The dates of these repeated demands are not given and not proved. But from the language of the pleading we must suppose that the demands were going on as long as the business was in existence, and, therefore, limitation will run from the termination of the agency business which, as we have said, was a little less than three years before suit. The defendant admits that he is liable to accounts from Bhadra to Magh 1308, and, therefore, accounts for this period must be rendered. As to the rest of the case we hold that the suit is barred. This appeal is, therefore, allowed and the decree of the lower Court is modified in accordance with what we have said. The parties are entitled to proportionate costs.

E. H. M. *Decree modified.*

APPELLATE CIVIL.

Before Mr. Justice Carnduff and Mr. Justice Chapman.

MAJIBAR RAHMAN

v.

MUKTASHED HOSSEIN.*

1912

June 11.

Agreement against public policy—Contract Act (IX of 1872), s. 23—Compromise forbidden by law—An agreement to compound a non-compoundable offence, void—Criminal breach of trust—Mortgage—Illegal consideration.

It is contrary to public policy to compound a non-compoundable criminal case, and any agreement to that end is wholly void in law:

Held, therefore, that a mortgage bond executed by a *gomastha* in favour of his master for withdrawal of a prosecution for criminal breach of trust,

*APPEAL from Appellate Decree, No. 2306 of 1909, against the decree of F. Roe, District Judge of 24-Parganas, dated June 1st, 1909, confirming the decree of Basanta Kumar Pal, Munsif of Basirhat, dated Dec. 23, 1908.

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which is not compoundable under the Criminal Procedure Code, is void (though a settlement out of Court had been suggested by the Magistrate); and a suit by the master to enforce such a bond is not maintainable.

Nubbee Buksh v. *Hingon* (1) commented on.

SECOND APPEAL by the defendant, Sheikh Majebar Rahman.

This appeal arose out of an action brought by the plaintiff to enforce a mortgage-bond executed by the defendant. It appeared that the defendant, who was the *tehshildar* of the plaintiff, was suspected of embezzling a large sum of money, and was arrested by order of the Subdivisional Magistrate of Basirhat. The case was transferred to the Court of the Subdivisional Magistrate of Barasat, who suggested that the case was appropriately one which might be settled out of Court. Accordingly the matter was settled, the defendant executed the aforesaid mortgage-bond in favour of the plaintiff, and in consequence thereof the criminal prosecution was dropped.

Defendant pleaded, *inter alia*, that, the agreement being contrary to public policy, the mortgage-bond was void, and therefore the suit ought to be dismissed.

The Court of first instance overruled the objection and decreed the plaintiff's suit. On appeal, the learned District Judge of 24-Parganas affirmed the decision of the first Court.

Against this decision the defendant appealed to the High Court.

Babu Dwarka Nath Mitter (*Babu Satindra Nath Mukherji* with him), for the appellant. The mortgage-bond, upon which the suit was based, was executed by the appellant to compromise a non-compoundable criminal case brought against him for embezzlement of

(1) (1867) 8 W. R. 412.

money. The transaction was against public policy: see section 345, Criminal Procedure Code; see also section 23, illus. (*h*) of the Contract Act. The contract is illegal; respondent could not take advantage of such a contract. The case of *Nubbee Buksh* v. *Hingon* (1) was decided before the passing of the Indian Contract Act; therefore that case does not help the other side. It makes no difference even if the compromise be effected at the suggestion of the Criminal Court: see *Flower* v. *Sadler* (2) and *Williams* v. *Bayley* (3).

Moulvi Wahid Hossein, for the respondent. This is a case of criminal breach of trust; it is of a *quasi* civil nature. The defence of the appellant in the case was that the Criminal Court had no jurisdiction, as it involved a question of accounts between the parties. The accused asked the Court to refer the case to a Civil Court for an account being taken, and the Magistrate, having had reason to believe that the case might not be within his competency to try as it virtually involved civil rights of the parties, suggested a settlement out of Court. No doubt a charge was drawn up, but further trial of the accused in his opinion was useless. Neither the respondent nor the Court suggested that the proceeding would be dropped on compromise. An arbitration was arranged, and according to the award of the arbitrators the mortgage-bond was executed by the appellant. The finding of both the lower Courts is that there was nothing unfair in the arbitration, and that no undue advantage was taken of the criminal case. Here the respondent did not make a bargain out of the case; he got less than what was actually due to him; hence the contract was not against public policy: see *Flower* v. *Sadler* (2) and *Keir* v. *Leeman* (4).

