APPELLATE CIVIL.

Before Ross and Wort, J.J.

HERBERT FRANCIS

v.

NAWAB SAIYID MUHAMMAD AKBAR.*

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Evidence Act, 1872 (*Act I of* 1872), *section* 65—*document executed outside British India but unstamped, loss of—secondary evidence, whether admissible—Stamp Act*, 1899 (*Act II of* 1899), *sections* 2, 3 *and* 35—*document admitted in evidence by trial court—admission, whether can be called in question at appellate stage—bond, recital in, whether prima facie proof of loan.*

J executed a bond in England which was intended to constitute a mortgage of his properties in India and under which he contracted to repay *H* the sum of Rs. 1,400 in 5 years and in the meantime to pay interest at the rate of 15 per cent. per annum. The bond, which was an unstamped document, was sent out to India for registration but before it could be registered was lost. *H* brought a suit for interest only and relied on the deed not as a mortgage bond but as a simple money bond. The deed having been lost the plaintiff sought to give, and was allowed in the trial court to give secondary evidence. The Subordinate Judge dismissed the suit. On appeal the respondents, in support of the judgment, contended that the document having been unstamped could not be proved by secondary evidence.

Held, that secondary evidence was admissible inasmuch as the document having been executed at a place other than British India was not chargeable with duty as a bond under section 3(*a*), Stamp Act, 1899, and did not, therefore, come within the mischief of section 35 of the Act which deals only with instruments chargeable with duty.

Sri Venkata Svera Chalapati Ranga Rao, Raja of Bobbili v. *Inuganti China Sitaramasami Garu* (1), distinguished.

*Appeal from Original Decree no. 57 of 1926, from a decision of M. Saiyid Muhammad Zarif, Subordinate Judge of Patna, dated the 22nd December, 1925.

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Arunachellaum Chetty v. *Olagappah Chetty* (1) and *Sopasan* v. *Shamu* (2), referred to.

Held, further, that the document having been admitted by the trial court, the respondents were precluded by section 36, Stamp Act, 1899, from calling into question its admission on the ground that the document had not been duly stamped.

A recital in a bond that the debtor had borrowed money, is, in the absence of any evidence to the contrary, sufficient prima facie proof of the loan.

The facts of the case material to this report are stated in the judgment of Wort, J.

S. M. Mullick and *B. N. Mitter*, for the appellant.

Sir S. Sultan Ahmad (with him *Akbari*, *Syed Ali Khan* and *Abu Zafar*), for the respondents.

WORT, J.—This appeal is against the decision of the learned Subordinate Judge of Patna dismissing the suit of one Herbert Francis for the sum of £671 8*s*. 6*d*. and interest thereon, against three defendants Nawab Syed Mahomed Akbar, the father of one W. H. M. Jung hereinafter mentioned, sued in his representative and individual capacity, Musammat Umrao Begum, described as the mistress of the first named defendant and against Zabunissa Florie Jung, described in the plaint as widow and heiress of late Wasig Hossain Mobarak Jung. The claim was against the defendants as representing the estate of Nawab Wasig Hossain Mobarak Jung hereinafter described as W. H. M. Jung and also against the 1st defendant in his personal capacity. The plaintiff also claims that the estate of W. H. M. Jung should be administered by the Court. In effect the claim against these defendants is as having come to possession and having intermeddled with the estate of W. H. M. Jung, and therefore brought under section 52 of the Civil Procedure Code.

(1) (1868) 4 Mad. H. C. Rep. 312. (2) (1884) I. L. R. 7 Mad. 440.

In the plaint it is alleged that W. H. M. Jung had borrowed a sum of £1,400 from Francis and that on the 15th of September, 1919, the said Jung entered into a deed which was intended to constitute a mortgage of his properties in India and under which he contracted to repay the sum of £1,400 in 5 years and in the meantime to pay interest at the rate of 15 per cent. per annum. The interest at the time of the action amounted to the sum of £630, the action having been brought on the 28th June, 1923. In addition to this £630 there was a claim for £35 together with interest on a promissory note signed by W. H. M. Jung dated the 2nd December, 1919, payable six months after date. The question of this promissory note may be dismissed from the discussion because it is admitted by the appellant that he has no case for the amount of this promissory note, inasmuch as it has not been proved formally and that in any event this claim is barred by limitation. We are concerned only with the amount of interest being £630 on the principal sum of £1,400 alleged to have been advanced. The only question with which this Court has to deal is whether technically the plaintiff has proved his case. The circumstances appear to be these:—W. H. M. Jung up to the year 1920 was a resident in England and his estate in India not producing the necessary means he had to resort to borrowing money, and for that purpose he was introduced to the plaintiff, a solicitor, practising in Bedford Row, London, by Dr. Abdul Majid, a member of the English Bar, who was practising before the Judicial Committee of the Privy Council. The greater part of this £1,400 appears to have been advanced in comparatively small sums by the time the deed before mentioned was entered into and executed. But from the record in the case it would appear that the sum of £116 15*s.* was advanced about a month after the date of the deed. This deed was drafted by Dr. Majid on the instructions of Mr. Francis and it was in Indian form. The explanation of this being that it related to Indian property and that Mr. Francis

