1901.

RUSTOMJI v. SHETH PURSHOTAM-DAS.

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.

SECOND appeal from the decision of Khán Bahádur B. E. Modi, Additional First Class Subordinate Judge, A.P., of Surat, confirming the decision of Ráo Sáheb G. V. Saraya, Joint Second Class Subordinate Judge at Surat.

Suit to recover Rs. 2,524-11-6 in respect of a loan alleged to have been made by him on 20th November, 1888, to a partnership consisting of the first defendant and one Uttamram, the father of defendants 2, 3 and 4.

This suit was filed on the 30th March, 1898.

The plaintiff contended that the suit was saved from the bar of limitation as follows:—

He alleged that a part payment of Rs. 81-12 was made to him on the 11th April, 1891; that on the 2nd November, 1891, a *samadaskat* was passed to him by the debtors in which the sum of Rs. 2,366-10-6 was acknowledged to be then due; that in March, 1894, another part payment of Rs. 300 was made, the entry in his book relating to which was in the handwriting of defendant 1; that subsequent part payments were made by defendant 1, after allowing for which the balance of Rs. 2,524-11-6 remained due, which was the sum sued for.

In 1893 Uttamram (father of defendants 2, 3 and 4) died, but his sons continued the partnership with defendant 1.

Defendant 1 pleaded that the suit was barred by limitation. He alleged that the loan was made, not on the 20th November, 1888, as alleged in the plaint, but on the 2nd November, 1888 (Kartik Sud 1, 1945). He denied that any part payment was made on 11th April, 1891. He alleged that the *samadaskat* was passed, not on the 2nd November, 1891, but on the 11th November, 1891, and that the plaintiff had fraudulently altered the date to the 2nd November, 1891, in order to save the bar of limitation. He contended that this was a material alteration which rendered the document null and void; that the entry of part payment of Rs. 300 was not in his handwriting and consequently did not give a fresh starting point of limitation, and that the claim was therefore time-barred.

Defendants 2 to 4 denied their liability and also pleaded limitation.

1901.

ATMARAM v. UMEDRAM.

The Court of first instance held that the date of the *samadaskat* had been altered without the knowledge and consent of the defendants; that this was a material alteration which vitiated the document, and that the claim was time-barred. Plaintiff's suit was therefore dismissed.

This decision was upheld in appeal by the Additional First Class Subordinate Judge, A.P.

Against this decision plaintiff preferred a second appeal to the High Court.

L. A. Shah for appellant (plaintiff):—The alteration in the date of the *samadaskat* is not a material alteration. It is not shown that it was made by the plaintiff fraudulently and subsequently to the execution of the document. Having regard to the date of the original loan and of the *samadaskat*, the alteration is not prejudicial to the defendant. Further, we submit that a material alteration does not vitiate a document for all purposes. Where a document forms the very basis of the suit, the action may fail if the document is found to be materially altered. But the case is otherwise where a document is merely evidence of pre-existing liability. The *samadaskat* in the present case was admittedly passed by the defendant, acknowledging his liability for the balance due. It does not form the basis of our suit. An alteration in such a document does not render it inoperative—*Ramasamy* v. *Bhavani*[1]; *Gogun Chunder* v. *Dhuronidhur*[2]; *Christacharlu* v. *Karibasayya*[3]; *Ganga Ram* v. *Chandan Singh*[4]; *Paramma* v. *Ramachandra*.[5]

G. S. Rao for respondent (defendant 1):—The general principle of law is that a material alteration in a document vitiates it and renders it inoperative if made without the consent of the other party. In the present case the date of the *samadaskat* is found by both the Courts below to have been altered while the document was in plaintiff's possession. The alteration affects the liability of the defendant, as it extends the time within which the

(1) (1866) 3 Mad. H. C. R. 247.
(2) (1881) 7 Cal. 616.
(3) (1885) 9 Mad. 399.
(4) (1881) 4 All. 62.
(5) (1883) 7 Mad. 302.

plaintiff is entitled to sue. This alteration is a material alteration and vitiates the document *in toto* — *Govindasami* v. *Kuppusami*.(1) It falls therefore within the principle laid down in the leading case of *Master* v. *Miller*.(2) An alteration in a document stating a falsehood is a material alteration—*Ganga Ram* v. *Chandan Singh*.(3) Even where the alteration is not prejudicial to the defendant, it has been held that if it is made while the document is in plaintiff's custody, it vitiates the document altogether—*Gardner* v. *Walsh*.(4)

