APPELLATE CIVIL.

Before Walmsley and Mukerji JJ.

DWIJENDRA NATH MULLICK

v.

GOPIRAM GOBINDARAM.*

1925

May 15.

Mortgage—Consideration—Withdrawal of prosecution—Public policy—Contract Act (IX of 1872) s. 23.

D was in the employ of the plaintiff firm and was charged with criminal breach of trust in respect of a cheque for Rs. 30,000 which he cashed for the plaintiff firm. D paid the plaintiff firm Rs. 15,000, also D and his brother R executed a mortgage in favour of the plaintiff with a view to withdrawal of the prosecution. The plaintiff firm put in a petition stating the facts and the prosecution was dropped. In a suit to enforce the mortgage the defendants D and R urged that the agreement was contrary to public policy. The suit was decreed and on appeal :—

Held, that the consideration was good and that the agreement was not against public policy.

THIS was an appeal from a decree made by the Subordinate Judge of Howrah.

On 3rd March 1919 the plaintiff firm Gopiram Gobindaram sent its employee Dwijendra Nath Mullick to cash a cheque for Rs. 30,000 on the International Banking Corporation. Dwijendra cashed the cheque and went to the police with the story that the money was lost from his pocket. The story was not accepted and Dwijendra was arrested by the police on suspicion. Immediately thereafter the plaintiff's man came to the police-station and laid a charge of criminal breach of trust against Dwijendra. Thereafter Rajendra Nath Mullick (Dwijendra's brother) and

* Appeal from Original Decree, No. 57 of 1924, against the decree of Atul Chandra Banerjee, Subordinate Judge of Howrah, dated December 21, 1923.

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Dwijendra approached the plaintiffs through Mr. A. C. Bose, an attorney. Through the intervention of Mr. Bose the plaintiffs agreed to give up Rs. 10,000 out of their claim and of the balance Rs. 20,000 arrangements were made to pay Rs. 15,000 in cash and Dwijendra and Rajendra executed a mortgage for Rs. 5,000 in favour of the plaintiffs. On that the firm of Gopiram Gobindaram filed a petition to the Deputy Commissioner in these words—"The complainant having "recently suffered heavy loss owing to the fall in the "piece-goods market and not being in a position to "give up such an amount in their present state and "the relations of the accused Dwijendra Nath Mullick "having promised without prejudice to the pending "criminal proceedings to make good a substantial "portion of the loss of the complainant's firm, if the "criminal case aforesaid now pending be withdrawn, "and all terms having been settled, complainant "prays that the aforesaid criminal case be withdrawn." This petition was filed in the records of the Chief Presidency Magistrate on the 16th April 1919, and was sent to the Commissioner of Police and the latter reported that he had no objection to the case being withdrawn. The Magistrate on the 5th May 1919 passed an order "File" on the petition.

On the 15th July 1922 the firm of Gopiram Gobindaram filed this suit in Howrah Court for enforcement of the mortgage against Dwijendra and Rajendra. The defendants denied consideration and alleged that the bond was obtained by undue influence. The learned Subordinate Judge decreed the suit and the defendants appealed from that.

Babu Rupendra Kumar Mitter (with him *Babu Pashupati Ghose*), for the appellants. There was no valid consideration for the mortgage, the agreement

being one to stifle a prosecution. Indian Contract Act, section 23. *Williams*.v.*Bayley* (1), *Collins* v. *Blantern* (2). Further the contract was vitiated for want of free consent. At any rate the second defendant was not liable—there was no consideration for him.

Sir Binod Mitter (with him *Babu Jagat Chandra Bose* and *Babu Suresh Chandra Das*), for the respondents. It could not be said that the agreement was to stifle prosecution. The prosecution was not in the hands of the plaintiffs but in the hands of the police and the Public Prosecutor; the plaintiffs did not institute it nor could they withdraw. It did not come to that stage when the plaintiff could withhold evidence; so the illustration to section 23 of the Contract Act does not apply. No pressure was brought upon the defendants by the plaintiffs; it was the defendants who wanted the plaintiffs to accept the mortgage bond.

Cur. adv. vult.