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thought it necessary to have it drafted in that form by Counsel who was acquainted with Indian conditions and Indian law. It must be stated here that in the plaint the plaintiff states that he does not rely on the deed as a mortgage but as a simple bond. The reason for this will appear. Soon after its execution it was sent, so it is alleged, to India to one Hasan Jan for registration as a mortgage deed. But as the fees for registration were not sent with the documents Hasan Jan did not register it but waited for the remittance. According to his evidence the document lay on his table until about December 1919 when it disappeared. Suggestions are made but no clear explanations are forthcoming. In those circumstances it is clear, as the plaintiff states in his plaint that the document cannot be relied upon as a mortgage deed. It having been lost, the plaintiff sought to give and was allowed in the Court below to give secondary evidence in the form of a copy of the deed.

Before coming to the question which is at issue in this appeal it would be wise to make one or two statements regarding the course of the trial. The suit was started on the 28th of June, 1923. On the 19th November, 1923, the plaintiff put in a petition before the learned Subordinate Judge for the issue of a commission for taking evidence of certain persons therein named, and on the 1st of December, 1923, the defendants filed a petition objecting to the issue of the commission. It was ordered by the learned Subordinate Judge that the evidence of the witnesses including the plaintiff should be taken on commission in England. On the 29th April, 1924, the High Court reversed the order of the learned Subordinate Judge, in so far as it allowed the examination of the plaintiff himself on commission. On the 3rd November, 1924, the plaintiff filed a petition praying that the commissioner who was to receive the evidence should also receive in evidence books produced by the plaintiff. This petition was objected to on the 4th of November, 1924, by the learned Subordinate Judge, on the grounds that certain interrogatories

that had been in the meantime sent to England for the examination of witnesses did not mention anything in regard to them and he ordered that the books should be produced in the Court at the earliest possible date to enable the defendants to inspect them deciding then whether the books should be admitted in evidence. As a matter of fact these books were not admitted at the hearing. These matters are mentioned, as the appellants say that by reason of the learned Subordinate Judge allowing the petition for evidence to be taken on commission in the first instance, and then that order being reversed in part by the High Court subsequently, certain questions, which might have been put to the witnesses who were examined on commission, questions which would in ordinary course of events be answered by Mr. Francis himself, were not put to these witnesses although they could have answered them. In consequence the proof of the case might not be considered to be complete. In those circumstances the appellants during the course of the hearing in this Court petitioned the Court to receive further evidence under Order XLI, r. 27, of the Civil Procedure Code. However, having regard to the decision at which I have arrived, it becomes unnecessary to deal with this application. It will be as well to deal with the case of the respondent in this appeal and his arguments and then come to a conclusion whether the appellant has satisfied this Court on the objections raised. One point, although not first raised but was suggested by the Court, has been urged against the plaintiff's case, this being, that nowhere either in the plaint or in the evidence is there any allegation that the interest due has not been paid. However, there seem to be two answers to this: first under paragraph 4 of the plaint it is stated that the defendants have paid nothing in respect of principal or interest. It is argued by the respondents however that the allegation there is that the 'defendants' have paid nothing, whereas, to meet their objection it would have been necessary