CHANDAVARKAR, J.:—This was a suit brought by the plaintiff on the 30th March, 1898, to recover the sum of Rs. 2,000 with interest, which, he alleged, had been lent to defendant No. 1 and the father of defendants 2 to 4 on Kartik Vad 2nd, Samvat 1945 (*i.e.* 20th November, 1888). To bring his claim within limitation, the plaintiff relied on certain payments and acknowledgments which form the main points for consideration in this second appeal. Both the lower Courts have held the claim not proved against defendants 2 to 4, so that we are concerned now with the question of the liability of defendant No. 1 alone, and it is against him that the present appeal is levelled.

The first point in dispute between the parties is as to the date of the original loan. The plaintiff alleges that it was advanced on Kartik Vad 2nd, Samvat 1945 (*i.e.* the 20th of November, 1888), whereas the case of defendant 1 is that it was advanced on Kartik Sud 1st, Samvat 1945 (*i.e.* the 2nd November, 1888). The Joint Second Class Subordinate Judge at Surat, who tried the suit, did not go into that question, but rejected the claim of the plaintiff on other grounds. The Additional First Class Subordinate Judge, who heard the appeal, raised an issue on the point, but though he was "inclined to believe on the evidence of plaintiff and his neighbour Fakirchand, corroborated by plaintiff's *thámkháta* or ledger account, that the loan was advanced on Kartik Vad 2nd, Samvat 1945," yet he did not consider the question important and deemed it unnecessary to record his finding upon the issue, because in his opinion the plaintiff's case must fail on

(1) (1889) 12 Mad. 239.
(2) Smith's L. C. Vol. I, 10th Ed, p. 777.
(3) (1881) 4 All. 62.
(4) (1855) 24 L. J. Q. B. pp. 285 at p. 288

1901.

ATMARAM v. UMEDRAM.

the ground that the acknowledgment of Samvat 1948, relied upon by the plaintiff to save the bar of limitation having been materially altered, was inoperative.

The acknowledgment is a *samadaskat* and forms part of Exhibit 55. In his plaint the plaintiff averred that this acknowledgment had been made on Kartik Sud 1st Monday, Samvat 1948 (*i.e.* the 2nd November, 1891). The first defendant, on the other hand, alleged in his written statement that it had been made on Kartik Sud 10th or 11th (the 11th of November, 1891), and that it had been altered from the latter date to the former. Neither of the Courts below has come to any definite conclusion as to the date on which the acknowledgment was made, because they hold that as the date of the acknowledgment has been tampered with there has been a material alteration which vitiates the document. The Second Class Subordinate Judge conjectured "that the *samadaskat* was passed on Kartik Sud 1st." The Additional First Class Subordinate Judge in appeal felt inclined to take the same view. But they both held that in any case, whether the alteration was, as suggested by the plaintiff, from the 2nd of November, 1891, to the 11th of November, 1891, or, as suggested by the first defendant, from the 11th of November to the 2nd of November, 1891, as the acknowledgment had been materially altered, it was void, according to the principle of the rulings in *Govindasami* v. *Kuppusami*[1] and *Gogun* v. *Dhuronidhur*.[2]

The principle of English law, which was first laid down in *Pigot's case*,[3] that the material alteration of a document by a party to it after its execution without the consent of the other party renders it void, has been followed in India. But all the decisions which have been cited at the Bar from the English and the Indian Law Reports relate to cases in one and all of which the *altered* instrument was the foundation of the plaintiff's claim and the source of the defendant's obligation or liability. They were cases of written contracts, or bonds or bills of exchange or similar instruments, as to which it may be taken as settled law both in England and here that a material alteration avoids the

(1) (1889) 12 Mad. 239. (2) (1881) 7 Cal. 616.