(1) (1867) 8 W. R. 412.
(2) (1882) 10 Q. B. D. 572.
(3) (1866) L. R. 1 H. L. 200, 220.
(4) (1846) 9 Q. B. 371.

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The English cases on the point clearly show that, when there are two remedies, civil and criminal, open to a party, he is at liberty to pursue both or either of them. Pendency of a criminal case is no bar to obtaining a civil remedy. In this case the respondent pursued both the remedies; the criminal matter was kept in the hands of the Criminal Court; and the mortgage-bond was obtained to ensure his civil rights. His civil rights did not depend upon the criminal prosecution, nor was the prosecution stifled to make a bargain out of it. There is no finding to that effect; on the other hand, the finding is there was no avoidance of public duty. I rely on the cases of *Ancketill* v. *Baylis* (1) and *Windhill Local Board of Health* v. *Vint* (2).

It would be a broad proposition to hold that, if a criminal case be non-compoundable, it is against public policy to withdraw from it, or to enforce a civil right during its pendency.

CARNDUFF J. The appellant before us was the *gomastha* of the respondent. He was prosecuted by the respondent for criminal breach of trust under section 408 of the Indian Penal Code in respect of certain moneys collected in the course of his duty. The Magistrate before whom the case was being tried, suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly the matter was settled out of Court. The appellant executed a mortgage-bond for the amount embezzled, and, though the withdrawal of the criminal prosecution is not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the respondent after the execution of the deed, and the appellant was

(1) (1882) 10 Q. B. D. 577, 579. (2) (1890) 45 Ch. D. 351.

then acquitted or discharged. The suit out of which this appeal arises, was afterwards brought upon the mortgage-bond executed in the circumstances just described, and it has been decreed by both the Courts below. The defendant has now preferred this second appeal to the High Court.

In my opinion, the appeal clearly must be allowed. The lower Appellate Court has held that no general rule as to what is, or what is not, contrary to public policy can be, or has been, laid down, and, relying on *Nubbee Buksh* v. *Hingon* (1), has declared that its conscience felt no repugnance towards the agreement between the respondent and the appellant, and that it entirely failed to see any danger to the public good therein. Now, the case cited by the learned District Judge stands, as far as I know, absolutely alone, and it appears to me to run counter to the trend of all authority. It is a case, moreover, of 1867, that is to say, of a time when the law on the subject had not been codified by the Indian Contract Act of 1872, and when the Code of Criminal Procedure in force contained no provision, such as that to be found in section 345 of the present Code, for the compounding of offences. The law, therefore, as to when there might be a compromise in a criminal case was not settled, and the law as to agreements contrary to public policy was probably equally unsettled. But now we have for our guidance section 345 of the Code of Criminal Procedure of 1898 and section 23 of the Indian Contract Act of 1872 with its Ill. (*h*), and there can, so far as I can see, be no doubt as to what the legal position is.

The broad principle is laid down by Lord Westbury in *Williams* v. *Bayley* (2), a decision to which the learned District Judge has himself referred, although he seems to have failed to appreciate its effect. If a

(1) (1867) 8 W. R. 412.

(2) (1866) L. R. 1 H. L. 200, 220.

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criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law. Criminal breach of trust is (*see* section 345 of the present Code of Criminal Procedure) non-compoundable either with or without the sanction of the Court. *Keir* v. *Leeman and Pearson* (1), which was affirmed by the Exchequer Chamber in *Keir* v. *Leeman* (2) and followed by the Court of Appeal in *Windhill Local Board of Health* v. *Vint* (3), is ample authority for holding the view that the circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference whatever. And the principle, established by *Collins* v. *Blantern* (4), that illegality may be pleaded as a defence to an action on a bond, has been so often recognised and is so well settled that it would be useless to enter into any discussion regarding it.

This appeal therefore must be allowed, the decree of the Court below discharged, and the respondent's suit dismissed with costs throughout.

CHAPMAN J. I agree, but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case the compromise of which is expressly forbidden by the Code of Criminal Procedure.

S. C. G. *Appeal allowed.*

(1) (1844) 13 L. J. Q. B. 359.
(2) (1846) 9 Q. B. 371.
(3) (1890) 45 Ch. D. 351.
(4) (1765) 1 Smith. L. Cas., 11th Ed., 369.