1916

DURGA DAS KHAN v. ISHAN CHANDRA DEY.

any effort to assert his own rights against her. The circumstances, however, which have been already set forth make it clear that the acquiescence does not amount to an estoppel. All that Kali Kumar can be said to have acquiesced in is the will, and according to the provisions of the will Santosh would be entitled to succeed. Santosh, therefore, and his successors-in-title cannot be held to be estopped by any such conduct on the part of Kali Kumar. There is no question of any representation having been made to defendants by Kali Kumar or Santosh on the strength of which the defendants made their purchase. The plaintiffs, therefore, are not concluded by any estoppel.

The result is that the appeal succeeds. The plaintiff's claim will be decreed with costs in all Courts

G. S. *Appeal allowed.*

LETTERS PATENT APPEAL.

Before Woodroffe and Chaudhuri JJ.

ANANDA MOHAN SHAHA

v.

ANANDA CHANDRA NAHA.*

1916

May 17

Bond—Alteration in good faith, consonant to original intention of th parties—Instrument, whether vitiated thereby.

Where a mortgage was in terms one rupee per mensem on a loan o Rupees 200, and the mortgagee inserted the words "per cent." in th bond while in his possession, thus altering the interest from eight anna per cent. per mensem to one rupee per cent. per mensem; and it wa found that there had been no fraud, and that it was the common intentio

*Letters Patent Appeal No. 68 of 1915 in Appeal from Appellat Decree No. 4037 of 1913.

of the parties that interest was to be paid at the rate of one rupee per cent. :—

Held, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument.

APPEAL under section 15 of the Letters Patent by Ananda Mohan Shaha and others, the plaintiffs.

This appeal arose out of a suit upon a mortgage bond for Rs. 200. The plaintiffs claimed the principal and interest at one per cent. per mensem. The defence was that, as the bond had been materially altered by the addition of the word "per cent.," plaintiffs were not entitled to any relief. Babu Hari Jiban Bannerjea, Munsif at Chikandi, by his judgment dated 18th July 1912, decreed the suit in part awarding interest at rupee one per month only. On appeal by the defendant, Babu Biraja Charan Mitra, the Subordinate Judge of Faridpur, by his judgment dated 18th August 1913, affirmed the decision of the Munsif and overruled the cross-objection preferred by the plaintiffs. Thereupon the defendant filed a second appeal in the High Court which was decreed by the Hon'ble Mr. Justice Walmsley on 12th April 1915; and against this decision the plaintiffs preferred the present Letters Patent appeal to the High Court.

The judgment of Walmsley J. was as follows:—

"The defendant borrowed 200 rupees from the plaintiff on mortgage, and executed a bond in which the interest was set out as one rupee per mensem. After execution and registration the plaintiff added the words "per centum," and in his plaint he asked for interest at one rupee per centum per mensem. The lower Courts gave him a decree for the principal with interest at one rupee per mensem, *i.e.*, they overruled the defendant's contention that the alteration completely vitiated the document, but they would not give interest according to the alteration.

The defendant has preferred this appeal, and it is contended on his behalf that the alteration rendered the bond absolutely void.

The learned Subordinate Judge appears to have held that the English rule about alterations in documents should not be applied in this case because it would be harsh to apply it; and that it is not applicable because

1916

ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA.

the alteration was of a venial character, and because it was made to bring the document into agreement with the intention of the parties, and because it was made after the bond had been registered.

The learned vakil for the respondent supports the judgment of the lower Appellate Court on the ground that the alteration is not of a material nature, and that it was made to bring the bond into agreement with the intention of the parties, and in spite of the alteration the bond is evidence of the debt and of the creation of a charge upon the property mortgaged The first question is whether the alteration is of such a nature as to fall within the English rule about alterations of documents. The English cases on the subject are to be found in the note on *Master* v. *Miller* (1) and the case of *Warrington* v. *Early* (2) is very useful for the purpose of the present case. There, in a promissory note the original stipulation was for lawful interest ; subsequently the words "interest at six per cent. per annum" were added in the corner of the note, and the alteration was held to be "fatal" and a "material alteration of the contract." On the authority of that case I hold that the alteration made by the plaintiff was of such a nature as to render the bond void under the English rule. It is not denied that effect is given to the English rule in this country. So I need not cite the cases bearing on this point.

Next comes the question whether the alteration can be sustained on the ground that it was made in order to bring the document into agreement with the original intention of the parties The cases of *Cariss* v. *Tattersall* (3), *London and Provincial Bank* v. *Roberts* (4), and *In re Howgate and Osborn's contract* (5) are quoted ; but an examination of those cases shows that they are quite different from the present one. It cannot be inferred from the document as it stood originally that the interest was to be "per centum," and external evidence to that effect is not admissible. The last contention of the respondent is that the principle adopted in *Ramasamy Kon* v. *Bhavani Ayyer* (6) is applicable, but that argument is disposed of by the remarks made in the Full Bench case of *Christacharlu* v. *Karibasayya* (7). In this case, also, the plaintiff's suit is founded "on the instrument as altered and on nothing else."

