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that a Court of Justice can properly arrive at any conclusion more favourable to the appellant. If it be true, as is earnestly alleged on his behalf, that expenses honestly incurred for the partnership have been disallowed to him, the answer is that by his own acts in mixing up his private affairs with those of the partnership, and his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for appellant: Messrs. *A. H. Arnould & Son.*

Solicitors for the respondent: Messrs. *Richardson & Co.*

C. B.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

GOBINDA PERSHAD PANDEY AND ANOTHER (PETITIONERS) *v.* G. L. GARTH (OPPOSITE PARTY.)*

1900 *March* 27.

Defamation—Proof necessary in charge of defamation—Penal Code (Act XLV of 1860) ss. 471, 499 and 500—Conviction of offence without charge—Re-trial, order of, by Appellate Court—Code of Criminal Procedure (Act V of 1898), ss. 232 and 423.

To constitute the offence of defamation as defined in s. 499 of the Penal Code, it is not necessary that the evidence should show that the complainant has been injuriously affected by such alleged defamation. The law requires merely that there should be an intent that the person who makes or publishes any imputation should do so intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person.

Where an accused was charged under s. 471 of the Penal Code of dishonestly using as genuine a false document, and the Magistrate convicted him under s. 500 of that Code of defamation, of which offence there was no charge framed against him. *Held* that the Sessions Judge, if he thought a new trial necessary, should have proceeded under s. 232 of the Criminal Procedure Code, under which an Appellate Court is competent to direct a re trial, and not, as he did, under s. 423.

* Criminal Revision No. 95 of 1900, made against the order passed by S. J. Douglas, Esquire, Sessions Judge of Dacca, dated the 18th of January

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GOBINDA PERSHAD PANDEY v. GARTH.

Quære. Whether an Appellate Court has under s. 423 of the Code general power to order a new trial.

IN this case on the 27th July complainant filed a complaint before the District Magistrate of Dacca, charging the accused with having, with intent to cause injury to complainant, used as genuine a certain letter which they knew to be a forged document. The offence of defamation was also alleged. The District Magistrate after a preliminary inquiry summoned accused under s. 471 of the Penal Code, and the case was sent to the Joint Magistrate for disposal, who, after hearing the witnesses for the prosecution, framed a charge under s. 471 of the Penal Code against the accused. Eventually the accused were convicted of defamation under s. 500 of the Penal Code, although no charge with regard to that section had ever been framed against them.

The accused appealed to the Sessions Judge of Dacca, who, on the 18th of January 1900, set aside the conviction of the accused under s. 500 of the Penal Code, and under s. 423 (*b*) of the Code of Criminal Procedure ordered the re-trial of the accused for defamation under s. 500 of the Penal Code.

Babu *Dwarka Nath Mitter* for the petitioner.

Mr. *C. R. Dass* (with him Babu *Gyanendra Mohan Das*) for the Crown.

1900, MARCH 27. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The Magistrate had before him a complaint of defamation as well as of dishonestly using a forged document under s. 471, Indian Penal Code. The alleged forgery consisted in affixing a false signature to a letter on which the charge of defamation proceeded. At the trial, the evidence was, no doubt, principally directed to the charge under s. 471, and it appears that, at the close of the trial, the Magistrate suddenly turned round and convicted the accused of defamation, having no charge before him of that offence. On appeal, the Sessions Judge very properly found fault with such a proceeding. He seems, however, to have followed the Magistrate into an error regarding the evidence necessary to prove the offence of defamation, for he points out that there is no evidence to show that the complainant

On appeal, the District Judge also was of opinion that the .b-divisional Officer, who had been invested with some of the wers of a "Collector" under the Bengal Tenancy Act, came thereby, according to s. 3, cl. (16), a Collector, and therefore .d jurisdiction to issue notice under s. 167 of the Act; and dismissed the appeal.

The plaintiffs appealed to the High Court.

