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right to retain that possession. In fact the purchaser had got his consideration for his purchase-money and enjoyed the benefit of it till the judicial declaration, when obviously the consideration failed. I think the fact that the purchaser had obtained possession is not only important but is sufficient to determine the question of limitation and distinguish the Madras case from this, because so long as the purchaser is in possession, the consideration exists and no cause of action can arise for damages as for failure of it. For these reasons I agree with Mr. Justice Candy that the decree of the Court below must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901. *March 6.*

RUSTOMJI ASPANDYARJI SETHNA AND ANOTHER (ORIGINAL DEFENDANTS 4 AND 5), APPELLANTS, *v.* SHETH PURSHOTAMDAS CHATURDAS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 TO 3), RESPONDENTS.*

Partnership—Several firms—Common partner—Money lent by partner to his own firm—Practice—Parties—Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act (IX of 1872), section 264—Guarantee—Liability of surety—Right of surety to indemnity.

Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and defendant to one and the same action.

One partner cannot sue for money lent by him to a firm of which he is a member. The advance is but an item in the partnership account.

It is open to the Court of appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed—*Sákharam* v. *Hari*.(1)

* Appeal No. 112 of 1899.

(1) (1881) 6 Bom. 113.

The plaintiff Purshotamdas Chaturdas and his son Nagindas were members of a joint Hindu family and were the owners of and equally interested in the firm of Gordhandas Bhagwandas. The son Nagindas was also a partner in another firm carrying on business in the name of Pathak Shanghavi and Company. The plaintiff Purshotamdas brought this suit against the latter firm which consisted of four partners, including his son Nagindas (defendant 2), to recover Rs. 61,419-3-1 in respect of advances made by the firm of Gordhandas Bhagwandas to the defendants' firm. The fifth defendant was sued as a surety for one of the partners (defendant 4) in the defendants' firm. The lower Court passed a decree for the amount claimed against all the defendants. One of the partners (defendant 4) and the surety (defendant 5) appealed. Pending the appeal the plaintiff died and his son Nagindas (defendant 2) became sole owner of the family firm and was substituted for his father on the record, thus becoming both plaintiff and defendant in the suit.

Held, (1) that although Nagindas (defendant 2) was partly interested both as creditor and debtor and could not have sued for his share, nevertheless all parties interested being before the Court either as plaintiff or defendants, the Court would adjust and determine their rights in accordance with the rule of justice, equity and good conscience.

(2) That Purshotamdas and Nagindas being equally interested in the plaintiffs' firm, the lower Court should have made a declaration that they were entitled to the amount advanced in equal shares, and have passed a decree that one moiety thereof should be paid to Purshotamdas and the other moiety treated as an item to the credit of Nagindas in the partnership accounts.

(3) That although on Purshotamdas' death pending the appeal, Nagindas as his heir had become sole plaintiff, the Court of appeal would not pass a decree in his favour even in respect of Purshotamdas' half-share, but would only declare that for this amount also Nagindas was entitled to credit in the partnership accounts. Under the circumstances Nagindas could only get such relief as would have been permissible had he occupied the position of plaintiff at the institution of the suit.

(4) That Nagindas was entitled to credit in the partnership accounts as against those who actually were his partners from time to time. Section 264 of the Contract Act (IX of 1872) only operates in favour of strangers to the partnership.

As to the liability of defendant 5 as surety, the Court *held* on the evidence that defendant 5 had become a surety for the partnership debt. The partners were the principal debtors. But the liability of the surety is co-extensive with that of the principal debtor; therefore no decree could be now passed against defendant 5. Further, Nagindas, now the beneficial owner of the debt, was one of the principal debtors, and as such was bound to indemnify his surety and to repay any sum paid under the guarantee. He therefore could not be entitled to any relief against his surety.

APPEAL from the decision of Lallubhai P. Parikh, Additional

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RUSTOMJI v. SHETH PURSHOTAMDAS.

First Class Subordinate Judge of Ahmedabad, in suit No. 275 of 1898.

