

1900
 MOHABUT
 SINGH
 v.
 UMAHIL
 FATIMA.

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 Court reversed, and the suit decreed with costs in all the Courts.

B. D. B.

Appeal allowed.

Before Mr. Justice Rampini and Mr. Justice Stevens.

RAHIMAN (PLAINTIFF) vs. ELABI BAKSHI (DEFENDANT).^o

1900
 Aug. 15, 24.

Evidence—Parol evidence—Evidence Act (I of 1872), s. 92—Evidence to shew 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), Walce Mahomed v. Kumur Ali (2), and Lala Himmat Sahai v. Llewellyn (3), distinguished.

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 Elabi Baksh, the brother of the plaintiff. This property was acquired from one Uziran Bibi who executed two deeds of sale in Elabi Baksh's favour in respect of it. At the time when the first of these deeds was executed Elabi 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 pur-

^o Appeal from Appellate Decree No. 2258 of 1898, against the decree of W. H. Vincent, Esq., Offg. District Judge of Phagwara, dated the 14th of October 1898, affirming the decree of Babu Nasser Chandra Bhatta, 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 Calc., 486.

chased 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 favor out of feelings of love and affection towards him.

1900 .

 RAHIMAN
 v.
 ELAHI
 BAKSH.

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 Himmat Sahai v. Llewellyn* (3), *Hem Chunder Soor v. Kally Churn Dass* (4), and *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 Sudhan 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.

(1) (1866) 6 W. R., 267.

(2) (1867) 7 W. R., 428.

(3) (1885) I. L. R., 11 Calc., 486.

(4) (1883) I. L. R., 9 Calc., 528.

(5) (1890) I. L. R., 13 Mad., 494.

(6) (1898) I. L. R., 25 Calc., 603.

(7) (1900) I. L. R., 22 All., 370 ; L. R., 27 I. A., 93.

1900
RAHIMAN
v.
BLAHI
BAKSH

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 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, form 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. Kumer Ali* (2), and *Lala Himmat Sahai v. Llewellyn* (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

(1) (1866) 6 W. R., 267.
(2) (1867) 7 W. R., 428.
(3) (1885) L. L. R., 11 Cal., 480.

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.

B. D. B.

Case remanded.

1900

RAHIMAN
v.
ELAHI
BAKSH.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

PHUL CHAND RAM (DECREE-HOLDER) v. NUBSINGH PERSHAD
MISSER (JUDGMENT-DEBTOR).

1899
Dec. 8.

*Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 310A, 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. 310A. 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* (1) followed.

It is not open to an applicant under s. 310A. 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.

An order absolute for sale under the provisions of the Transfer of Property Act is not indispensably necessary as a condition precedent for the sale of a mortgaged property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder. *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (2) and *Tara Prosad Roy v. Bhubodeb Roy* (3) referred to.

A MORTGAGE-DECREE was obtained on the 23rd December 1897 against the minor defendant Nursingh Pershad Misser for

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

(1) (1897) 1 C. W. N., 703.

(2) (1890) I. L. R., 18 Calc. 139.

(3) (1895) I. L. B., 22 Calc., 931.