WALMSLEY J. This appeal is preferred by the defendants, and the question that it raises is whether the agreement on which the suit is based was opposed to public policy.

The first defendant Dwijendra was employed by the plaintiff firm, and on March 3, 1919, he was sent to the Bank to cash a cheque for Rs. 30,000. He cashed the cheque and then went to the police with the story that the money had been stolen from him. This story was found to be untrue and he was arrested. Friends of the family went to a solicitor, Mr. Akshoy Kumar Bose, and through his efforts it was arranged that the plaintiff firm would agree to the prosecution being given up, if they received Rs. 15,000 in cash and a mortgage for a sum of

(1) (1866) L. R. 1 H. L. 200.

(2) (1767) 1 Smith's L. C. 11th Ed. 369.

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Rs. 5,000. This mortgage was executed by Dwijendra and his brother Rajendra and it is the document upon which the suit is based. The plaintiffs on their side carried out the terms of the arrangement: they signed a petition to the Commissioner of Police asking that the prosecution should not be continued and the Commissioner gave his consent. The Presidency Magistrate afterwards wrote "File" on the petition: whether he passed a formal order of discharge or not, we do not know, but I do not think it is of any importance.

None of these facts has been challenged before us, and the arguments have been confined to legal points. It is urged that the consideration of the agreement was unlawful as offending against the principle laid down in section 23 of the Contract Act. A second argument was that the plaintiffs cannot fall back upon the debt, but that argument need not be considered because Sir Benod Chandra Mitter for the respondents said that he had no intention of doing so. A third argument is that at any rate the second defendant cannot be held liable.

The first argument, shortly stated, is that the agreement was one for stifling a prosecution. If that is a correct description of it, then it cannot be enforced, but the learned Judge has found to the contrary and has given his reasons for his conclusions.

The statute law of this country on the subject is to be found in section 23 of the Contract Act. It is as follows:—"The consideration or object of an agreement is lawful unless . . . . the Court regards it as immoral or opposed to public policy" . . . . Illustration (*h*)—"A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object

is unlawful". The illustration unfortunately does not throw much light on a difficult matter.

In the present instance there is no room for the suggestion that the plaintiffs are making "a trade of a felony". On the contrary they assented to such generous terms that the defence set up by the appellants wears a most repulsive appearance. If however the agreement was contrary to public policy as explained in the Contract Act and in English decisions then we shall have no alternative but to dismiss the suit, however repugnant to our feelings such a course may be.

The defence with which defendant Dwijendra was charged was not compoundable under the provisions of the Criminal Procedure Code, and if the negotiations are to be regarded as a composition of such a non-compoundable offence then the conclusion must be that the object of the agreement was contrary to public policy. It is necessary, therefore, to see what the arrangement was. It is fully described by Mr. Bose, the solicitor, and he says that so far from pressure coming from the plaintiffs it was brought about at the request and entreaties of the defendants. In cross-examination he speaks about the case being withdrawn, and about the plaintiffs agreeing to drop the proceedings, but we must look at what the plaintiffs actually did to determine whether those expressions are correct.

The first thing they did was to write a letter or petition to the Deputy Commissioner: it was returned and another petition was written addressed to the Commissioner of Police. The plaintiffs had the assistance of the Public Prosecutor, Rai Bahadur Tarak Nath Sadhu, who was conducting the prosecution, and of their own attorneys in preparing these petitions. The terms of the two petitions are substantially

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the same: the plaintiffs said that they could not afford to lose the whole sum, and that it was to their advantage to get a portion, and they hoped that permission would be given for the case to be withdrawn. The plaintiffs did nothing further. It was the defendants who engaged Mr. Pugh, a solicitor, to go to the Commissioner and urge him to allow the case to be withdrawn. He was successful, and the Commissioner wrote "No objection to withdrawal of the case" and the Magistrate wrote "File", after which no further steps were taken in connection with the prosecution.

It is to be noted that the plaintiffs did not at any stage abate any part of their charge against the accused, and they did not suggest that they would withhold their evidence if the case proceeded. They laid all the facts before the police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. I cannot find in the conduct of the plaintiffs any reason for supposing that if the Commissioner's decision had been different, the plaintiffs would have rendered the criminal proceedings abortive.

