

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

OODEYCHAND BOODAJI AND OTHERS (PLAINTIFFS) v. BHASKAR
JAGONNATH AND ANOTHER (DEFENDANTS).*

1881
December 10.

Promissory note—Negotiable instrument—Material alteration.

An alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument. The alteration of the rate of interest in one of the clauses of a promissory note held to be a material alteration vitiating the note, although the clause so altered was a penal clause to which, even if unaltered, the Court would not give effect.

THE following case was stated for the opinion of the High Court, under section 7 of Act XXVI of 1862, by W. E. Hart, First Judge of the Court of Small Causes at Bombay:—

“1. This was an action on a document, written in the Marathi language and character, of the nature of a promissory note for Rs. 600 and interest, dated 15th October, 1877, and payable ten months after date.

“2. The portion of this document that is material for the purposes of this reference is to the following effect:—

“ ‘ In respect of these rupees we will continue to pay interest at the rate of *annas eight per month* per cent.; as to the fixed period in respect of these rupees, we will pay off your rupees within ten months. Should the rupees remain unpaid beyond the fixed time, we will pay interest at the rate of rupees *two (2)* per cent. per month.’

“3. Both the word ‘*two*’ and the figure ‘(2)’ italicised in the last para, seem to have been altered from *one* and (1) respectively.

“4. There are two endorsements on the note, of payments made on account, to the following effect:—

“ ‘ Two hundred on the 9th day of June in the year 1888 Rs. (200) two hundred have been paid on account of this bond on account of principal; the handwriting of S. M. O.’

“ ‘ 200 on the 10th day of August in the year 1880 rupees two hundred have been paid on account of this bond on account of

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interest on this bond ; the handwriting at the request of the party is of Sakharam Maroba.'

"5. The words above italicised are in each case noted by the translator as presenting the appearance of having been written subsequently to the rest of each endorsement.

"6. The plaintiffs instituted this action on the 15th August, 1881, for Rs. 605-9-7. Giving credit for Rs. 200 paid on account of the principal moneys of the note for Rs. 600, they charge Rs. 205-9-7 as interest, calculated at 6 per cent. *per annum* for ten months from 15th October, 1877, to 14th August, 1878, and at 24 per cent. *per annum* from 15th August, 1878, to the filing of the suit.

"7. The defendants at the hearing by their pleader admitted the making of the note on 15th October, 1877, but contended that it was now void by reason of material alterations having been made in it without their knowledge and consent. They also pleaded limitation (which plea was subsequently withdrawn), and contended that they were not liable to pay penal interest at an enhanced rate.

"8. The material alterations of which they complained were, *first*, the alteration of the enhanced rate of interest from *one* to *two* per cent. *per month*, as shown above in paras. 2 and 3 ; and, *second*, the addition to the second endorsement which made it appear that the Rs. 200 paid on 10th August, 1880, had been paid on account of *interest*, whereas they contended it had been paid on account of *principal*.

"9. The plaintiff by his pleader consented to allow both the payments endorsed on the note to be taken as having been made on account of principal, and to admit (for the purposes of this suit only) that the alteration in the amount of the enhanced rate of interest from *one* to *two* per cent. *per mensem* had been made without the authority of the defendants.

"10. On these facts and admissions I held that the note was not void as against the defendants, *first*, because the alteration in the amount of the enhanced rate of interest was not a material alteration of the contract ; and, *second*, because the endorsements evidencing payments on account were no part of the contract.

" 11. I considered that a material alteration sufficient to avoid a contract must be such an alteration as materially alters not only the wording of a term in the contract, but its legal effect: *Suffell v. The Bank of England*(1). In the present case the alteration was in a term of the contract to which no effect could have been given, even in its unaltered state; for, as originally written, it provided for the increase of the rate of interest from 6 per cent. *per annum* to 12 per cent. *per annum*, as a penalty for the non-payment of the amount due on the note within ten months of its execution. The defendants in contending generally that they could not be called on to pay penal interest at an enhanced rate, virtually compelled me to strike out of the note the whole clause providing for it, and the legal effect, or rather non-effect, of that clause was not, in my opinion, changed by the alteration of an inoperative provision for the payment of interest at the increased rate of 12 per cent. *per annum*, into an equally inoperative provision for the payment of interest at the increased rate of 24 per cent. *per annum*.