(3) 9 Rep. 26*b*, 11 Rep. folio 27*a*.

instrument where the action is on the instrument itself: see *Agricultural Cattle Insurance Company* v. *Fitzgerald*.[1] The decisions cited in the notes to the case of *Master* v. *Miller* in Smith's Leading Cases also make that clear. As pointed out in the case of *Earl of Falmouth* v. *Roberts*,[2] there is a distinction between cases in which the altered instrument is merely evidence and those in which the obligation sought to be enforced is by reason of the instrument itself. "The rule of law," said Parke, B., in that case, "applies where the obligation is by reason of the instrument." To the same effect was the principle of *Pigot's case* construed by Campbell, C.J., in *Gardner* v. *Walsh*.[3] But even as to that Courts in England have ruled in some cases that under certain circumstances and for certain purposes the altered instrument may be looked at to see the real terms of the contract. (See *Pattinson* v. *Luckley*[4].) But no case has been cited to us nor have we been able to find any in which it has been laid down either in England or here that a written acknowledgment of his liability by a debtor becomes void and inoperative if it is materially altered without his consent by his creditor. An instrument which creates a liability and gives rise to a cause of action is one thing and a written acknowledgment of that liability is another. The distinction between the two was clearly pointed out by their Lordships of the Judicial Committee of the Privy Council in *Gopekishen Goshamee* v. *Brindabunchunder Sircar Chowdhry*.[5] Their Lordships said:—"The authorities which have been mainly relied upon in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case were cases of actions on promises, decided on the Statutes of the 21st Jac. 1 and the 9th Geo. IV. c. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common Law with respect to the cause of action. The issue joined made it incumbent on the plaintiff to prove a promise made within six years and such as to agree with that laid in the declaration. In such cases, acknowledg-

(1) (1851) 16 Q. B. 432 pp. 440-441.
(2) (1842) 9 M. & W. 469.
(3) (1855) 56 & B. 83 at p. 91.
(4) (1875) L. R. 10 Ex. 330.
(5) (1869) 13 Moore's I. A. 37.

1901.

ATMARAM v. UMEDRAM.

ments, whether by words or acts, are of no avail save so far as they sustain the promise alleged: there is no exception within which they come: and these cases are to be regarded simply as actions brought on promises made within six years. But the cases within which acknowledgments are operative by way of exception are of a different character. In these the action must be maintained on the original security: and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied: a promise to pay is not required." And further on their Lordships go on to say: "It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the defendant." The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of Limitation have (as Sir Edward Sugden has observed) "proceeded on a liberal but yet a fair and just construction of those Statutes."

A written acknowledgment then is merely evidence of the original liability which it seeks to keep alive. According to section 19 of the Limitation Act, all that is necessary to make it evidence is that it should be "made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability." It may be contained in a deed or a letter or a deposition or an affidavit or in any other form. Having regard then to the provisions of the Limitation Act, we think that a written acknowledgment, which is intended to save the bar of limitation and not to give a right of action, does not come within the principle laid down in the decisions following the rule in *Pigot's case*. In the case before us what is relied on as an acknowledgment under section 19 of the Limitation Act is a *samadaskat*, as to which it has been held that it is merely an admission of a balance due and is receivable in evidence, though unstamped: see *Dhondu* v. *Narayan*.[1] As soon as the acknowledgment is made, the Statute of Limitation says that it shall have the effect of prolonging the period of limitation and there is neither reason nor principle for extending the rule as to material alterations in a deed to it and undoing

(1) (1863) 1 Bom. H. C. 47.

that effect. In the case of a deed, said Bramwell, B., in *Pattison* v. *Luckley*[1], "where a person claiming to be paid for work did the work under an instrument of contract, that instrument, though altered in a material part, is still the governing document to determine the rights of the plaintiff." Equally where a statute attaches a legal incident to an instrument, that instrument, though altered, must continue to be the governing document for the purposes of the statute. It is true that the reason of the rule laid down in *Pigot's case* has been pointed out to be the fraud or laches of the party altering the deed or instrument or allowing it to be altered while it was in his custody. But in no case has the fraud been held to vitiate every document which is adduced merely as evidence in support of a claim or contention. If the rule were extended indiscriminately in the way we are asked to extend it here to all documents which are put in merely as evidence, it would operate harshly and shut out true, because it is altered, into false evidence. The rule has been borrowed from the English cases by our High Courts and applies to bonds or other instruments creating *per se* rights and liabilities on the ground that it is consistent with justice, equity and good conscience. But we do not think that the rule of justice, equity and good conscience requires that it ought to be carried further and applied to documents which are not the foundation of a plaintiff's claim but are merely evidence of a defendant's pre-existing liability.

