PRIVY COUNCIL.

P. C.*
1929.
Nov. 14, 15;
1930.
Jan. 21.

KAMINIKUMAR BASU
v.
BIRENDRANATH BASU.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Public policy—Illegal consideration—Stifling criminal proceedings—Reference to arbitration—Costs—Successful but uncommendable defence—Indian Contract Act (IX of 1872), ss. 23, 24.

If it is an implied term of a reference to arbitration, and of an *ekrârnâmâ* pursuant to the award, that a complaint that a non-compoundable offence under the Penal Code has been committed shall not be proceeded with, the consideration is unlawful on the ground of public policy, and the award and *ekrârnâmâ* are, therefore, unenforceable ; that is so, irrespective of whether in law a prosecution has been commenced.

Jones v. *Merionethshire Permanent Benefit Building Society* (1) applied.

Appellants succeeding on the ground of public policy in a defence which, in the circumstances of the case, was not a commendable one, deprived of costs.

Decree of the High Court reversed.

Appeal (No. 17 of 1928) from a decree of the High Court (May 28, 1925) reversing a decree of the Subordinate Judge, 4th Court of Dacca.

The plaintiff respondents by their plaint claimed a declaration that they were entitled to a 3 annas 12 *gandâs* share in a *hât* (market) known Taltala Hât under an arbitrator's award and an agreement, dated January 23, 1917; or, if the award and agreement were unenforceable, they claimed as purchasers a 10 annas share of the property against some of the defendants.

Among the issues settled were whether the award and agreement were valid and enforceable.

The Subordinate Judge held that a reference to arbitration and the agreement were made to stifle a prosecution for a non-compoundable offence, and, therefore, were contrary to public policy and

*Present : Viscount Dunedin, Sir George Lowndes and Sir Benod Mitter.

(1) [1892] 1 Ch. 173.

unenforceable; on the alternative claim he made a decree for a 1 anna 4 pies share in certain plots.

On appeal, the High Court (Walmsley and Ghose JJ.) held, on grounds which appear from the present judgment, that the award and agreement were valid, but that they bound only some of the defendants, against whom the Court decreed the plaintiffs a 3 annas 12 *gandâs* share of the property.

Subba Row, for the appellants.

The respondents did not appear.

The judgment of their Lordships was delivered by

SIR BENOD MITTER. The facts out of which this appeal arises are as follows :—

The Basu family, referred to in the pleadings in the suit, owned Taltala Hât and Bâzâr, which was an old and established *hât* of considerable repute. It was originally held on land owned by the Basu family on the bank of the river Dhaleswari. The site of the *hât* had to be changed from time to time owing to the action of the river, and ultimately, in the year 1916, there was no land owned and possessed by the family on which the *hât* could be held and it was removed to some lands belonging to a Musalman family. There was a great scramble for the purchase of such lands from the different members of the Musalman family amongst the plaintiffs on the one hand and the principal defendants on the other. One Abdul Aziz purported to execute conveyances in favour both of the plaintiffs and the principal defendants in respect of the same land, and, in the course of the proceedings taken by both parties to have their respective documents registered, he sometimes admitted and sometimes denied the execution of such documents before the Sub-Registrar.

On the 14th December, 1916, one Rohini, a servant of the plaintiffs, and on their behalf, complained before the Subdivisional Officer of Munshiganj, against various persons, including some of the principal defendants, namely :—Pareshchandra Basu,

1930

KAMINIKUMAR BASU
v.
BIRENDRANATH BASU.

defendant No. 16; Gopalchandra Basu, defendant No. 13; Binaychandra Basu, defendant No. 14; Khishnakumar Basu, defendant No. 18; and Kaminikumar Basu, now defendant No. 2 (son of Anantakumar Basu, since deceased, who was originally defendant No. 2 in the suit).

The complainant charged them with having committed offences under sections 465, 467, 193 and 194 of the Indian Penal Code, all of which offences were non-compoundable. The persons against whom the complaint was made are referred to for the purposes of the judgment as the accused in the criminal proceedings. The magistrate did not issue any summons, but directed the complainant to prove his case on the 8th January, 1917.

The criminal proceedings served to bring matters to a head, and, after its institution, Ananta, whose son, Kamini, was accused No. 6, became exceedingly alarmed, and was very anxious to have all the disputes settled between the plaintiffs and the defendants, including the criminal proceedings. He desired that the disputes should be referred to the arbitration of A. C. Basu, a relation of the parties, and one of the *pro formâ* defendants in the suit.

