Rámlál Bhágirath (*f*); *The Imperial Banking and Trading Co.* v. *A'tmárám Mádhavji* (*g*), *per Sausse*, C.J.; and Special Appeal No. 117 of 1870 (from Súrat), in which Dayábhái Dípchand, the present plaintiff, was the plaintiff, and Máṇiklál Vrijbhukan* was the defendant, a copy of the judgment in which must have been transmitted to the Súrat Adálat in February or March 1871.

Each party to bear his own costs of this appeal.

Special Appeal No. 124 *of* 1871. July 19.

SA'VJI bin SATU .....*Appellant.*
PATLU and MAHA'DU bin DHA'RU .....*Respondents.*

Claim on a Bond—Alleged Theft of Bond by Obligees—Plea of Payment—Burden of Proof.

The plaintiff sued on a bond made in his favour by the defendants which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment.

Held that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Regular Appeal No. 155 of 1870, reversing the decree of the Subordinate Judge of Tásgám.

The facts of the case sufficiently appear from the following judgment of the District Judge:—

"The plaintiff's claim was on a bond, dated Ashvin Shudh 1787, for Rs. 300, executed to the plaintiff by the defendants; no limit specified. Some land, 22 acres and 15 guntás, was in the possession of the defendants, and one-fourth "*vátá*" of the produce of this was promised in lieu of interest, or one-half this land to be placed in possession of the plaintiff. The *vátá* promised was given up to 1788, and then stopped, and the defendants stole the bond, and the plaintiff sued for

(*f*) *Ibid.*, O. C. J. 69, 78. (*g*) 2 *Ibid.*, 246, 248, 249.

* *Suprà*, p. 123.

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payment, or to have the land placed in his possession, as agreed on, till full payment.

"The defendants said the claim was false; that they paid off the bond with Rs. 300 and got it back, and now owe nothing.

"The Subordinate Judge of Tásgám found that the plea of the defendants was not proved, and he decreed for the plaintiff as sued for.

"The defendants, Patlu and Mahádu, appeal:—(I.) Bond not proved. * * * *

"*Issue*:—The plaintiff having pleaded that the theft of his bond by the defendants, while in his hands and still unpaid, prevented its production, does he prove this so as to let in secondary evidence of the bond, or do the defendants prove that they paid off the bond?

"The only evidence of the theft of this bond is the report of a police *havildár* that, on the complaint by the plaintiff of the theft of a bond from him, he had made inquiry and could find out nothing. The defendants have admitted the existence of the bond, which, they plead, was paid off and returned to them, and the bond not being in the plaintiff's hands, the presumption is in favour of the defendants: for their theft is not proved. If it was proved that the defendants were in any way to be blamed, then the presumption would be against them (*contra spoliatorem omnia præsumuntur*) as wrong-doers; but as their plea is in accordance with the custom of the country, to get back a bond when it is paid off, that of the plaintiff is, in my opinion, the one requiring proof. The plaintiff's want of possession of the bond is against the presumption that it is still due. All that the plaintiff can urge in regard to the want of the bond is that the defendants stole the bond. Where is his proof of this? Nothing but a police *havildár's* report that the plaintiff complained of a theft; which report is not evidence of a theft: and this is all; while, on the other hand, a reasonable story is told by the defendants, both consonant with daily

custom and common sense; for who would believe that a man would leave bonds where his debtors could steal them? The presumption here is, in my opinion, in favour of the defendants' plea, and as the plaintiff does not prove that his bond was taken away, or show anything to support the assumption that it was stolen, I consider this failure of evidence must count against him, and that the bond must be concluded to have been paid off, as pleaded by the defendants, against whom, therefore, the Subordinate Judge's decree must be reversed—costs on the plaintiff."

The special appeal was argued before WESTROPP, C.J., GIBBS and WEST, JJ., on the 19th of July 1871.

Dhirajlál Mathurádás, for the special appellant:—The respondents having admitted the execution of the bond and pleaded satisfaction of the debt, the Judge was wrong in not throwing the *onus* of proof upon them.

No one represented the special respondents.

PER CURIAM:—The District Judge was in error in deciding the case on the question of the alleged theft. The execution of the bond was admitted by the defendants, so that no proof of it was requisite. They alleged payment and the return of the bond, but they did not produce the bond, or account for its non-production, nor did they produce any receipt for the money: and, though the burden of proof of payment lay on them, they did not offer any evidence on the point. It further appears that the non-production of evidence (if they had any available) was owing to their own neglect. The Court, therefore, must reverse the District Judge's decree, and uphold that of the Subordinate Judge, with all costs of the suit and of both appeals on the respondents.

Decree reversed and claim allowed.