviso must be one which would invalidate the document, and not a mere non-payment of a part of it. The

(1) (1895) I. L. R., 18 All., 168.
(2) (1876) I. L. R., 3 Bom., 159.
(3) (1900) 5 C. W. N., 158.
(4) (1911) I. L. R., 33 All., 340.
(5) Weekly Notes, 1907, p. 181.
(6) (1906) 8 Bom. L. R., 764.
(7) (1905) 8 Bom. L. R., 669.

defendant alleges that the real agreement was that Rs. 15,126 was to be the actual consideration but that Rs. 40,000 was to be the stated price in the deed. An allegation of an exactly similar nature was made in the case of *Adityam Iyer* v. *Ramakrishna Aiyar* (1). There it was sought to be proved that the agreement was that Rs. 36,000 was to be the true consideration although Rs. 35,000 was to be shown in the deed. It was held that the price was a material term of the deed; and that the allegation made did not bring the case within any of the provisoes of section 92; so that oral evidence was not admissible to prove the alleged fact and thereby vary or contradict the term relating to the amount of the consideration. Of the cases cited by the appellant, the one reported in 12 M. I. A., 157, was decided prior to the enactment of the Evidence Act of 1872. Now the law is laid down by section 92 of that Act, and the defendant has to bring his case within one or other of the provisoes. Besides, the amount of the consideration was not in question in that case. In fact none of the cases relied on by the appellant furnishes an authority applicable to the facts of this case. The question in this case is whether a party to a sale deed which states the consideration to be a particular sum of money can give oral evidence to show that the real consideration was a different sum of money. This question did not arise in any of those cases. In the case in I. L. R., 3 Bom., 159, the amount of the consideration, Rs. 100, was not questioned. The only question was whether a part of the Rs. 100 was paid in cash, as stated, or was given credit for on account of another bond. In the case in 18 All., 168, the question was whether a part of the consideration was paid in cash or was held over to meet the expenses of certain litigations. There was no dispute as to the amount of the consideration. The passage at page 171 of the report which is relied on by the appellant is merely *obiter dictum* if it is construed to lay down that a party to a deed can prove that the real consideration differed from the stated consideration in any way other than the mode of payment thereof. The case in I. L. R., 11 Calc., 486, was also one of the mode of payment of a portion of the consideration money. The case in 27 A. W. N., 181, is another instance of the consideration

(1) (1913) 25 M. L. J., 602.

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having passed in a different form from that stated in the deed; the amount was not in question. The case in 5 C. W. N., 158, was that of an illegal sale, not genuine; it clearly came within the provisoes. In 15 C. W. N., 408, the point was raised by a person who was not a party to the sale deed; moreover, no reasons are given in the judgement in that case. In the case in I. L. R., 33 All., 340, the ostensible sale deed for Rs. 60,000 was really a deed of pure gift. There was an entire want of consideration and the document *qua* sale deed would be invalidated. Proviso (1) of section 92 would cover that case, and perhaps also, proviso (6). In the present case it is not denied that the document is really a sale deed. The other cases cited by the appellant have no application. The only case exactly in point is that in 25 M. L. J., 602, cited above.

The Hon'ble Dr. *Sundar Lal*, in reply:—

The case in 25 M. L. J., 602, was not a suit for recovery of balance of consideration. The real point in that case was that the true consideration of the two sale deeds, was the discharge of the three previous bonds, whatever the aggregate amount of those may have been.

CHAMIER, J.—This appeal arises in a suit brought by the respondents for an alleged balance of purchase money and interest thereon.

On the 21st of July, 1909, the respondents sold some zamindari property to the appellant for Rs. 15,000. Part of the property had been sold in execution of a decree and it was intended that the appellant should get the execution sale set aside. But it was discovered that according to order XXI, rule 89, as then interpreted, neither the vendors nor the purchasers could get the sale set aside. Accordingly the appellant relinquished her interest in the property by a registered deed. The respondents then raised on a mortgage of the property in favour of one Parsotam Das, a sum sufficient to pay off the decree-holder and in due course the sale was set aside. On the 28th of October, 1909, the respondents executed in favour of the appellant a deed whereby they sold to her the property which had been the subject of the earlier sale together with some other property for the stated sum of Rs. 40,000. The deed contains a recital that the respondents have received

the whole of this sum and have out of it paid off Parsotam Das and discharged other debts. Before the Sub-Registrar they received a sum af Rs. 2,400, and acknowledged the receipt of Rs. 37,600. On the same day they gave the appellant a receipt for Rs. 37,600.