The plaintiff was the owner of the firm of Gordhandas Bhagwandas. The first four defendants were the partners of the firm of Pathak Shanghavi and Company. The fifth defendant was the father of defendant 4, and was sued as his surety.

The plaintiff claimed to recover Rs. 61,419-3-1 from the defendants in respect of advances which, he alleged, his firm of Gordhandas Bhagwandas had made to the defendants' firm of Pathak Shanghavi and Company.

The second defendant Nagindas was the son of the plaintiff. The two lived together as members of a joint Hindu family, and it appeared that the advances made to the defendants' firm were made out of the family funds of the plaintiff and second defendant.

Defendants 1 and 2 admitted the plaintiff's claim.

Defendant 3 alleged that he had retired from the firm in 1895 and was not liable for any advances from that date. Defendant 4 alleged that he had ceased to be a partner on the 13th May, 1896.

Defendant 5 denied that he was surety for his son (defendant 4), alleging that the following letter, which was relied on by the plaintiff, had been fraudulently obtained from him: It was dated 5th May, 1896, and was addressed by him to the plaintiff:

> In Pathak Shanghavi and Company my son Rustomji is a partner. And you have been paying money to the Company from time to time whenever the Company has been in need of it, and I fully hope you will continue to pay the same. You are old like me and so you know me that I am not a beggar and that Rustom is my only son. You should not therefore entertain any anxiety whatever as to the profit or loss in respect of his share. I am careful about it. And we (*i.e.* Rustomji, and I myself for Rustomji,) will be entirely responsible for the whole amount that you might have paid up to this time and will pay hereafter. Therefore you, an old man, will continue to assist with money without entertaining any doubts. This is the only request. Dated 5th May 1896.

The Subordinate Judge passed a decree for the plaintiff for the sum claimed, *viz.* Rs. 61,419-3-1, and ordered that of this sum Rs. 19,908-3-7 should be recovered from defendants 1, 2, 3 and 4; Rs. 13,723-1-8 from defendants 1, 2 and 4, and the

remainder Rs. 27,787-13-10 from defendants 1 and 2 only, and that plaintiff should be at liberty to recover from defendant 5 the amount which he was entitled to recover from defendant 4.

From that decree defendants 4 and 5 appealed. While the appeal was pending the plaintiff died, and his son Nagindas (defendant 2 in the suit and respondent 3 in the appeal) was substituted as his heir.

Donald (with *Branson, R. S. Sethna,* and *L. A. Shah*) for appellants (defendants 4 and 5). This suit is not maintainable, for defendant 2 (Nagindas) is a partner in that firm and also a partner with his father the plaintiff. They are members of the same joint family, and the money sued for was money advanced out of the family funds. Nagindas is therefore equally interested with the plaintiff in this suit and is really a co-plaintiff with his father. He is both plaintiff and defendant. The plaintiff ought to have sued for partition and charged defendant 2 with the advances made—*Ramsebuk* v. *Ramlall* [1]; Leake on Contracts (3rd Ed.), page 363; Rules of the Supreme Court, order 48 (*a*) rule 10. Defendant 2 might afterwards claim contribution from the other members of his firm. But as co-plaintiff here he cannot sue, for he is both creditor and debtor, both plaintiff and defendant. His remedy is to sue for dissolution of partnership and for an account—*Chunder Sikhur* v. *Ram Buksh.*[2]

The original plaintiff being now dead, Nagindas (defendant 2), who is his son and heir, is now on the record as plaintiff. He is now in actual fact what he virtually was before, *viz.* creditor and debtor, plaintiff and defendant, in the same suit—Williams on Executors (9th Ed.), page 1175. This appeal Court in dealing with the decree must regard it as if the suit had been originally brought by Nagindas—*Sakharam* v. *Hari.*[3]

Defendant 5 is now sued on his alleged guarantee. We say it was obtained by the fraud and misrepresentation of defendant 2 (Nagindas). On the true construction of the writing it appears that defendant 5 became surety to the plaintiff, not for defendant 4 only, but for the firm. But the plaintiff is now dead and

(1) (1881) 6 Cal. 815. (2) (1878) 1 Cal. L. R. 545.
(3) (1881) 6 Bom. 113.