" 12. With regard to the endorsements, I was of opinion that, as they were no part of the note originally executed by the defendants, an alteration in them could not be said to be such a material alteration in the contract as would entitle the defendants to avoid the note. These endorsements are evidence merely of the payment of certain sums on account of the note. Assuming the endorsements to have been subsequently altered, so as to make it appear that money paid as principal had been paid as interest, this might entitle the defendants to insist upon having the money applied as it was originally paid, but it would not, in my opinion, entitle them to decline to make any further payment on account of the note.

" 13. I, therefore, passed a verdict for the plaintiffs for Rs. 200, with interest at 6 per cent. *per annum*, to be calculated, taking both payments endorsed on the note to have been made on account of principal at the dates shown in the endorsements, and I certified the plaintiff's pleader's costs Rs. 15.

" 14. At the request of the defendant's pleader, and because

(1) 7 Q. B. D 270 *per* Lord Coleridge, C. J., at p. 271.

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I felt myself some doubt on the first point, the above verdict was made, subject to the opinion of the High Court on the two following questions :—

“ (1). Is the alteration of the penal rate of interest in the note from one per cent. to two per cent. *per mensem* such a material alteration as to avoid the whole note ?

“ (2) Are the endorsements of payment part of the contract between the parties ?

“ 15. The defendants have lodged in this Court the amount of the verdict and costs and the sum of Rs. 50 to meet the costs of this reference.”

The parties did not appear in person or by counsel.

SARGENT, J.—The conclusion to be drawn from the English authorities is that an alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument (*Davidson v. Cooper*(1) *Gardner v. Walsh*(2)), or, as it is expressed in *Suffell v. Bank of England*(3), “ must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of.”

In the present case the alteration effects a material change in the contract as it appears on the face of the instrument. But it is said that being in a penal clause to which the Court would not give effect, however intrinsically material it may be, it cannot be said to effect a change in the operation of the instrument. The clause, however, is not void *ab initio*. It operates according to its plain language until relieved against by a Court of Equity or possibly treated as a penalty by a Court of Law in an action brought on the instrument. It is further to be remarked that the relief in such cases turns upon very fine distinctions, and is, therefore, necessarily uncertain, as at once appears from a comparison of the cases reported in 6 Bom. H. C. Rep., pp. 8, 9 ; 2 Mad. H. C. Rep., 451 ; 2 Calc. L. R., p. 202, and L. R. 2 Eq. 221.

To hold that the alteration under such circumstances is immaterial would, we think, be contrary to the spirit of the rule as

(1) 13 M. & W. 343.

(2) 5 E. & B. 83.

(3) 7 Q. B. D. 270.

stated by Lord Denman in delivering the judgment of the Exchequer Chamber in *Davidson v. Cooper*(1). "The strictness of the rule", he says, "on this subject as laid down in Pigot's case can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind and the rule adhered to. The party who may suffer, has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

The reasoning of the Court in *Anandji Visram v. Naviad Spinning and Weaving Company*(2), where the circumstances were analogous to those under consideration, has a close bearing on the present case. The Court was there asked to hold an alteration in the Memorandum of Association of the company, which was in its nature material, to be immaterial on the ground that the alteration was illegal. The Court, however, refused to do so on the ground that the plaintiff's position was practically altered by the fact that he would have to resort to legal proceedings to be protected from it if attempted to be enforced against him; and, further, that the nature of his remedy was far from clear. The nature of the remedy, it is true, is not open to doubt in the present case, but the result of its application can scarcely be said to be otherwise. We think, therefore, that the first question referred to us should be answered in the affirmative, which renders it unnecessary to answer the second question.

Plaintiff to pay costs of reference.

(1) 13 M. & W. 343.

(2) I. L. R. 2 Bom. 331.

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