APPELLATE CIVIL.

Before Derbyshire C. J. and Mukherjea J.

1938

June 6, 8, 13, 14; *Aug.* 4.

SUDHINDRA KUMAR RAY CHAUDHURI

v.

GANESH CHANDRA GANGULI.*

Contract—Agreement to refer dispute relating to debt to arbitration—Mortgage consequent on award—Stifling criminal prosecution—Implied condition—Validity—Indian Contract Act (IX of 1872), ss. 23, 24.

Where part of a consideration for submission to arbitration is a promise to drop a criminal prosecution for a non-compoundable offence and a security by way of mortgage is executed to implement the award made as a result of the arbitration, the security cannot be enforced at law as being based on a pre-existing debt, both the reference to arbitration and the debt as determined by the award being void under ss. 23 and 24 of the Indian Contract Act.

Kaminikumar Basu v. *Birendranath Basu* (1) considered.

Per MUKHERJEA J. If the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected even if it were given under threat of criminal proceedings but if the dropping of the prosecution was also a matter of bargain between the parties and constituted a part of the consideration the security cannot be enforced in law.

Gopal Chandra Poddar v. *Laksmi Kanta Saha* (2); *Dwijendra Nath Mullick* v. *Gopiram Govindaram* (3) and *Deb Kumar Roy Choudhury* v. *Anath Bandhu Sen* (4) referred to.

Shaikh Gafoor v. *Hemanta Shashi Debya* (5) distinguished.

Flower v. *Sadler* (6); *Kessowji Tulsidas* v. *Hurjivan Mulji* (7) and *Sayamma* v. *Punamchand Raichand Marwadi* (8) referred to.

*Appeal from Original Decree, No. 247 of 1936, against the decree of Sitesh Chandra Sen, First Subordinate Judge of 24-*Parganás*, dated July 21, 1936.

(1) (1930) I. L. R. 57 Cal 1302; L. R. 57 I. A. 117.
(2) (1933) 37 C. W. N. 749.
(3) (1925) I. L. R. 53 Cal. 51.
(4) (1930) 35 C. W. N. 26.
(5) (1930) 35 C. W. N. 28.
(6) (1882) 10 Q. B. D. 572.
(7) (1887) I. L. R. 11 Bom. 566.
(8) (1933) I. L. R. 57 Bom. 678.

1938

Sudhindra Kumar Ray Chaudhuri
v.
Ganesh Chandra Ganguli

APPEAL FROM ORIGINAL DECREE preferred by the defendants Nos. 3 to 5.

The facts of the case are as follows :—

Defendant Jitendra Kumar Ray Chaudhuri and his father Kali Das had an account with the plaintiff bank, the Bhowanipur Banking Corporation, for some time before 1924. Both Kali Das and Jitendra were speculating in shares and for that purpose had overdrawn their accounts. As the bank claimed a large sum as having been thus overdrawn, the settlement of claims between Kali Das Ray Chaudhuri and the bank was discussed between the parties from April 1, 1924, onwards, and on August 29, 1924, the bank wrote to Kali Das enclosing a docquet of Kali Das's account for his signature stating that Rs. 2,42,700-7-11ps. was due from Kali Das. Kali Das did not sign the docquet but wrote to the bank saying that he was entitled to get from the bank a sum of Rs. 31,048. Then, there was a talk of reference of the matter to arbitration and in March, 1925, the parties were disputing about the state of accounts between them, the bank pressing for arbitration to settle the matter, whilst Kali Das took up the position that the bank owed him Rs. 31,000. Kali Das was evading a submission to arbitration and there was a deadlock and up to this stage there was no suggestion that Kali Das or Jitendra had been guilty of any criminal offence. On April 1, 1925, a petition of complaint was filed in the criminal Court on behalf of the bank by the Assistant Manager against Kali Das, Jitendra and three others who were related to them and were connected with the bank, charging them with offences under ss. 406/120B and 420 of the Indian Penal Code. The allegation was that, in pursuance of a conspiracy, the accused persons drew large sums of money on over-draft on altogether insufficient securities by means of cheques which were passed under orders of another accused, the manager of the bank, who was a brother of Kali Das, and the accused persons were summoned to stand their trial. Soon