I am of opinion that the decree of the lower appellate Court cannot be sustained. The application of the English doctrine may seem harsh to the plaintiff, but it is his own wrong and foolish act that has brought

(1) (1791) 4 T. R. 320; 2 R. R. 399.
(2) (1853) E. & B. 763.
(3) (1841) 2 M. & Gr. 890.
(4) (1874) 22 W. R. 402.
(5) [1902] 1 Ch. 451.
(6) (1866) 3 Mad. H. C. 247.
(7) (1885) I. L. R. 9 Mad. 399, 410.

him into trouble. The only relief he can be allowed is that he should not be made to pay costs to a defendant who has escaped a moral obligation on a technical plea.

The appeal is allowed, and the plaintiff's suit is dismissed, but the parties will bear their own costs in all Courts."

Babu Jogesh Chandra Roy and *Babu Asita Ranjan Ghose*, for the appellant. There was no fraudulent intention on the part of the mortgagee to alter the bond. He interpolated the words "per centum" merely to carry out the original intention of the parties and in good faith without the intention of defrauding the mortgagor. These are the findings arrived at by both the Courts below and cannot be challenged here in second appeal. Alteration in good faith does not vitiate the instrument. See *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1) where it is said that fraud alone will vitiate the instrument.

Refers to *Cariss* v. *Tattersall* (2).

[WOODROFFE J. There the obligor consented to the alteration and therefore he was estopped.]

See *Dodge* v. *Pringle* (3) and *In re Howgate* v. *Osborn* (4). Sections 92 and 93 of the Evidence Act do not prevent the taking of evidence in order to ascertain the state of facts by which the mortgagee was actuated to alter the deed by inserting the words "per centum." In other words, these sections are no bar to the Court taking additional evidence in order to ascertain the original intention of the parties, and to determine the question of fraud, *i.e.*, whether the mortgagee interpolated the words merely to set matters right in good faith, or whether his intention

(1) (1906) I. L. R. 33 Calc. 812, 819; 3 C. J. L. 363.

(2) (1841) 2 M. & Gr. 890; 10 L. J. C. P. 187.

(3) (1860) 29 L. J. Ex. 115.

(4) [1902] 1 Ch. 451.

1916

ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA.

was to vary the terms of the contract in order to defraud the mortgagor. The cases relied upon by Mr. Justice Walmsley in his judgment differ entirely from the present case, inasmuch as in all those cases the question of fraudulent intention on the part of the party who altered the deed was found: *Narayana Pattar* v. *Viraraghavan Pattar* (1), *Mangal Sen* v. *Shankar Sahai* (2), *Achhutanand Bhattacharji* v. *Ram Nath Bhattacharji* (3) and *Surendra Nath Ghose* v. *King-Emperor* (4).

My next point is that the alteration was made after registration. The mortgage being for Rupees 200 was complete on registration of the deed, and once the mortgage is created an interest in the mortgaged property vests in the mortgagee; and he cannot be divested of this interest by any alteration or interpolation subsequent to the registration of the deed. Of course, the mortgagee may not get any relief in terms of the deed as altered, but his right to the mortgaged property in terms of the deed, as it stood when registered, cannot be impeached or impaired by any subsequent event: see *Ramasamy* v. *Bhawani* (5), *Christacharlu* v. *Karibasayya* (6), *The Agricultural Cattle Insurance Co.* v. *Sir John Foster Fitzgerald* (7), *Doe dem. Beanland and Others* v. *Hirst* (8) and *Hutchins* v. *Scott* (9).

Babu Trailakya Nath Ghose, for the respondent. Though the finding is that the alteration is *bonâ fide* but unauthorised, still the law will apply. The question of good faith and bad faith does not arise as the plaintiff has not come into Court with clean hands.

(1) (1899) I. L. R. 23 Mad. 184, 187.
(2) (1903) I. L. R. 25 All. 530, 532.
(3) (1913) 18 C. L. J. 354, 358.
(4) (1910) 12 C. L. J. 277.
(5) (1866) 3 Mad. H. C. 247.
(6) (1885) I. L. R. 9 Mad. 399.
(7) (1851) 16 Q. B. 432.
(8) (1821) 23 R. R. 756.
(9) (1837) 46 R. R. 770, 777.

The law will apply whether there has been fraud or not, as in the case of promsisory notes and other instruments. Here is a material alteration made by interpolating the words "per cent" without the consent of the defendant-respondent. The law was introduced in England in *Pigot's Case*(1). The principle in *Pigot's Case* has been extended to (i) negotiable instruments or promissory notes [*Master* v. *Miller* (2)], (ii) to bought and sold notes [*Powell* v. *Divet* (3)], (iii) to guarantee [*Davidson* v. *Cooper* (4)] and (iv) to cases of alteration by adding a party [*Gardner* v. *Walsh* (5)]. All these cases are collected in *Suffel* v. *The Bank of England* (6). In those cases "fraud" is not mentioned: see also *Sutton* v. *Toomer* (7), *Leonard Warrington* v. *John Early* (8), *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (9).