The present suit was instituted on the 3rd of November, 1912, the last day of limitation. The respondents allege that they were obliged to sell the property in order to raise some cash and pay off some creditors; that certain persons acting on behalf of the appellant induced them to acknowledge the receipt of the consideration in full and to sign the receipt for Rs. 37,600, by representing that they would, after the registration of the deed, pay off certain creditors of the respondents and make over to them proof of the payment and account for the balance, but they had paid only Rs. 11,726, to Parsotam Das. Giving the appellant credit for that amount, for Rs. 1,000, spent in connection with the execution of the deed and for Rs. 2,400, paid at registration, the respondents claimed a decree for the balance Rs. 24,874, and interest thereon. The appellant's defence was that the real consideration for the sale was Rs. 15,126, made up of the three sums of Rs. 11,726, Rs. 1,000, and Rs. 2,400, mentioned above and that the property was not worth more. She said that Parsotam Das wished to buy the property, but for reasons of their own the respondents did not wish to sell to him; therefore they gave out that they were selling the property for Rs. 40,000, a sum which Parsotam Das was not prepared to pay, and they induced the appellant to agree to this sum being entered in the sale-deed in order that Parsotam Das might have no cause for complaint.

The question for decision is whether the appellant is entitled to produce oral evidence in proof of her allegations. The court below has held that she is not.

On behalf of the appellant it was contended that her allegations, if proved, would entitle her to have the sale deed rectified or rescinded, also that it was a case of mistake, therefore the case fell within the first proviso to section 92 of the Evidence Act. It was also urged that all the terms of the contract had not been embodied in the deed, thefore section 91 of the Act, and consequently section 92 also, did not apply, and we were referred to the case

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of *Jumna Doss* v. *Srinath Roy* (1). But none of these arguments was seriously pressed and it seems unnecessary to consider them.

The main contention of the learned advocate for the appellant was that if the respondents are entitled, as they undoubtedly are, to go behind the recital and admission in the deed and prove that the entire consideration has not been paid it is open to the appellant to produce oral evidence as to the true nature and extent of the consideration. Among the cases relied upon were those of *Shah Mukhun Lal* v. *Baboo Sri Kishen Sing* (2), *Lala Himmat Sahai Singh* v. *Llewhellen* (3), *Hukumchand* v. *Hiralal* (4), *Indarjit* v. *Lal Chand* (5), affirmed on appeal in I. L. R., 22 All., 370, *Kailash Chandra Neogi* v. *Harish Chandra Biswas* (6), *Nathu Khan* v. *Sewak Koeri* (7), *Muhammad Yusuf* v. *Muhammad Musa* (8), and *Hanif-un-nissa* v. *Faiz-un-nissa* (9).

The first of these cases was a suit for redemption of a mortgage purporting to make interest payable at the rate of 9 per cent. The plaintiff put forward other documents executed at about the same time and proved that they evidenced a single transaction and were a contrivance to evade the usury laws. He thus put himself in a position to redeem the mortgage before the date fixed by one of the documents. He wished, however, to have the interest calculated at 9 per cent. The defendants pleaded that the rate agreed upon was 12 per cent. Their Lordships of Privy Council dealing with this matter said:—"The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection, one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction, as, for instance, in cases of fraud, illegality and redemption, in such cases the maxim applies that a man cannot affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudice his adversary."

(1) (1886) I. L. R., 17 Calc., 176 (note).
(2) (1868) 12 Moo. I.A., 157 (185).
(3) (1885) I. L. R., 11 Calc., 486.
(4) (1876) I. L. R., 3 Bom., 159.
(5) (1895) I. L. R., 18 All., 168.
(6) (1900) 5 C. W. N., 158.
(7) (1911) 15 C. W. N., 408.
(8) Weekly Notes, 1907, p. 181.
(9) (1911) I. L. R., 33 All., 340.

