Court was within time in accordance with the authorities referred to and the view expressed by me in my order of 26th October 1921.

I accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for decision of the appeal in accordance with law. Stamp to be refunded and other costs to be costs in the case.

Appeal accepted—Case remanded.

LETTERS PATENT APPEAL.

Before Sir Shadi Lal, Chief Justice, and Mr. Justice Harrison.

1922

Mar. 28.

MUHAMMAD AYUB AND OTHERS (PLAINTIFFS)—*Appellants,*

versus

RAHIM BAKHSH (DEFENDANT)—*Respondent.*

Letters Patent Appeal No. 231 of 1921.

Indian Stamp Act, II of 1898, *section* 35—*loss of bond after copy filed with plaint has been compared with the original and certified by the Clerk of Court to be correct—whether copy admissible onpayment of penalty.*

The plaintiffs sued to recover money from defendant on an unstamped bond executed in their *bahi*. The *bahi* was presented in Court with the plaint and a copy of the *bahi* entry. The copy was compared by the Clerk of the Court with the *bahi* entry and was certified by him to be a true copy. The *bhai* was subsequently stolen. The Munsif and District Judge held that the copy of the *bahi* entry was under the circumstances admissible in evidence on payment of the penalty. On appeal to the High Court Mr. Justice LeRossignol accepted the appeal and dismissed the suit.

Held, that production and presentation of a document are in no way identical with admission; and secondary evidence of the contents of an unstamped document, which has been lost or destroyed, can under no circumstances be allowed.

A non-existent document cannot be admitted, though under certain circumstances, of which the first and most essential is that before its disappearance the original should have borne the necessary atamp, secondary evidence is permitted.

Raja of Bobbili v. *Inugauti China* (1), followed.

Held consequently, that in this case no penalty should have been levied and that the suit was rightly dismissed.

(1) (1899) I. L. R. 23 Mad. 49 (P. C.)

1922

MUHAMMAD AYUB v. RAHIM BAKHSH.

Appeal from the decree of Mr. Justice LeRossignol, dated the 4th November 1921.

SHAMAIR CHAND, for Appellants.

Diwan MEHR CHAND, for Respondent.

Judgment of Mr. Justice LeRossignol, dated the 4th November 1921, under appeal :—

In this case plaintiffs sued to recover money from defendant on an unstamped bond executed in their *bahi*. The *bahi* was presented in Court with the plaint and a copy of the *bahi* entry. The copy was compared by the Clerk of the Court with the *bahi* entry and was certified by him to be a true copy.

The plaintiffs then carried off their *bahi* which shortly after was stolen, as they alleged.

The defendant alleged that the *bahi* entry which is found to have been a bond was a forgery, and that being unstamped, it was inadmissible in evidence.

The Courts below have decreed for the plaintiff and the defendant has preferred this second appeal.

The Munsif and the Appellate Court has distinguished cases in which it was held that a lost unstamped document could not be proved on payment of the stamp and penalty from the present case on the ground that in those cases the document was lost prior to the institution of the suit, whereas in this case the document was produced in Court. The learned District Judge writes—

"It appears to me that its production suffices to render the document admissable in evidence, even though the penalty had not been paid at the time it was lost."

It is certainly very incorrect to say that a document needs only to be produced to be admissible in evidence, if that were correct, every document produced would be admissible, section 35 of the Stamp Act prohibits the admission in evidence of any unstamped document and the proviso sets forth the conditions on which a defective document may be admitted, but it does not cover the case of a copy of a document and further enjoins that no document can be admitted till after payment of the duty and penalty.

A clerk cannot admit a document in evidence, that is a task reserved for the Court, and up to the date of the disappearance of the *bahi* no such order of admission had been passed by the trial Court. Hence I hold that there is no legal authority for admitting the copy of the *bahi* entry as secondary evidence on payment of duty and penalty at a time when the original was not before the Court.

