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case, to perform the functions of a Collector under certain specified sections of the Bengal Tenancy Act. As an instance, one Notification appointed all the officers in charge of sub-divisions to discharge the functions of a Collector under ss. 12, 13 and 15 of the Act. Now, it being the practice of the Local Government to appoint officers to discharge duties under particular sections, it seems to us it is impossible to argue that, because an officer has been appointed to discharge particular duties under particular sections, he is thereby empowered to discharge duties under any other sections of the Act. It appears to us that the very fact that he is only appointed to perform particular duties under particular sections by implication involves the position that he is not empowered to perform other duties under sections other than those under which he is appointed to perform duties. And it seems to us that such appointment when made creates the officer a Collector within the meaning of s. 3, cl. (16) for the purpose of carrying out the duties under those particular sections, and does not make him a Collector "for all purposes of the Act." If that be so we have to consider whether the Sub-divisional Officer in this case had been appointed fo perform duties under s. 167. It appears from a reference to the Civil List for July 1897, which was in force when these proceedings took place, that this gentleman was not empowered to perform duties under s. 167, and it has been very fairly admitted by the vakil who argued the appeal on the part of the respondents that he is unable to say that as a matter of fact the Sub-divisional Officer in this case was empowered to perform duties under s. 167 of the Bengal Tenancy Act.

Under these circumstances we are of opinion that the Sub-divisional Officer had no power to receive an application such as is provided for by s. 167 of the Bengal Tenancy Act nor had he jurisdiction to issue the notice annulling the incumbrance [70] under that section. It follows, therefore, that the defendant No. 5 has failed to annul the incumbrance which the plaintiff seeks to enforce on the property in suit.

The result is that this appeal must be allowed, the judgment of both the lower Courts, reversed, and the suit decreed with costs in all the Courts.

*Appeal allowed.*

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**28 C. 70.**

*Before Mr. Justice Rampini and Mr. Justice Stevens.*

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RAHIMAN (*Plaintiff*) v. ELAHI BAKSH (*Defendant*).*
[15th and 24th August, 1900].

***Evidence—Parol evidence—Evidence Act (I of 1872), s. 92—Evidence to show that a deed of sale' was meant to be a 'deed of gift'—Admissibility of oral evidence to vary a written contract.***

**Under the provisions of s. 92 of the Evidence Act (I of 1872) no oral evidence is admissible to shew that a deed of sale was really meant to be a "deed of gift" and *not* a "deed of sale."**

*Shewab Singh* v. *Asgur Ali* (1), *Walee Mahomed* v. *Kumur Ali* (2), and *Lala Himmat Sahai* v. *Llewhellen* (3), distinguished.

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* **Appeal from Appellate Decree No. 2258 of 1898, against the decree of W. H. Vincent, Esq., Offg. District Judge of Bhagalpur, dated the 14th of October 1898, affirming the decree of Babu Nuffer Chandra Bhutta, Subordinate Judge of that District, dated the 27th of May 1898.**

**(1) (1866) 6 W. R. 267.**
**(2) (1867) 7 W. R. 428.**
**(3) (1885) I. L. R. 11 Cal. 486.**

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THE suit out of which this appeal arises was brought by the plaintiff to establish her right to a one-third share in certain properties, which she alleged have been left by her father Sheikh Bakshi. The Subordinate Judge gave the plaintiff a decree for one-third of all the properties except one named Sazore, which he held to be the exclusive property of the defendant Elahi Baksh, the brother of the plaintiff. This property was acquired from one Uziran Bibi who executed two deeds of sale in Elahi Baksh's favour in respect of it. At the time when the first of these deeds was executed Elahi Baksh was a minor; when the second deed was executed he was a major. The plaintiff's contention is that these deeds of sale were *benami* transactions, and that Sazore was really **[71]** purchased by the father of the plaintiff and the defendant in the name of the defendant; while the defendant's case was that they were not deeds of sale but deeds of gift executed by Uziran Bibi in his favour out of feelings of love and affection towards him.

The lower Courts have both admitted oral evidence to shew that these deeds of sale were deeds of gift and have held that they were deeds of gift, and that the mouzah in question belongs exclusively to the defendant, relying principally upon *Shewab Singh* v. *Asgur Ali* (1), *Walee Mahomed* v. *Kumur Ali* (2), *Lala Hemmat Sahai* v. *Llewhellen* (3), *Hem Chunder Soor* v. *Kally Churn Dass* (4), *Venkatratnam* v. *Reddiah* (5).

The plaintiff appealed to the High Court.

1900, AUGUST 15. *Babu Saligram Singh* and *Babu Karuna Sindhu Mukerjee* for the appellant.—It is not open to the defendant to shew by oral evidence that a deed of sale was meant to be a deed of gift. The terms of s. 92 of the Evidence Act are conclusive on that point. Oral evidence may be admissible to prove that a deed of sale was intended to operate only as a mortgage, but not otherwise. See *Preo Nath Shaha* v. *Madhu Sudan Bhuiya* (6).