The disputes as to the title concerned the plaintiffs and defendants Nos. 1 to 21. A. C. Basu, in his deposition, stated that at the time of the reference there were only present the plaintiff Birendra, Ananta and the accused Binay, Paresh and Krishna. The reference was oral, and only two sittings were held, namely, on the 27th and the 29th December. The only persons who attended both days were the plaintiff, Ananta, and the accused, Binay, Paresh, Krishna and Kamini (son of Ananta). A. C. Basu further stated that no evidence, oral or documentary, on the question of title was produced before him, and on the 29th December he delivered an oral award which was followed by a written memorandum, which is not forthcoming. A memorandum purporting to be a copy of the award, and dated the 12th August, 1917, signed by one A. C. Samanta, and the arbitrator, is

1930

KAMINIKUMAR BASU
v.
BIRENDRANATH BASU.

on the record. The arbitrator further stated that it was provided by the award that all the interested persons, and not merely those who made the reference or who appeared before him, would execute an agreement embodying the result of his decision. According to him, the award had declared that the plaintiff and the principal defendants Nos. 1 to 21 would get 3 annas 12 *gandâs* and 12 annas 8 *gandâs* shares, respectively, of the proprietary interest of the *hât* land. The award also purported to deal with certain pecuniary interests of the *pro formâ* defendants (Nos. 22-72).

On the 8th January, 1917, the criminal proceedings came up before the magistrate, but, at the instance of the parties, were adjourned to the 24th January.

On the 23rd January, 1917, after 9 o'clock in the evening, an *ekrârnâmâ* was executed by Ananta, his son Kamini, his brother Jayanta, defendant No. 3, and defendants Nos. 5, 6 and 10, *i.e.*, Debendrakumar Basu, Surendrakumar Basu and Sanatkumar Basu. They were very near relations of Ananta. By this *ekrârnâmâ*, its executants admitted that the plaintiffs have title and possession to 3 annas 12 *gandâs* share of the land in suit. The *ekrârnâmâ* further provided that if the other co-sharers of the land did not join with the executants in executing a *solenâmâ* or other appropriate deed within six weeks from the date thereof, then the executants would execute a proper deed in favour of the plaintiffs, making up their aforesaid share of 3 annas 12 *gandâs* out of their own share. None of the executants except Ananta had taken any part in the arbitration proceedings, and were in no way bound by them.

On the 24th January, the complainant Rohini put in a petition before the magistrate, alleging that his principal witnesses had been won over by the accused, and he further alleged that the dispute had already been settled. On this petition, the magistrate dismissed the case under section 203 of the Criminal Procedure Code for non-production of evidence.

1930

KAMINIKUMAR BASU v. BIRENDRANATH BASU.

The learned Subordinate Judge held that the real object of the reference to arbitration was not to get a judicial decision on the question of the right and title of the plaintiffs in the lands in dispute, but to placate the plaintiff Birendra, and induce him to withdraw from the criminal proceedings. He further held that the *ekrârnâmâ* was not a *bona fide* settlement of the dispute, but was executed with a view to securing the withdrawal of the criminal proceedings on charges of forgery and other non-compoundable offences, and that the consideration wholly or in part, of this agreement, was unlawful and, therefore, the agreement was void.

The High Court disagreed with the learned Subordinate Judge, and held that the reference to arbitration was a *bona fide* one for the settlement of the disputes as to title. They further held that the persons against whom the complaint was made were never brought before the magistrate as accused persons, and that as the magistrate dismissed the complaint under section 203 of the Criminal Procedure Code, the prosecution could not be said to have been dropped, implying thereby that the stage at which a prosecution could be said to have commenced had not been reached within the meaning of the Criminal Procedure Code. They further held that in the circumstances aforesaid there was no tampering with the administration of justice by the complainant or that he usurped the functions of the Judge. The High Court, on the basis of their findings that the award and *ekrârnâmâ* were valid, gave certain relief to the plaintiffs against the persons who had taken part in the arbitration proceedings or who had signed the *ekrârnâmâ*. From this judgment and decree of the High Court, the defendants, the representatives of Ananta, and defendants Nos. 3, 5, 6, 10, 14, 16 and 18 have appealed to this Board.

It may quite well be that a prosecution only commences after a summons is issued, and that before that stage is reached a complainant cannot be said

to have dropped a prosecution under the Code [see *Golap Jan* v. *Bholanath Khettry* (1)].

Their Lordships are not called upon to express any opinion on this point, nor are they doing so. The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the *ekrârnâmâ* was unlawful, and not whether any prosecution within the meaning of the Criminal Procedure Code had been started or dropped. If it was an implied term of the reference or the *ekrârnâmâ* that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the *ekrârnâmâ*, as the case may be, is unlawful [see *Jones* v. *Merionethshire Permanent Benefit Building Society* (2)], and the award or the *ekrârnâmâ* was invalid, quite irrespective of the fact whether any prosecution in law had been started.