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Nagindas, who is a member of the firm, is his heir and now stands in his place. He cannot claim payment from the surety of a debt for which he, as a member of the firm, is himself liable equally with the other defendants. The surety is now discharged. Further, if the surety were to pay the debt, Nagindas, as a member of the firm, would immediately become liable to repay him, for the principal debtor is bound to indemnify the surety—Contract Act, section 145.

Inverarity (with *Bhaishankar Nanabhai*) for respondents 1 and 3 (original plaintiff, now dead, and Nagindas, original defendant 2).

The Court below found that it was the original plaintiff (Purshotamdas) and not his son Nagindas who advanced to the defendant firm. The suit by the firm is therefore maintainable. The lower Court has found the whole sum due from the firm. The decree being correct, no subsequent event can now be allowed to modify it. The effect of the death of the plaintiff will be considered in the execution proceedings.

Setalwad (with *M. N. Mehta*) for respondent 4 (original defendant 3).

JENKINS, C.J. :—The plaintiff, describing himself as the owner of the firm of Gordhandas Bhagwandas, brought this suit to recover Rs. 61,419-3-1. His case against the first four defendants is that they carried on business in partnership under the name of Pathak Shanghvi and Company; and that the sum he claims is the result of advances made to the partnership. He alleges that the fifth defendant is liable to him by reason of a guarantee of the partnership's indebtedness. The first and second defendants alone admit the claim.

The third, fourth and fifth defendants assert that the advances were made not by the plaintiff, but by his son the second defendant; the third defendant contends that in any case he retired from the partnership in October, 1895, so that he is liable for nothing after that date; and the fifth defendant maintains that the oral guarantee alleged against him is not proved and that the written guarantee is vitiated in its origin.

The case was heard by the Additional First Class Subordinate

Judge of Ahmedabad, who passed the following decree in plaintiff's favour:

I therefore order that out of the sum of Rs. 61,419-3-1 claimed by the plaintiff, he (plaintiff) do recover Rs. 19,908-3-7 from defendants 1, 2, 3 and 4; that out of the remainder he do recover Rs. 13,723-1-8 from defendants 1, 2 and 4; that he do recover the rest, *viz.* Rs. 27,787-13-10, from defendants 1 and 2 only and from the property of Pathak Shanghavi and Company; that on all the above sums awarded to the plaintiff, he (plaintiff) do recover simple interest at 4½ per cent. from the date of this suit till the payment of the sums by the respective defendants; that the plaintiff is at liberty to recover from the fifth defendant the amount which he is entitled to recover from the fourth defendant. The plaintiff do recover his costs from all the defendants. Defendants to bear their own costs.

From this decree the present appeal has been preferred by the fourth and fifth defendants.

During the pendency of the appeal the plaintiff has died and his son the defendant Nagindas has been substituted in his place. To this order we will refer later.

The main contentions before us have been that the advances were made, not by the plaintiff, but by Nagindas, and that the guarantee is not binding. The first of these points has been urged before us by the appellant with great care and elaboration, but in view of the admissions that have been made, we think, so far as the facts go, it invites a simple solution. It is admitted on both hands that the advances were made out of the joint family funds of the plaintiff and the second defendant, who, as members of a joint Hindu family, were jointly interested in the firm of Gordhandas Bhagwandas. We think it therefore of little importance whose hand actually advanced the money, though, if it be a matter of any moment, we agree with the learned Judge in the Court below that the advance was actually made by Sheth Purshotamdas Chaturdas out of the firm's funds.

It becomes, however, a point of some difficulty to determine what are the legal consequences which flow from this. It is clear that Purshotamdas Chaturdas and Nagindas were the owners of the firm of Gordhandas Bhagwandas, so that *prima facie* the funds of that firm could only be recovered by a suit in which they both were plaintiffs—*Jugal Kishore* v. *Hulasi Ram*.[1] This is

(1) (1886) 8 All. 264.