Babu *Saroda Charan Mitter* and Babu *Brojendra Lal Mitter* r the appellants.—The Sub-divisional Officer of Aurangabad, ot being specially appointed by the Local Government to discharge the functions of a Collector under s. 167 of the Bengal 'enancy Act, was not a proper officer to serve the notice annulling he incumbrance. When an officer, other than a Collector of a District, is invested with the powers of a Collector under any section of the Act, the Local Government does it by Notification in the *Calcutta Gazette*—see the Notifications investing all the Sub-divisional Officers with the powers of a Collector under ss. 12, 13, 85, 69, 70 of the Act; and also the Notifications appointing certain Deputy Collectors within the meaning of ss. 69—71. The Sub-divisional Officer of Aurangabad was not specially invested with the powers of a Collector under s. 167, and therefore he had no jurisdiction to issue the notice. "Collector" is defined in s. 3, cl. (16) of Act.

Moulvie *Mahomed Mustafa Khan* for the respondents.—"Collector" includes any officer appointed by the Local Government to discharge any of the functions of a Collector under the Bengal Tenancy Act. When a Sub-divisional Officer is authorised to discharge some of the functions of a "Collector," he is a "Collector" within the purview of the Act. As soon as an officer is appointed to discharge any of the functions of a Collector he becomes invested with the general powers of a Collector under s. 3 of the Act.

1900, MAY 30. The judgment of the High Court (GHOSE and HARINGTON, JJ.) was delivered by

GHOSE, J.—This was an action brought to enforce a mortgage security. The defendant No. 5 alleged that the incumbrance which the plaintiffs sought to enforce in this action had been

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annulled by proceedings taken under s. 167 of the Bengal Tenancy Act.

The real question that has been argued before us on appeal is whether the application which has to be made to the Collector under that section was made to the proper officer, and whether the notice was duly issued by the officer by whom it has to be issued under the provisions of the section.

In the Court of First Instance a question arose as to whether the defendant No. 5 was out of time in the proceedings which he took to annul the incumbrance, and it was found as a fact by the Munsif that neither the defendant No. 4, who is the assignor, nor the defendant No. 5, who is his assignee, was served with notice of the incumbrance until served with the summons in the suit which has given rise to this appeal, and that therefore the defendant No. 5 was within the time prescribed by the statute.

In the Lower Appellate Court no finding of fact appears to have been arrived at as to whether the defendant No. 4 or the defendant No. 5 had notice of the existence of this incumbrance, and the learned Judge appears to have held that inasmuch as the assignee had not as a matter of fact express notice of the existence of this incumbrance at a time more than a year before the bringing of the action, therefore the assignee had power to take these proceedings under s. 167, irrespective as to whether the assignor had notice or not.

We are hardly able to assent to the view taken by the learned Judge of the Lower Appellate Court with regard to the notice; but for the reasons which will presently appear it is not necessary for us to deal with that point in any detail, because this appeal must be disposed of on what is the real question, and that is whether the Sub-divisional Officer in this case was authorized to receive an application under s. 167 of the Bengal Tenancy Act, and to issue notice under that section annulling the incumbrance. Section 167 provides that a purchaser, who has power to annul an incumbrance, may present to the Collector an application in writing, requesting him to serve on the incumbrancer a notice declaring that the incumbrance is

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annulled. "Collector" is defined by clause (16) of s. 3 of the Act as "the Collector of a district or any other officer appointed by the Local Government to discharge any of the functions of a Collector under this Act." Now, it appears that the practice of the Local Government is to appoint officers, sometimes a gentleman holding the position of a Sub-divisional Officer, as in this 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 to 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

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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.

1900 *Aug. 15, 24.*

RAHIMAN (PLAINTIFF) *vs.* ELAHI BAKSH (DEFENDANT).*

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), *Walee Mahomed* v. *Kumur Ali* (2), and *Lala Himmat Sahai* v. *Llewhellen* (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 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 pur-

* 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 Calc., 486.