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to have alleged that W. H. M. Jung had not paid. It seems to me however that this is a clearly stupid clerical error because as the allegation stands without correction it is quite irrelevant. Defendants were never liable for these sums and they are only now sought to be made liable inasmuch as they have had the estate of the deceased in their hands. I think it is not doing violence to the case to assume that what was intended was an allegation that W. H. M. Jung had not paid. However, in paragraph 7 of the plaint it is clearly stated that £671-8-6 was now due to the plaintiff, and in paragraph 8 it is stated that W. H. M. Jung died in about December 1920. It can therefore be seen that if, as was the fact, W. H. M. Jung died in December 1920 he certainly could not have paid the greater part of this sum. It is doubtful whether these allegations would be sufficient under the English rules of pleading but in this country before the hearing there is a preliminary discussion as to the issues which are to be framed. This course was followed in this case as one would expect, but nowhere in those issues is any issue framed on this point. It must therefore be assumed that it did not arise. The main controversy in this case is whether the bond as we must now call it, was proved. As I have stated the plaintiff sought to give secondary evidence of the bond and his evidence took the following form:—One R. H. Collins who was a clerk of the plaintiff was examined on commission and stated that he was present when the bond was executed. He gives details of the circumstances and states that although he would not remember the dealings of the ordinary English clients of Francis he remembers this case particularly as it was his first dealing with an Indian client; that two witnesses were not usual for an ordinary English mortgage deed and he was struck by the peculiar wording of the bond. He said that he had never seen one like it before nor had he since. He produced a copy stating that he compared it with the original and that copy was produced with his deposition

before the learned Subordinate Judge at the hearing. One J. E. Sparshott another clerk of Francis gave evidence to the like effect. He also stated that a copy of the deed was kept in the office but that he did not compare the copy with the original. These two witnesses also deposed to the account books of Francis containing the entries relating to this transaction. Dr. Majid was also examined on commission and he gave evidence to the effect that he prepared the mortgage bond and also purported to state its contents. But as regards the latter part of his evidence it seems to me of doubtful admissibility, but he does state a fact which is important and that is, he was present at the execution. In addition to this evidence Hasan Jan to whom the deed had been sent for registration was examined before the learned Subordinate Judge. He gives evidence to the effect that he received the deed and that ultimately before registration it was lost. One witness might be mentioned here: one Ganga Prasad who purported to prove the signature on the promissory note and the signature on certain letters and receipts. However in my opinion this evidence must be discarded and it was discarded by the learned Subordinate Judge. He was a chance witness in the sense that he was asked to give evidence in Court at the hearing for the first time and his cross-examination clearly proves that his depositions are worthless.

As we are dealing with the question of evidence it had better be stated that the evidence of the defendants such as it was, related merely to the alleged property of W. H. M. Jung. But this matter will be dealt with later. It will suffice to say that there was no evidence by the defendants as to the debt.

The real question in this case, therefore, is first, whether in the circumstances the document of the 15th September, 1919, can be and was proved by the secondary evidence. The appellants urge that they have complied with the provisions of the Indian

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Evidence Act in that regard. On behalf of the respondents Sir Sultan Ahmad relies on the case of *Sri Venkata Svera Chalapati Ranga Rao, Raja of Bobbili* v. *Inuganti China Sitaramasami Garu* (1) where a deed of gift which had been lost was sought to be proved by the production of a copy of the instrument. From the facts of that case it is clear that the original had not been stamped and the Indian Courts before which the suit came were unanimous in rejecting the copy. The decision was based on section 34 of the Stamp Act then in force (Act I of 1879) which was similar to section 35 of the Stamp Act (being Act II of 1899) which is now in force. The effect of those sections is that no document either unstamped or insufficiently stamped shall be admitted in evidence with the proviso that certain documents shall be admitted on the payment of duty and penalty. The argument in the Madras case was that secondary evidence could not be admitted of a document that had not been stamped or was insufficiently stamped and was therefore not admissible itself in evidence, the argument being based on the decision of two cases, *Arunacheddum Chetty* v. *Olagappah Chetty* (2) and *Kopasan* v. *Shamu* (3), Lord Watson in the case to which I refer decided on the construction of the Stamp Act of 1879 that the Courts were right in rejecting a draft or copy as secondary evidence. The appellant, however, differentiates this case from the present on the grounds that the *Raja of Bobbili's* case (1) was a case in which a gift was sought to be proved by a deed: that a deed is necessary to perfect a gift in Indian law. But that in the present case no such considerations apply, but that he was merely using it to prove the debt which in certain circumstances he might have proved by other evidence. However, the true answer seems to be the following:—The bond the subject matter of the suit was executed in England. I think the evidence clearly establishes

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(2) (1868) 4 Mad. H. C. R. 312. (3) (1884) I. L. R. 7 Mad. 440.