The acknowledgment being then operative, the question is—what is the date on which it was passed? The lower Court has indeed discussed that question in its judgment and given some reasons for holding that the original date is that given by the plaintiff, *i.e.* Kartik Sudh 1st, Monday (the 2nd of November, 1891), but it is clear that the Court did not mean to come to any distinct conclusion on that question of fact, because, though it raised the 9th point to cover that question, yet it has not recorded any finding on it on the ground that a finding is unnecessary. We must therefore send back the case for a distinct finding on the 9th point raised in the lower appellate Court. That point includes the question as to the date of the

(1) (1875) L. R. 10 Ex. 330.

1901.

ATMARAM v. UMEDRAM.

loan by the plaintiff to the defendant. In determining this latter point, we would ask the Court to bear in mind with reference to the respondent's contention that the plaintiff's *thámkháta* or ledger account is not admissible because it was not written at or about the time of the loan, the recent ruling of the Privy Council in *Deputy Commissioner of Bara Banki* v. *Ram Parshad*,(1) where (differing from *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Company*(2)) their Lordships have held that an account to be "regularly kept" within the meaning of section 34 of the Evidence Act need not be written from day to day or hourly as the transactions have taken place and that the time of making the entries may affect the value of the accounts but cannot affect their admissibility.

In order to enable this Court to dispose of the case finally, the lower Court should also find whether, as evidenced by the credit entry of Rs. 81-12-0 in the plaintiff's *thámkháta* or ledger account of Chaitra Sudh 3rd, Samvat 1947 (*i.e.* 11th April, 1891), the plaintiff received the said amount on that date as alleged by him, and whether the entry is in the handwriting of defendant No. 1. The reasons given by the lower Court for not determining the question are not sound in law. Though the plaintiff did not specifically rely upon this entry in those paragraphs of his plaint where he showed the ground upon which he claimed exemption from the ordinary period of limitation, yet he did mention it in paragraph 3 of it, and we think that there was a substantial compliance with the spirit, if not with the letter, of section 50 of the Code of Civil Procedure. There is no justification whatever for the lower appellate Court's remark that this entry was not relied upon by the plaintiff "throughout the trial in the first Court." The plaintiff in his deposition swore that the entry was in the handwriting of defendant No. 1 and had been made in his (plaintiff's) presence. Defendant No. 1 was examined about it and the Second Class Subordinate Judge refers to it in his judgment. It was not indeed mentioned in so many words in the grounds of appeal to the District Court by the plaintiff; nor was the entry of Rs. 300, which the lower Court has found to be

(1) (1899) 27 Cal. 118. (2) (1880) 4 Bom. 576.

genuine, mentioned in those grounds. The third ground of appeal, which relates to payments and acknowledgments made by defendant No. 1, raised the question as to all of them. As to the other payments alleged to have been made by the defendant, the lower appellate Court has found the first credit entry of Rs. 300 to be proved and in the handwriting of the defendant and the other entries are admitted to be in his handwriting by the defendant. We must take them to be payments under section 20 of the Limitation Act.

We must therefore send the case back to the lower appellate Court for distinct findings on the following issues :—

1. What is the date of the loan advanced by the plaintiff to the defendant ?

2. Is the credit entry of Rs. 81-12 in Exhibit 32 in defendant No. 1's handwriting, and is it an entry of payment under section 20 of the Limitation Act ?

3. What is the date on which the written acknowledgment in Exhibit 55 was passed by defendant No. 1 ?

Findings to be returned within a month.

Issues sent down.

APPELLATE CIVIL.

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

VINAYAK GANGADHAR BHAT (ORIGINAL DEFENDANT), APPELLANT, *v.* KRISHNARAO SAKHARAM ADHIKARI (ORIGINAL PLAINTIFF), RESPONDENTS.*

1901. *March* 12.

Small Cause Court—Jurisdiction of—Question of title—Provincial Small Cause Courts Act (IX of 1887), section 23—Claim to possession of land when title to land disputed—Second appeal—Civil Procedure Code (XIV of 1882), section 586—Practice.

The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

Held, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under section 586 of the Civil Procedure Code (XIV of 1882) no second appeal lay.

* Second appeal No. 92 of 1900.