In the second case a deed recited payment of Rs. 2,000, in a lump sum to the executant who, however, sued for recovery of Rs. 1,850, alleging that only Rs. 150 had been paid. The defendant admitted that no more than Rs. 150 had been paid and that Rs. 850 were still due. As regards the remaining sum of Rs. 1000, he was allowed to prove by oral evidence an agreement to the effect that it was to be retained by him on account of a debt due to him by a relative of the plaintiff. The court held that it was under the first proviso to section 92 of the Evidence Act that the plaintiff was entitled to go behind the recital and prove that only Rs. 150 had been paid, and on the strength of the passage cited above from the judgement of their Lordships of the Privy Council they went on to hold that the defendant was entitled to prove that the consideration was different from that stated in the deed.

In the third case the defendant challenged the title of the plaintiff, who relied upon a sale deed purporting to transfer the property to him in consideration of Rs. 100, already received in cash. The plaintiff was allowed to meet the defendant's case by proving that the consideration consisted of Rs. 63-12-0 due on a bond and Rs. 36-4-0 paid in cash. The court was of opinion that there was no real variance between the statement in the deed and the statements of the plaintiff's witnesses, but in the course of their judgement they observed that section 92 of the Evidence Act does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that described in the contract.

In the fourth case there was a recital in the sale deed that the whole of the consideration money had been received; but their Lordships of the Privy Council ruled that in such a case it was open to the vendor to prove that no consideration had passed, and they held that evidence was admissible to prove an agreement that the consideration money should remain in the hands of the purchaser for certain purposes and to be accounted for later. In the judgement of the High Court, in a passage which perhaps went further than was necessary, it was said :—"If it is open to a party, as is undoubtedly the case, to show, notwithstanding a recital in the deed, that no consideration passed or that the actual consideration

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was different from that stated in the deed, it is in our opinion open to a party to prove under what circumstances the payment of consideration was postponed and what was the mode agreed upon as to the payment of it." The second and third cases above mentioned were referred to in this connection.

The fifth case was a suit to set aside a sale deed on the ground that there had been no consideration for it and that it had been obtained by unfair means. The deed recited that Rs. 500 had been received in cash. The plaintiff gave evidence that nothing had deen paid and the defendant was permitted to adduce evidence that there was some, and that ample, consideration for the transaction, though not the amount stated in the deed. The court seems to have been of opinion that it was under the first proviso to section 92 of the Evidence Act that the plaintiff was entitled to go behind the recital, and it was held by both the learned Judges that in such a case the other party was entitled to prove that there was some consideration for the deed. The Chief Justice relied upon the second and third cases mentioned above and BANERJI, J. referred to one of them with approval.

In the sixth case the plaintiff sued for Rs. 800 the consideration stated in a *kabala* and therein acknowledged to have been received. The plaintiff proved that it had not been paid and the defendant was allowed to prove that the stated consideration was fictitious and that the real consideration was services rendered by the defendant.

In the seventh case two sisters had agreed to exchange properties. Each executed in favour of the other a sale deed in which the consideration was stated to be Rs. 1,000 and payment in full was acknowledged. In a suit by one of the sisters for the amount of the consideration the defendant was allowed to prove that the real consideration was the property given in exchange.

In the eighth case the plaintiff had executed in favour of the defendant what purported to be a sale deed of property for Rs. 60,000 the receipt of which was acknowledged in the deed. The plaintiff on certain grounds asked that the deed should be set aside and in the alternative claimed a decree for the sum of Rs. 60,000. She proved that the money had not been paid and the defendant was allowed to prove that the executant had intended

to make a gift of the property and had never intended to take any part of the alleged consideration.

The respondents rely upon the decision of the Madras High Court in *Adityam Iyer* v. *Ramakrishna Aiyar* (1), which will be referred to later. As regards the cases relied upon by the appellant they urge that the first of them merely lays down one of the rules subsequently embodied in section 92 of the Evidence Act and that the passage quoted has no application to the facts of this case, inasmuch as the respondents are not seeking to *remove the blind* which hides the real transaction, but wish merely to contradict a statement of fact contained in the deed; that the 2nd, 3rd, 4th, 6th and 7th cases are not authorities for the proposition that a party may prove by oral evidence that the consideration for a sale is less than or different from that stated in the deed but are only instances of parties to deeds being allowed to show that the consideration passed in a form other than that stated in the deed; and that if the fifth case goes further than that it was wrongly decided. As regards the eighth case, the respondents contend that it was a case of facts being proved which would invalidate a document within the meaning of the first proviso to section 92 of the Evidence Act.