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that fact. Section 2 of the Act of 1899 defines inter alia a bond. This document clearly comes within that definition. But section 3 enacts the general principles upon which the duty is chargeable under the Act. Sub-clause A of the first part of the section excludes by inference documents which were executed at places other than in British India. It would appear, therefore, that there was no necessity to stamp this as a bond, although if it had been registered as a mortgage bond it would have attracted duty. Now section 35 deals with instruments upon which duty is chargeable and as the duty was not chargeable upon this document it does not come within the mischief of that section. Therefore whatever view one would take of the *Raja of Bobli's case* (1) it is not an authority for the rejection of this instrument. We have been referred, however, to section 18 of the Stamp Act which provides that every instrument chargeable with duty executed only out of British India, and not being a bill of exchange, cheque or promissory note, may be stamped within three months after it has been first received in British India. It is argued, that the inference to be drawn must be that although this document was executed in England it attracts duty. The answer seems to be that this section deals only with those documents which although being executed in places other than in British India attract duty. I have already decided that this one does not. There is a further answer to this question of admissibility, and that is contained in section 36 of the Stamp Act, which provides that an instrument having once been admitted in evidence, such admission shall not, except as provided by section 61, be called in question at any stage of the same suit or proceeding. This document was received by the Court below. Section 61 referred to in section 36 deals with cases where the court is exercising its civil or revenue jurisdiction and has no connection with the present case. Before I leave the consideration of the

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Stamp Act, sub-clause (*b*) of section 3 must be mentioned. That provides that a document although executed in a country other than in British India attracts duty if it relates to immovable property in British India. It is true that the deed in question here related to immovable property in India but that part of the document the plaintiff does not rely on and that provision in the deed must be disregarded by the Court for the reason that it is an unregistered deed and consequently invalid to the extent that it refers to immovable property. There is one question, however, which arises at this point. It is said by the respondent that the actual identity of the deed which was executed in Mr. Francis' office and is alleged to have been sent to Patna and lost is not strictly proved. This is not that class of case, however, in which identity has to be strictly proved. The identity is doubted by the Subordinate Judge but I think the reasonable presumption is, and I have no doubt that the executed deed was the one which was lost in the Vakil's office in Patna. That being so and by reason of the foregoing considerations I am of the opinion that the deed has been sufficiently proved by the secondary evidence adduced.

It remains to be seen what that proof amounts to. Does it prove the loan to W. H. M. Jung? The deed recites the fact that W. H. M. Jung did borrow the sum of £1,400 at 15 per centum per annum simple interest from Mr. Francis. In my opinion that recital is sufficient prima facie proof of the fact. With that prima facie proof and in the absence of any evidence to the contrary I hold that the debt of £1,400 is proved against W. H. M. Jung. The liability for the payment of interest naturally follows.

In these circumstances it is unnecessary to decide whether the debt is proved by the cheques produced and which purport to show payments to W. H. M. Jung. The evidence as to these does appear to be defective. The signature of the plaintiff is in my opinion sufficiently established but some of the cheques

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are made payable to persons other than W. H. M. Jung and to bearer and therefore do not bear the endorsement of W. H. M. Jung. Others although made out to him, his signature by way of endorsement is not proved. There are matters which in my opinion in the circumstances of the case the Court would allow the plaintiff to produce evidence at this stage, if necessary, to complete the links in the chain of proof. However a decision on that point is unnecessary.

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The appeal will therefore be allowed with costs in this Court and the Court below. There will be a decree for the sum of £630 or its equivalent in Indian Currency together with interest at the rate of 6 per cent. per annum from date of suit until realization. The decree will be against the three defendants as the legal representatives of the deceased under section 52 of the Civil Procedure Code in so far as they are in possession of the estate of deceased Wasig Hossain Mobarak Jung or under sub-section 2 to the extent to which they have been in possession. If any further directions are necessary there will be liberty to apply.

Ross, J.—I agree.

APPELLATE CIVIL.

Before Das and Allanson, J.J.

KHAIRULLAH KHAN

v.

PANDAY LACHMI RAM.*

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Chota Nagpur Encumbered Estates Act, 1876 (*Bengal Act VI of* 1876), *sections* 2, 3, 12 *and* 15—*vesting order, whether bars the institution of suits—proceedings, revival of—bar, when is removed—section* 12, *scope of—Limitation Act*, 1908 (*Act IX of* 1908), *section* 15, *applicability of.*

*Appeal from Appellate Decree no. 1534 of 1924, from a decision of F. G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 8th September, 1924, reversing a decision of Babu Debi Prashad, Munsif of Palamau, dated the 19th February, 1923.