after the criminal proceedings were started Kali Das met one of the directors of the bank and, on the next day fixed for the criminal case, the Magistrate noted in his order-sheet that there was a talk of compromise and adjourned the case. On April 26, 1925, Kali Das wrote a letter to the bank mentioning the criminal proceedings but making no suggestions that the prosecution should be withdrawn and expressing his willingness to place for settlement the dispute about the liabilities of himself and his son in the hands of an arbitrator. Just before this there was some secret talk between the secretary to the bank and Kali Das. Mr. Amarendra Nath Bose was then appointed an arbitrator from whom it was previously ascertained that he was willing to arbitrate expeditiously within a week. On April 30, 1925, a deed of reference to arbitration was executed by the bank and Kali Das and Jitendra appointing Mr. Bose as arbitrator. On May 14, Mr. Bose made an award that Kali Das was to pay to the bank in liquidation of his debt Rs. 1,54,650 and Jitendra Rs. 55,500. The criminal case in the meantime was being adjourned on the application of both the parties date after date. At the same time Kali Das and Jitendra were handing over their securities to the bank in settlement of the bank's claims; and finally, on June 27, 1925, Kali Das and Jitendra executed a mortgage in favour of the bank of certain immoveable properties for the sum of Rs. 1,53,965-4-7 stated to be the balance for which the mortgagees have been found indebted to the bank by the arbitrator after crediting Kali Das and Jitendra with certain amounts realised by sales of shares, the original debts being stated in the mortgage to be the result of overdrafts on the bank. It was also stated in the deed of mortgage that the wife of Kali Das and the mother of Jitendra took a loan of Rs. 30,000 by mortgaging her personal properties by a separate deed and paid Rs. 25,000 out of the same to the bank on account of the mortgagor's indebtedness. This

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

formed part of the payments made by Kali Das and Jitendra to reduce the amount awarded against them by the arbitrator. Two days after the execution of the mortgage the Assistant Manager of the bank who was the complainant in the criminal proceedings presented a petition to the Magistrate stating that the accused Kali Das and Jitendra had made up their differences with the bank and had voluntarily made arrangements for the payment of the monies due from them and the complainant therefore did not desire to further proceed with the case or adduce any evidence and prayed that the accused might be discharged. Upon this the Magistrate discharged the accused. About ten years later, the plaintiff bank instituted a suit, being Title Suit No. 124 of 1935, to enforce the mortgage executed by Kali Das and Jitendra, dated June 27, 1925, and the defence of the contesting defendants *inter alia* was that the plaintiff bank brought a non-compoundable criminal case against Kali Das and Jitendra and that the case was compromised or withdrawn on condition of Kali Das and Jitendra submitting to arbitration and executing the mortgage bond in question and that the bond was accordingly void and unenforceable. The Subordinate Judge held that the debt in satisfaction of which the mortgage bond in suit was executed was a genuine one and existed prior to the criminal case and that the bond in suit was valid and enforceable in law, and decreed the suit.

The contesting defendants thereupon appealed to the High Court.

Sarat Chandra Basak, Senior Government Pleader, *Bejoy Kumar Bhattacharjya*, *Ambika Pada Chaudhuri* and *Bhabesh Narayan Bose* for the appellants. There was no valid consideration for the mortgage, the agreement being one to stifle a prosecution for a non-compoundable offence. The reference to arbitration, the award and the bond in suit are all void, as the consideration or one of the considerations was the withdrawal of the criminal case.

Indian Contract Act, ss. 23, 24. [*Kaminikumar Basu* v. *Birendranath Basu* (1); *Gopal Chandra Poddar* v. *Laksmi Kanta Saha* (2) and other cases cited.] The view taken in *Deb Kumar Roy Choudhury* v. *Anath Bandhu Sen* (3) is not correct.

Braja Lal Chakraburtty, Ramaprasad Mukhopadhyaya, Mahendra Kumar Ghosh, Mohit Kumar Chatterji and *Upendra Chandra Mullick* for the respondent. It could not be said that the agreement was to stifle prosecution, although it was followed by the withdrawal of the charge. The reference was a *bona fide* one and the agreement is in settlement of a previously existing civil liability. The transaction does not come within the mischief of ss. 23 and 24 of the Contract Act. [*Shaikh Gafoor* v. *Hemanta Shashi Debya* (4) and other cases cited].

Cur. adv. vult.

[After dealing with the facts and evidence in the case DERBYSHIRE C. J. said :—

It is clear to me that Kali Das and Jitendra agreed: (i) to submit to the arbitration, (ii) to sell their securities and hand over the proceeds to the bank in the way they did, and (iii) to execute the mortgage in question in return for a promise made by the bank through its directors or secretary that when there had been arbitration and satisfaction made and/or security given for the sum awarded, the bank would drop the prosecution. I find that such a promise was made by Nagendra to Kali Das on various dates in April, May and June, 1925, when Nagendra visited Kali Das. I am further of opinion that the existence of the agreement aforesaid is to be inferred from and is implicit in the dealings between the parties as and from 15th April to the execution of the mortgage.

(1) (1930) I. L. R. 57 Cal. 1302; L. R. 57 I. A. 117.
(2) (1933) 37 C. W. N. 749.
(3) (1930) 35 C. W. N. 26.
(4) (1930) 35 C. W. N. 28.

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Derbyshire C. J.

The consideration for the submission by Kali Das and Jitendra to arbitration was, in my view, the promise to drop the criminal proceedings. There were two considerations for the granting of the mortgage: (*a*) the promise to drop the criminal proceedings, and (*b*) the debt expressed in the mortgage deed to be owing by Kali Das and Jitendra to the bank consequent on the award.