On this statement of the facts it must be allowed that the case comes very near the line, but on the whole, I think, that, whether we use the rhetorical expression of stifling a prosecution or the more homely words of the Contract Act, the action of the plaintiffs ought not to be regarded as contrary to public policy, because they did not take the administration of justice out of the hands of the authorities and themselves determine what should be done.

The first ground taken by the appellants fails.

There remains the third ground, namely, that the second defendant, Rajendra is not liable. In his cas

it is said that there was no consideration. That seems a strange argument for any brother, perhaps I should say particularly for any Hindu brother, to put forward, and I regard the consideration as real and ample.

My conclusion is that the appeal should be dismissed with costs.

MUKERJI J. The defendant No. 1 was a servant in the plaintiff firm. On the 3rd March 1919 the plaintiff firm handed over to the defendant No. 1 two cheques—one for Rs. 30,000 to be cashed at the International Banking Corporation and the other a crossed cheque for Rs. 7,384-9-9 to be paid in in the same Bank. The defendant No. 1 cashed the cheque for Rs. 30,000, but did not pay in the other cheque for Rs. 7,384-9-9. He then telephoned to the plaintiff firm that the money had been lost, and about 4-45 P.M. appeared at the police-station and gave an information to the effect that 30 G. C. Notes for Rs. 1,000 each, one Chalan Book, and the cheque for Rs. 7,384-9-9 had been stolen from his right shirt pocket. Thereupon he was arrested by the police on suspicion. Immediately after the plaintiffs' man arrived at the police-station and laid a charge of criminal breach of trust against the defendant No. 1. The police took up the investigation in the course of which the defendant No. 1 was let out on bail. He was eventually sent up for trial before the Chief Presidency Magistrate of Calcutta.

On the 7th March 1919 the defendant No. 2, brother of the defendant No. 1, arrived from Jhargram where he had been from before. On the 14th March 1919 the two brothers and some other persons saw an attorney, Mr. A. C. Bose, and took his advice. The attorney advised them that there was no defence,

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and that the case would in all probability end in a conviction. The brothers then requested the attorney to bring about a settlement. The attorney sent for the plaintiffs. After some conferences an agreement was reached.

The settlement, as far as it can be ascertained from the evidence, was in this form: The plaintiffs were to give up Rs. 10,000 out of their claim and accept Rs. 15,000 in cash and a mortgage executed by the defendants Nos. 1 and 2 securing the balance of Rs. 5,000. The money would remain with a third party, one Manik Chand. The plaintiffs would then apply for withdrawal of the criminal proceedings and after they were withdrawn, they would get the money and the mortgage-bond. On the 20th March 1919, a mortgage-bond was duly executed by the two brothers, for a sum of Rs. 5,000 hypothecating their 2/7ths share in their joint family properties.

On the 1st April 1919 a petition signed by the informant on behalf of the plaintiffs was put in before the Deputy Commissioner on whose order the defendant No. 1 had been sent up for trial. The petition was in these words: "The complainants "having recently suffered heavy loss owing to the "fall in the piece-goods market and not being in a "position to give up such an amount in their present "state and the relations of the accused Dwijendra Nath "Mullick having promised without prejudice to the "pending criminal proceedings to make good a subs-"tantial portion of the loss of the complainant's firm, "*if the criminal case aforesaid now pending be with-*"*drawn* and all terms having been settled, complainant "prays that the aforesaid criminal case be with-drawn". Nothing much came out of this petition, presumably because the Deputy Commissioner could not interfere in the matter, the case having already