It is true, no doubt, that several of the cases relied upon by the appellant were cases in which a party to a deed sought to prove that the consideration passed in a form different from that stated in the deed, not to prove that the amount of the consideration was different in amount from that stated in the deed. But in the fifth case the defendant seems to have been allowed to prove that the amount of the consideration was different from that stated in the deed, and in the eighth case the defendant was permitted to prove that the consideration did not pass at all and was never intended to pass. In some of the cases the decision rests upon a ground which applies as much to one kind of case as to the other, namely, that if one party to a deed alleges and proves that the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to section 92 of the Evidence Act and the other party is at liberty to prove what the real consideration was. It appears to me that

(1) (1913) 25 M. L. J., 602.

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it must have been upon this ground that their Lordships of the Privy Council admitted the evidence tendered by the defendant in the eighth case.

The Madras case relied upon by the respondents is distinguishable. It was a suit upon a mortgage. The defence set up was discharge, it being contended that the discharge of the mortgage was part consideration for the sale of certain properties to the mortgagor some years after the mortgage. The discharge of the mortgage was not mentioned in the deed of sale, but the defendant sought to prove the arrangement by oral evidence. The court held that such evidence was not admissible. It was not a case in which one party denied receipt of consideration acknowledged by him in a deed and the other party sought to prove that the true consideration was other than that stated in the deed.

On the authorities I would hold that as the respondents have alleged and proved that the whole of the consideration, receipt of which is acknowledged in the deed, did not pass, the appellant is entitled to produce oral evidence in support of her allegations, and as the court below did not allow her to produce such evidence, I would remand the case for a fresh trial.

BANERJI, J.—This was a suit to recover unpaid purchase money. The plaintiffs executed a sale deed in favour of the defendant appellant on the 28th of October, 1909. The amount of consideration for the sale is stated in the sale-deed to be Rs. 40,000. The plaintiffs state that they have received out of this sum Rs. 21,726 and that the balance is due. The defendant contended that the amount of consideration specified in the sale-deed was fictitious and that the real amount agreed to be paid was that which the plaintiffs admitted to have received. The question to be determined is whether, in view of the provisions of section 92 of the Evidence Act, the defendant appellant is entitled to produce oral evidence in support of her allegation.

A large number of rulings have been cited by the respective parties, but I deem it unnecessary to consider and discuss them, as I am of opinion that the matter is concluded by the recent decision of their Lordships of the Privy Council in *Hanif-un-nissa* v. *Faiz-un-nissa* (1). In that case the plaintiff, who had executed

(1) (1911) I. L. R., 33 All., 340.

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a document which on the face of it was a sale-deed for Rs. 60,000, sought to have it cancelled on various grounds and in the alternative claimed the Rs. 60,000. The defendants alleged that the transaction was in fact a gift and not a sale as it purported to be. This Court held that the defendants were precluded by the provisions of section 92 of the Evidence Act from proving that the transaction was different from that which it purported to be and that it was in reality a gift. Their Lordships of the Privy Council reversed this decision and held that oral evidence could be given by the defendants to prove the real nature of the transaction. Apparently their Lordships were of opinion that the case would come within the first proviso to section 92. I am unable to distinguish the present case from the principle of the ruling above mentioned. In view of that ruling I must hold that the appellant is entitled to produce oral evidence to prove her allegations. As the court below did not permit her to produce such evidence the case must be remanded to that court.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the court below be set aside and the case be remanded to the court below with directions to re-admit it under its original number in the register and dispose of it according to law, after allowing the parties to adduce such evidence as they may bring forward. The costs hitherto incurred will be costs in the cause.

Appeal decreed and cause remanded.

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

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June, 5.

JAGANNATH AND OTHERS (APPLICANTS) *v.* LACHMAN DAS AND ANOTHER (OPPOSITE PARTIES)*

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 36—*Insolvent—Question of* bonâ fides *of transfer by insolvent—District Judge not competent to refer to subordinate court.*

Held that a court exercising insolvency jurisdiction under Act No. III of 1907 has no power to refer for inquiry to a subordinate court a question arising under section 36 of the Act as to whether a mortgage executed by an insolvent was *bonâ fide* or not.

IN this case one Lachman Das was adjudicated an insolvent on the 6th of December, 1912. He had made a mortgage of his

*First Appeal No. 31 of 1914 from an order of H. Nelson Wright, District Judge of Bareilly, dated the 20th of June, 1913.