*Moulvie Serajul Islam* for the respondent.—The point of law referred to by the other side does not arise in this case considering the distinct finding of facts. In the case of *Sah Lal Chand* v. *Indrajit* (7) it is laid down that if no consideration is passed oral evidence may be given to prove that fact.

[RAMPINI, J.—That is between a vendor and a vendee.]

Oral evidence of circumstances may be given to shew what was the real nature of the transaction. Apart from all questions of law the deed gives the plaintiff no title at all, as no consideration passed for the transfer under the deed of sale the property being in the possession of the respondent.

**[72]** *Babu Saligram Singh* in reply.—If there was a failure of consideration, the titles of both the parties would fail. It is admitted that the property was transferred. The question is for whose benefit was the sale effected?

*Cur. adv. vult.*

1900, AUGUST 24. The judgment of the Court (RAMPINI and STEVENS, JJ.) was delivered by

RAMPINI, J. (who after stating the facts as above continued).—We are of opinion that under the provisions of s. 92 of the Evidence Act

(1) (1866) 6 W. R. 267.
(2) (1867) 7 W. R. 428.
(3) (1885) I. L. R. 11 Cal. 486.
(4) (1888) I. L. R. 9 Cal. 528.
(5) (1890) I. L. R. 13 Mad. 494.
(6) (1898) I. L. R. 25 Cal. 603.
(7) (1900) I. L. R. 22 All. 370; L. R. 27 I. A. 98.

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no oral evidence is admissible to show that these deeds of sale are not deeds of sale but deeds of gift.

The Subordinate Judge, whose judgment on this point is affirmed by the District Judge, has relied on certain cases in which it has been held that ostensible deeds of sale may be shown, by evidence of the circumstances of their execution and the conduct of the parties, to be really deeds of mortgage. Such cases, no doubt, from an apparent exception to the general rule embodied in s. 92 of the Evidence Act, but the object of making this exception apparently was to prevent the commission of fraud by one of the parties to the contract. But we are not aware of any ruling, nor has any been cited to us, in which it had been ruled that oral evidence is admissible to prove that a deed of sale is really a deed of gift, and that not between the parties to the deed but between third parties.

In some of the cases cited by the Subordinate Judge, *viz.*, *Shewab Singh* v. *Asgur Ali* (1), *Walee Mahomed* v. *Kumar Ali* (2), and *Lala Himmat Sahai* v. *Llewhellen* (3), it has been held that oral evidence of the non-payment of the consideration may be given. But these are cases between vendor and vendee, and are, moreover, in accordance with the provisions of proviso (1) to s. 92 which is to the effect that any fact may be proved that would invalidate any document, such as fraud, intimidation, and so forth. Now the object of the defendant in producing the oral evidence objected to, was not to invalidate the deeds but to [73] validate them, and yet at the same time to vary and contradict their terms. For these reasons we consider the oral evidence admitted by the lower Courts is inadmissible. We accordingly set aside the decree of the District Judge and remand the case to him for a fresh decision after excluding the oral evidence adduced by the defendant to show that the deeds of sale were deeds of gift.

Costs to abide the result.

*Case remanded.*

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**28 C 73.**

(*Before Mr. Justice Rampini and Mr. Justice Wilkins.*

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PHUL CHAND RAM (*Decree-holder*) *v.* NURSINGH PERSHAD MISSER (*Judgment-debtor*).* [8th December 1899].

***Appeal—Civil Procedure Code** (Act XIV of* 1882), *ss.* 244 (*c*), 310-*A*, 311 *Order setting aside sale in execution of decree—Mortgage decree—Sale of mortgaged property—Transfer of Property Act* (*IV of* 1882) *s.* 89—*Order absolute for sale.*

**An order under s. 310-A of the Civil Procedure Code is one under s. 244 clause (*c*) of that Code and therefore an appeal lies from that order at the instance of the decree-holder who is also the auction-purchaser. *Kripa Nath Pal* v. *Ram Laksmi Dasya* (4) followed.**

**It is not open to an applicant under s. 310-A of the Civil Procedure Code to impugn the sale on the ground of irregularity in publishing and conducting it, a question which properly arises in an application under s. 311 of the Code.**

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Appeal from order No. 151 of 1899, against the order of C. M. W. Brett, Esq., District Judge of Bhagalpur, dated the 7th of March 1899, reversing the order of Babu Hem Chunder Mitter, Munsif of Banka, dated the 5th of December 1898.

(1) (1866) 6 W. R. 267.
(2) (1867) 7 W. R. 428.
(3) (1885) I. L. R. 11 Cal. 486.
(4) (1890) I. L. R. 18 Cal. 139.