gone before the Court. On the 16th April 1919 a petition purporting to have been signed on behalf of the complainant was filed before the Chief Presidency Magistrate. It stated that the accused (meaning the defendant No. 1) had approached complainant and offered to make good, as far as possible, the loss suffered by him, without prejudice to the case, that the financial condition of the firm would not allow them to refuse the offer and that under the circumstances the complainant did not wish to proceed with the charge against the accused. The prayer was that the accused might be discharged, if necessary, with the permission of the Court. The Chief Presidency Magistrate forwarded the petition to the Commissioner of Police, with the remark "To Commissioner of Police for favour of disposal". The latter reported that he had no objection to the withdrawal of the case. The Chief Presidency Magistrate on the 5th May 1919 passed the order "File" on the petition. Some days later the sum of Rs. 15,000 which was held by Manik Chand as aforesaid was received by the plaintiff firm. Thereafter, as is usual in such cases, the two defendants were not very anxious to register the mortgage deed. Consequently, it appears, a letter was written to them by the plaintiffs' solicitor Mr. M. N. Sen, calling upon them to register the document and intimating to them that if they failed to do so he would present the mortgage at the Registry Office and apply for warrant for a compulsory registration. The letter also contained a threat that in case of such failure the plaintiff firm would also withdraw the petition which they had filed in Court for withdrawal of the case. It was also stated in the letter that a copy of it was being sent to Rai Bahadur Tarak Nath Sadhu, for his information. This gentleman, it should be stated, was the Public

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Prosecutor of Calcutta. Thereafter, on the 1st May 1919, the document was registered, both the defendants admitting execution thereof.

On the 15th July 1922 the suit was filed for enforcement of the mortgage. The Court below decreed the suit, and hence the present appeal.

At the hearing of the appeal the facts alleged on behalf of the plaintiffs were mostly not disputed. It was no longer disputed that the information of theft was false or that the defendants approached Mr. A. C. Bose, and on his advice sought his assistance to get a settlement effected with a view to have the case withdrawn. It was no longer asserted that Rs. 15,000 had not been paid by the defendants as alleged on behalf of the plaintiffs. Nor was it disputed that the mortgage-bond was duly attested in accordance with the provisions of the law. The findings of the Court below to the effect that the defendant No. 1 did actually commit the offence in respect of the sum of Rs. 30,000 and that Rs. 15,000 was paid back in some of the identical notes that had been misappropriated were not challenged. In fairness to the learned vakil for the appellant, however, it should be said, that in the face of the evidence on the record it is hardly possible to dispute or challenge any of the aforesaid facts or findings.

The appellants' arguments give rise to three questions:—First, as to whether the agreement embodied in the deed is enforceable in view of the provisions of section 23 of the Indian Contract Act; second, as to whether the contract was vitiated for want of free consent; and third, whether it may be enforced as against the defendant No. 2 as evidently he was not a party to the offence and there was no liability on him for which he need have executed the mortgage.

In order to deal with the first question the nature of the agreement has first of all to be ascertained with precision. As I have stated, it was to the effect that the plaintiffs were willing to accept Rs. 15,000 in cash and a mortgage from defendants Nos. 1 and 2 for Rs. 5,000 in satisfaction of their claim for Rs. 30,000. The defendants Nos. 1 and 2 were willing that the plaintiffs should have what they wanted but not if the criminal proceedings against the defendant No. 1 were not withdrawn, and the plaintiffs in their turn were willing to abandon the prosecution if they got the cash and the bond. To give effect to this intention, Rs. 15,000 was kept with a third party, the bond though executed remained unregistered, the plaintiffs put in the two petitions referred to above, the defendants engaged counsel to explain matters to the Commissioner of Police and eventually got the necessary permission from him which practically ended the prosecution, and it was only after the proceedings had been "Filed" that the plaintiffs received the money and the defendants got the deed registered.

The appellants' contention is that the agreement is void as the consideration or object of the agreement is opposed to public policy and that it was in effect an agreement to stifle a prosecution. The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice. An agreement to stifle a prosecution is of course distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it must be held to

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be illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy. *Collins* v. *Blantern* (1), *Kier* v. *Leeman* (2), *Williams* v. *Bayley* (3). On the other hand, there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute. *Flower* v. *Sadler* (4).

The respondents' contention is that the prosecution was not in the hands of the plaintiffs, but in the hands of the police and the Public Prosecutor was in charge of it, that the plaintiffs did not institute it, that there was no agreement to withdraw the case and in fact no withdrawal thereof, the only order proved in the case being one of "File"; and it is urged that for these reasons the case is not covered by illustration (*h*) to section 23.