As to material alteration, it has been held that alteration of the rate of interest is a material alteration: *Oodeychand Boodaji* v. *Bhaskar Jagonnath* (10). No fraud is mentioned there. Also see *Achhutanand Bhattacharji* v. *Ram Nath Bhattacharji* (11). In this case there is no reference to fraud either, as an alteration in respect of compound interest vitiated the instrument. According to sections 87 and 89 of the Negotiable Instruments Act (XXVII of 1881) a material alteration in a promissory note vitiates a negotiable instrument without any question of fraud. Now the only question is, does this law apply to a bond? As to the finding that the alteration was made in good

(1) (1615) 11 Rep. 266.
(2) (1791) 4 T. R. 320; 2 R. R. 399.
(3) (1812) 15 East 29.
(4) (1844) 13 M. & W. 343; 67 R. R. 638.
(5) (1855) 24 L. J. Q. B. 285; 5 E. & B. 83.
(6) (1882) 9 Q. B. D. 555, 561.
(7) (1827) 7 B. & C. 416.
(8) (1853) 2 E. & B. 763.
(9) (1881) I. L. R. 7 Calc. 616.
(10) (1881) I. L. R. 6 Bom. 371.
(11) (1913) 18 C. L. J. 354, 358.

1916

ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA.

faith, sections 92 and 93 of the Indian Evidence Act provide against going behind a contract reduced to writing. Therefore, the original intention cannot be proved. Further, there was no issue of fraud and mistake in this case, yet a finding has been arrived at thereon. The decisions referred to by the other side were all cases of alteration by consent and were accepted on the ground of estoppel.

[CHAUDHURI J. It is conceded that your knowledge and consent was not there.]

If the alteration was unauthorized, the instrument would be vitiated: see Pollock on Contract, 3rd Edition, page 62, under heading "Unauthorized Alterations."

WOODROFFE J. This appeal has been heard at great length. The point which is raised is a simple one. The suit was brought on a mortgage bond of Rs. 200. The defence, which has been found to be false, is that money was not borrowed, that the bond was not executed or registered as the plaintiff alleges, but that the defendant with a view to defraud his own creditors got up a sham mortgage and in order that the *benami* character of this transaction should not be discovered, he made it over to the plaintiff who has taken advantage of that fact. Subsequently, it is alleged that there was a dispute between the plaintiff and the defendant about some tin-shed and other matters and the plaintiff then put in force this mortgage against the defendant. The defendant alleges that there was no consideration. It is further alleged that when the mortgage bond was in possession of the plaintiff, the mortgage being in terms one rupee per mensem, the plaintiff fraudulently inserted the words "per cent." in the bond, thus making the interest from eight annas per cent. per mensem to one rupee per cent.

per mensem. The defence of the *benami* character of the document was abandoned; and the learned Judge found that consideration had been received for this document as was evidenced by a previous deposition of the defendant. Thereupon stress was laid upon the alleged alteration in the document. It has been found as a fact that the document has been altered. It has also been found as a fact that there has been no fraud and that the document was not fraudulently altered. It has been found as a fact, too, that it was the intention of the parties, as it seems to me to be obvious upon reading the document, that interest was to be paid at the rate of one rupee per cent. per mensem. Anybody reading this document (rupee one per mensem) could not fail to read it in the sense in which both the Munsif and the Subordinate Judge have done, viz., that interest was to be paid at the rate of one rupee per cent. per mensem. The finding is that this was the agreement between the parties, and in making this alteration effect was given to the common intention of the parties. It has been held as a matter of law, as has been pointed out in the judgment of the Subordinate Judge, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. That is the rule of law; and applying the facts found to this rule, the finding of the Subordinate Judge disposes of this question.

It is unnecessary, therefore, to consider the other point which has been raised on behalf of the appellant, viz., that apart from this question altogether, there are a number of decisions which show that as soon as a document is registered a charge is created in favour of the plaintiff and the plaintiff is entitled to enforce the charge and no alteration subsequent to the registration of the document can affect the validity of

1916

ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA.

WOODROFFE J.

the document. A large number of cases has been cited in support of this proposition. It is unnecessary to decide that question because this case is disposed of upon the ground which I have already stated.

In my opinion the judgment and decree of Mr. Justice Walmsley should be set aside. I accordingly set aside the judgment and decree of Mr. Justice Walmsley and restore the judgment and decree of the Subordinate Judge.

The appellants will be entitled to their costs of this appeal from the respondent.

CHAUDHURI J. I agree.

G. S. *Appeal allowed.*

LETTERS PATENT APPEAL.

Before Sanderson C.J. and Mookerjee J.

1916

May 17.

KRISHNA CHARAN BARMAN

v.

SANAT KUMAR DAS.*

Penalty—Interest, exorbitant rate of—Inference by Court—Court's power to reduce rate of interest—Mortgage—Release of one joint mortgagor, effect of—Contract Act (IX of 1872), ss. 44, 74.

It is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation by way of penalty.

What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances.

* Letters Patent Appeal No. 40 of 1914 in Appeal from Appellate Decree No. 56 of 1911.