With regard to the award, there is a further question, namely, whether, assuming that there was a valid reference, the award was capable of being enforced against any of the defendants.

Their Lordships will, first of all, determine the validity of the *ekrârnâmâ*.

In a case of this description, it is unlikely that it would be expressly stated in the *ekrârnâmâ* that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful. There is, however, in this case, the evidence of Sasanka, who acted as a pleader for the plaintiffs, and was called by them in this suit. He stated before the learned Subordinate Judge as follows :—"The former case was withdrawn the day "after the execution of the agreement, at the time of "which there had been an understanding between the "parties that the parties would withdraw from their "respective criminal cases. I understand that the

(1) (1911) I. L. R. 38 Calc. 880. (2) [1892] 1 Ch. 173.

1930

KAMINIKUMAR BASU
v.
BIRENDRANATH BASU.

"result of the agreement would be to settle all disputes "including the criminal cases." Amulya, another pleader, also called by the plaintiffs, stated:—"I "know that the object of the compromise was to bring "about a reconciliation including the dropping of the "prosecution."

There is no doubt that the parties had agreed not to proceed with the complaint, as the complainant in his petition, dated the 24th January, stated to the magistrate that the dispute had been settled.

The fact that the *ekrârnâmâ* was executed only by Ananta and his very near relatives, none of whom was bound by the arbitration proceedings, is very significant. The only question is whether the agreement settling the criminal proceedings was arrived at before or after the execution of the *ekrârnâmâ*. The *ekrârnâmâ*, as has already been stated, was signed after 9 p.m., on the 23rd January, and it is hardly credible that after its execution the plaintiffs for the first time decided not to proceed with the complaint.

Their Lordships have no hesitation in holding that, prior to the execution of the *ekrârnâmâ*, it was an implied though not an expressed term, that in consideration of the executants admitting the shares of the plaintiffs they would not proceed with the charges laid by them against the accused. It is also a significant fact that when after the execution of the *ekrârnâmâ* and the dismissal of the criminal proceedings the executants of the *ekrârnâmâ* did not carry out its terms, the plaintiffs took steps to revive the criminal proceedings, though without success. For these reasons, the *ekrârnâmâ* is not enforceable against its executants.

The next question that calls for determination is whether any part of the consideration for reference to the arbitration was unlawful. The only persons amongst the principal defendants who joined in the reference were Ananta, Binay, Krishna and Paresh. The criminal proceedings were pending at the time

of the reference against the last three mentioned persons and the son of Ananta. The dispute affected the other principal defendants, as also the *pro formâ* defendants, and no proper settlement could have been reached unless the other defendants joined in the reference.

The learned Subordinate Judge held that the arbitration proceedings were "hasty and rapidly run "through somehow to placate the plaintiff Birendra "and to induce him to withdraw the criminal case."

Nothing was done to give effect to the award, and the proceedings were adjourned from the 8th to the 24th January, on which date, as has been stated, the *ekrârnâmâ* was executed, which in effect took the place of the award.

Their Lordships have set forth in the early part of the judgment the circumstances under which the reference was made and the manner in which the arbitration was conducted, and they are of opinion that the finding of the learned Subordinate Judge that the reference was not a *bona fide* reference for settlement of civil disputes only is amply borne out by the evidence in the case. Their Lordships are also of opinion that the award was incomplete and that the parties whose presence was absolutely necessary to make it valid were never before the arbitrator.

For these two reasons their Lordships are of opinion that the award is not valid. The suit, therefore, so far as it is based on the *ekrârnâmâ* and the award, should be dismissed.

The plaintiffs' suit was based upon their alleged title by purchase, and, alternatively, upon the award and the *ekrârnâmâ*.

The learned Subordinate Judge held that the plaintiffs had succeeded in proving their title of purchase to the extent of 1 anna 4 pies share of plots Nos. 472, 473, 474 and 842. The High Court did not think it necessary, by reason of its findings on the award and the *ekrârnâmâ*, to determine this question. Their Lordships think that this part of the case, not

1930

KAMINIKUMAR BASU
v.
BIRENDRANATH BASU.

having been investigated by the High Court, should be remitted to them for further investigation. It does not appear that the plaintiffs ever gave up this part of their case.

For the reasons stated above, their Lordships think that the decree of the High Court should be set aside. The defences raised by the appellants were not commendable although they are compelled to give effect to them upon grounds of public policy indicated in their judgment. They will therefore not give any costs of the appeal before them or before the High Court. The learned Subordinate Judge did not give any costs to any of the parties and their Lordships think that his direction as to costs was right and they will not interfere with it. The costs of the further investigation of the title will abide the result.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellants: *Francis & Harker.*