Now, I am prepared to concede that the defendants would not have parted with the sum of Rs. 15,000 or completed the execution of the bond for Rs. 5,000 unless and until the criminal case against the defendant No. 1 was withdrawn, but I am not at all sure that the consideration or object of the agreement was the withdrawal of the said case. The motive for the execution of the bond and the payment of the money was the withdrawal, but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this distinction in view all the more in a case

(1) (1767) 1 Smith's L. C., 11th Edn. 369.

(2) (1846) 9 Q. B. 371 Ex. Ch.

(3) (1866) L. R. 1. H. L. 200.

(4) (1882) 10 Q. B. D. 572.

where there is a civil liability already existing which is discharged or remitted by the agreement. Even if all the principles of English Common Law relating to agreements for stifling prosecution be held to be applicable to all kinds of non-compoundable offences in this country,—a question about which I entertain some doubt in view of the fact that the offence of criminal breach of trust though declared non-compoundable by law is very often treated by the Courts as otherwise,—and if the principle of the doctrine be that "you shall not make a trade of felony" [Per Lord Westbury in *Williams* v. *Bayley* (1)] then it is difficult to see how the plaintiffs can be said to have acted improperly in entering into the arrangement to get what they were justly entitled to or rather much less than what they were so entitled, when they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not. My learned brother does not find any thing culpable or wrong in this conduct on the part of the plaintiffs and what they did does not also offend against my sense of fairness and propriety. Illustration (*h*) though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance. I am therefore not prepared to say that upon the peculiar facts of the present case the contract between the parties was one opposed to public policy or that it in any way tended to prejudice the State or hamper the administration of justice.

As regards the second ground, namely, whether the contract is vitiated for want of free consent, there is scarcely any material which may bring the case within any of the clauses of section 14 of the Contract Act. The parties had ample independent

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

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advice and it seems that the defendants not only did all that was necessary to be done willingly and out of their own accord but also on their own initiative. I attach no importance of the letter of Mr. M. N. Sen referred to above because the threat contained therein was merely for compelling the registration of the bond and as the registration thereof could be enforced by other means as well. The registration of the document by whatever means it was effected could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

The appellants' last contention has not much substance. If the agreement was a valid one, and the appellant No. 2 voluntarily offered to join in the bond with his brother in whom he was interested, it must be presumed that there was a lawful consideration for the transaction. In the case of *Kessowji Tulsidas* v. *Hurjivan Mulji* (1) it was held that a guarantee for the payment to creditors of debts due to them in consideration of the creditors abstaining from taking criminal proceedings is void, as being against public policy; but a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute; but he must not by stifling a prosecution obtain a guarantee from third parties. This principle has been followed in the case of *Jai Kumar* v. *Gauri Nath* (2) where it has been held that where a *bona fide* debt exists and where the transactions between the

(1) (1887) I. L. R. 11 Bom. 566. (2) (1906) I. L. R. 28 All. 718.

parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor and a third party as security for the debt is not void under section 23 of the Contract Act.

For these reasons, in my judgment, the decision of the Court below is correct and the appeal must be dismissed with costs.

N. G. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Page J.

1925

June 29.

JOHN BATT & Co. (LONDON), LTD.

v.

KANOOLAL & Co.

(AND THE CROSS SUIT.)*

Arbitration—Whether submission to arbitration must be signed—Arbitration Act (IV of 1899), s. 4(b), interpretation of—Filing of English award in Indian Court, whether permissible.

It is essential alike under the English Arbitration Act and under the Indian Arbitration Act that the agreement to arbitrate should be contained in a written document signed by the parties to the submission, or by their agent or agents duly authorised in that behalf.

Ram Narain Gunga Bissen v. *Liladhur Lowjee* (1), *Caerleon Tinplate Co.* v *Hughes* (2), and other cases referred to, and followed.

An award duly made in England under the English Arbitration Act of 1889 can be enforced by a suit in an Indian Court, and cannot be set aside by an Indian Court on any ground of misconduct or irregularity on the part of the arbitrator.

Oppenheim & Co. v. *Mahomed Haneef* (3) followed.

* Original Civil Suits Nos. 2321 of 1923 and 446 of 1922.

(1) (1906) I. L. R. 33 Calc. 1237. (2) (1891) 60 L. J. Q. B. 640.
(3) (1922) I. L. R. 45 Mad. 496.