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in accordance with the doctrine that where an individual is a common partner in two houses of trade no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. In illustration of this we may refer to *Bozzäquet* v. *Wray*.(1)

This doctrine is founded on the elementary rule of procedure, too often disregarded in this country, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action. While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in *Luke* v. *South Kensington Hotel Company*.(2)

Similarly, we think the fact that Nagindas was interested both as creditor and debtor cannot stand in the way of our adjusting the rights of the parties in accordance with the enjoined rule of justice, equity and good conscience. To learn the goal to which that guiding principle should direct our steps it will be well to consider separately what the rights first of Purshotamdas, and then of Nagindas, would have been had the money advanced been in each case his alone. Now if Purshotamdas had been the sole creditor, he clearly could have recovered the amount in a suit properly framed for that purpose: had the advance been out of Nagindas' separate moneys, a suit to recover that money would not have lain; for one partner cannot sue for money lent by him to a firm of which he is a member, as the advance would be but an item in the partnership account.

This we think gives a clue to the proper equitable principle to be applied here. First, we must determine the shares in which Purshotamdas and Nagindas were interested in the firm of Gordhandas Bhagwandas. In some cases this might be a matter of considerable difficulty, but not in the present instance; for

(1) (1815) 6 Taunton 597. (2) (1879) 11 Ch. D. 121.

it is not questioned that the two were equally interested in this firm, and we think we are entitled to take that as the basis of adjustment.

That it is within the power of the Court to administer equity on these lines is, we think, to be inferred from *Piercy* v. *Fynney*.[1] Therefore we think there should in the lower Court have been a declaration that Purshotamdas and Nagindas were entitled to the amount advanced in equal shares and a decree, that one moiety thereof should be paid to Purshotamdas, and the other moiety treated as an item to the credit of Nagindas in the partnership accounts.

Now had that decree been passed, Purshotamdas during his life-time would have been entitled to execute the decree passed in his favour. On his death, however, the decree was transferred to Nagindas, so that under section 232 (*b*) of the Civil Procedure Code it would have been incapable of execution.

But if we pass this decree on appeal, section 232 (*b*) will have no application, and in that case *quoad* Purshotamdas' half share, Nagindas, one of the judgment-debtors, would be able to execute it, though he could not himself, according to the rule to which we have alluded, have sued originally for that part of the debt. The substitution of Nagindas in Purshotamdas' place made Nagindas both a plaintiff and a defendant, a position not ordinarily permissible. The result in this case is, that though Nagindas was equally liable with his co-partners, if we confirm the decree as it stands, he will, both as regards Purshotamdas' share and his own, be at liberty to execute the decree against any one of his co-partners.

In our opinion, therefore, we cannot, as things now stand, pass a decree in Nagindas' favour for payment to him of the amount due from the partners even in respect of Purshotamdas' share. We can only declare that for this amount too Nagindas is entitled to credit in the partnership accounts. It is true this is due to what has occurred since the decree of the lower Court, but it is open to this Court to vary a decree under appeal, not only for error, but also on grounds which have come into existence since

(1) (1871) L. R. 12 Eq. 69.

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it was passed—*Sakharam* v. *Hari*.[1] Subsequent events have placed Nagindas in the position of the sole plaintiff, and we can under the circumstances of this case only give him such relief as would have been possible had he occupied that position at the institution of the suit.

Bhagubhai, the third defendant, it is true, has contended before us, that as he left the partnership in October, 1895, the Judge erred in treating him as liable up to the following January. The ground of the decision is the rule prescribed in section 264 of the Contract Act, in reference to which the Judge held on the evidence that the plaintiff was not shown to have had notice of the dissolution before January. We see no ground for holding that the Judge's appreciation of the evidence was wrong, but the point does not now arise. Nagindas can only be entitled to credit in the partnership accounts as against those who actually were his co-partners from time to time; for section 264 merely operates in favour of strangers to the partnership. Obviously, however, this is a matter of no practical importance, if, as is alleged, the advances went to pay off indebtedness of the firm incurred while Bhagubhai was a partner: for in that event the rights and liabilities of the partners will be worked on the taking of the partnership accounts.