The next question is whether secondary evidence can be given of the *bahi* entry, and here I must hold that where the primary evidence is inadmissible secondary evidence of that primary evidence can be in no better position, *cf. Kallu* v. *Haiki* (1), for all

(1) (1896) I.L.R. 18 All. 285.

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that the secondary evidence could show was that the primary evidence was inadmissible, being unstamped. In this case it is admitted that primary evidence was unstamped. Section 65 of the Evidence Act states that any secondary evidence may be given that a document is lost, but that secondary evidence would include evidence that the primary evidence was unstamped, and therefore could not be acted upon, cf. section 35 of the Stamp Act.

In this view I am confirmed by *Sennandam* v. *Kollakira* (1) and *Kopasan* v. *Shamu* (2).

For these reasons I must accept this appeal and set aside the decree of the Court below and dismiss the suit, but as the circumstances of the case are so peculiar I direct that parties bear their own costs throughout.

The judgment of the Court was delivered by—

HARRISON J.—The plaintiff in this case sued on an unstamped bond entered in his book of accounts. He presented the original book with the plaint and then took it away after the copy had been compared and certified to be correct. The bond was stolen from his house before the first hearing of the case. The claim was decreed but, on appeal, the learned Judge in Chambers dismissed the suit finding that as the bond had never been admitted, no secondary evidence could be produced as to its contents. From that decision the plaintiff appeals and contends that the production and presentation of the original was tantamount to admission, and, in the second place, that the document would have been admissible on payment of the penalty, and, inasmuch as a penalty was levied by the trial Court, it was treated as admitted and that such an order directing the penalty to be paid is tantamount to an order of admission. The law on the subject is quite clear and the Privy Council ruling, *Raja of Bobbili* v. *Inuganti China* (3) leaves no room for doubt. Production and presentation are in no way identical with admission, and secondary evidence of the contents of an unstamped document, which has been lost or destroyed, can under no circumstances be allowed. A non-existent document cannot be admitted, though under certain circumstances, of which the first and most essential is that before its disappearance the original should have borne the necessary stamp, secondary evidence is permitted. We agree with the order of the learned Judge and dismiss the appeal with costs. The penalty should not have been levied under the

(1) (1880) I.L.R. 2 Mad. 208 (2) (1884) I.L.R. 7 Mad. 441.
(3) (1899) I.L.R. 23 Mad. 49 (P. C.).

circumstances and we leave it to the plaintiffs to seek his remedy from the revenue authorities.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Harrison.

PARTAP SINGH (PLAINTIFF)—*Appellant,*
versus
NATHU AND OTHERS (DEFENDANTS)—*Respondents.*

1922
April 18.

Civil Appeal No. 695 of 1919.

Mortgage—mortgagee entitled to possession on failure of annual payments of interest—whether mortgagor entitled to notice, where mortgagee has waived his right on previous default.

Held, that there is no general rule that a mortgagee who in the past has waived his right on the occurrence of a default is bound to give notice, before enforcing his penalty, that the waiver will not be repeated, although it may be equitable in certain cases to insist upon such notice.

Held also, that in the present case, where the mortgagor-defendants had not pleaded waiver and had failed entirely in their pleas, plaintiff's suit for possession should not have been dismissed for want of notice to the defendants that a suit would be brought if they failed in future to pay the annual sums stipulated.

Banu Mal v. *Pars Ram* (1), distinguished.

Second appeal from the decree of F. W. Kennaway, Esquire, District Judge, Hoshiarpur, dated the 19th December 1918, *affirming that of* Rai Sahib Lala *Diwan Chand, Senior Subordinate Judge, Hoshiarpur, dated the 27th June* 1918, *and dismissing plaintiff's suit.*

MUKAND LAL PURI, for Appellant.

B. N. KAPUR, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL J.—This appeal arises out of a suit by a mortgagee to obtain possession of the land mortgaged on the failure of the mortgagors to pay

(1) 30 P. R. 1918.