If this be the position so far as defendants 1 to 4 are concerned, how does defendant No. 5 stand? The case against him is that he is liable as a surety, and it is alleged that he gave Purshotamdas both an oral and a written guarantee. Defendant No. 5 denies the oral guarantee, and it is said, and we think rightly, that there is no distinct finding of the learned Judge in favour of the oral guarantee. As to the existence of the written guarantee there can be no question, but it is contended that it was obtained by a fraud which is a complete answer to any suit on it. The fraud imputed is twofold; first, it is said that defendant No. 5 was induced to sign the guarantee by a false misrepresentation of his son's determination to commit suicide unless freed from his pecuniary embarrassment, and secondly, that defendant 5 was

(1) (1881) 6 Bom. 113.

assured the letter of guarantee would be submitted to his brother Shapurji for approval before it was treated as operative.

Now it is obvious that the *onus* of establishing this plea was on defendant 5, and it was incumbent on him to make it out beyond dispute, as it involved a charge of fraud. The lower Court held that defendant 5 had not made out his case, and it is for us to say whether we can on the evidence hold that the charge of fraud is so clearly established as that we ought to reverse the Judge's finding of fact. The evidence has been sifted before us carefully and critically by Mr. Donald, but we are unable to say that the Judge's appreciation of the evidence is wrong. The witnesses were examined before him, and in a conflict of evidence any appeal Court must be slow to differ from the Judge's estimate as to the credibility of the witnesses examined before him. We therefore would not disturb the finding of the lower Court on this point.

We do not now propose to examine the evidence in detail, because it seems to us there is another ground which is fatal to the claim. Taking the guarantee as established we have to see what is its true construction. Mr. Inverarity has argued before us that though the fifth defendant thereby became liable for the whole debt of the partnership, that is so only because he guaranteed his son's obligation. We are not prepared to say that if this were so, it would make any difference; but in any case we do not so read the document: it is true Rustomji alone of the partnership is named, but we read the document as constituting defendant 5 directly a surety for the partnership debt. We start then with this, that defendant No. 5 was the surety and the partners were the principal debtors. But the liability of a surety is co-extensive with that of his principal debtor, therefore it follows from what we have already said that we cannot now pass a decree for payment against defendant No. 5. Nor does the matter rest there: in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee (Indian Contract Act, 1872, section 145). But Nagindas, the present beneficial owner of the debt, is one of the principal debtors, so that it is obvious by no equitable adjustment of rights can he be entitled to any relief

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against defendant 5, who stood surety for him. This no doubt was not the position of affairs when the decree of the lower Court was passed, but we have already dealt with this in an earlier part of our judgment and the same considerations are equally applicable here.

The conclusion, then, to which we come is that the judgment under appeal cannot stand, and in place of it there must be a declaration that Nâgindas in the taking of the partnership accounts is entitled to credit for the amount advanced out of the funds of Gordhandas Bhagwandas and that the sums so advanced with interest thereon amount in all to Rs. 61,419-3-1. In determining how that amount is to be borne by the various partners regard must be had to the dates on which the amounts making up that total were advanced, and to the debts discharged thereby, and to the proportions in which the partners are liable to contribute. We do not disturb the decree of the lower Court as to costs: the appellants must bear half the costs of the respondent Nagindas in this Court.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1901.
March 7.

ATMARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* UMEDRAM (ORIGINAL DEFENDANT 1), RESPONDENT.*

Document—Alteration of a document—Material alteration—Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective—Limitation.

The rule of English law that a material alteration of a document by a party to it after its execution without the consent of the other party renders it void, is in force in India.

This rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability.

A written acknowledgment of his liability by a debtor which is intended merely to save the bar of limitation and not to give a right of action is not within the rule.

* Second Appeal No. 579 of 1900.