To compound a charge of a non-compoundable offence is both opposed to public policy and forbidden by law, and thus unlawful; therefore, an agreement in which such compounding is either a consideration or an object is void. See s. 23 of the Contract Act. By s. 24 of the Contract Act, if any part of a consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

The operation of the law here is illustrated in the Privy Council case of *Kaminikumar Basu* v. *Birendranath Basu* (1): there were disputes between certain persons who claimed to have purchased land. A complaint to a Magistrate was made by one of the parties alleging that others had been guilty of uncompoundable offences in relation to the attempted or alleged purchase of the land; no summons was issued, but the complainant was directed by the Magistrate to prove his case. One of the parties charged suggested and procured a reference of the disputes to arbitration in which some of the disputants took part and an award was made. Later an *ekrârnâmâ* in pursuance of the award was entered into between some of the parties to the award. The complainant put in a petition to the Magistrate alleging that his witnesses had been won over and also that the dispute was settled. On this petition the Magistrate dismissed the case under s. 203 of the Code of Criminal Procedure for non-production of evidence. The plaintiffs in the suit (respondents in the Privy Council) claimed a declaration of title to

(1) (1930) I. L. R. 57 Cal. 1302 (1307); L. R. 57 I. A. 117 (121-122).

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Derbyshire C. J.

a part of the land under the arbitration award and agreement (*ekrârnâmâ*). The Subordinate Judge held that the reference to arbitration and the agreement were made to stifle a prosecution for a non-compoundable offence and were unenforceable.

The High Court held the award and agreement valid. The Privy Council set aside the decree of the High Court and restored the decision of the Subordinate Judge. Sir Benod Mitter in delivering the judgment said :—

> 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* (1)] and the award or the *ekrârnâmâ* was invalid, quite irrespective of the fact whether any prosecution in law had been started.

Further on he says :—

> 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.

Before us in the present case it was contended that the mortgage was valid notwithstanding the agreement to compound a non-compoundable offence, because there was still a "pre-existing debt" to support the mortgage as good consideration for it. That contention seems to me to ignore s. 24 of the Contract Act and to be contrary to the language of the Privy Council above cited. Moreover, in this case, as the consideration for the submission to arbitration was unlawful, the award was invalid; and the "pre-existing debt" rested upon and was determined by that invalid award. Under these circumstances, such debt cannot be good consideration for the mortgage.

(1) [1892] 1 Ch. 173.

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Derbyshire C. J.

In my judgment, both the award and the mortgage are invalid, and the judgment and decree of the Subordinate Judge must be set aside.

There will be no order as to costs either in this Court or in the Court below.

MUKHERJEA J. I agree with my Lord the Chief Justice in holding that this appeal should be allowed.

The appeal is on behalf of defendants Nos. 3, 4 and 5, and it arises out of a suit commenced by the plaintiff bank for enforcement of a mortgage-bond. The material facts may be shortly stated as follows: Defendant No. 1 was interested to the extent of 8 as. share in the properties described in Sch. *ka* of the plaint, and on September 22, 1916, he executed a mortgage-bond in favour of one Kali Das Ray Chaudhuri, predecessor of defendants Nos. 3 to 5, and hypothecated his interest in the said properties to secure an advance of Rs. 10,500 only. His mother, Jay Kali Debi, who had a right of maintenance and residence in respect of the said properties, joined with him in the mortgage. Defendant No. 1 took a further loan of Rs. 1,350 from Kali Das, and as security for the same executed a second mortgage in respect of the identical properties in favour of the latter. Kali Das, together with one of his sons Jitendra, who is defendant No. 3 in the suit, were indebted to the plaintiff bank for various sums of money, and they jointly executed a mortgage in favour of the bank on June 27, 1925, mortgaging *inter alia* the two mortgage bonds of defendant No. 1, to one of which his mother, Jay Kali, was also a party. By subsequent partition with their co-sharers, defendant No. 1 and his mother got the properties described in Sch. *kha* of the plaint exclusively in their share. The mother died later on and her heirs are the defendant No 1 himself and defendant No. 2. Kali Das is also dead and his heirs are defendants Nos. 3, 4 and 5.

The plaintiff bank has commenced this suit as a sub-mortgagee of Kali Das, for recovery of money due

on the first mortgage bond, by sale of the properties described in Sch. *kha* which are owned by defendants Nos. 1 and 2. Defendants Nos. 3, 4 and 5 were impleaded as parties defendants, and it was considered desirable that the suit should be decided in their presence.

The suit was contested principally by defendants Nos. 3, 4 and 5, and their contention in substance was that the mortgage-bond, executed by Kali Das in favour of the bank, was void and unenforceable under s. 23, Indian Contract Act inasmuch as the consideration for the bond was the stifling of a non-compoundable criminal case, which was proceeding between the bank on the one hand and Kali Das and his son on the other.

The decision in the case really hinges on this one point. The trial Court decided the point in favour of the plaintiff and against the defendants and decreed the plaintiff's suit. It found on evidence that though one of the motives of the executant in executing the bond in suit might have been the withdrawal of a criminal case that was pending between the parties at that time, yet that was not the consideration of the bond; the real consideration was the debt that was found by the arbitrator, chosen by Kali Das himself, to be due by Kali Das and his son to the plaintiff bank. The Sub-Judge accordingly was of opinion that the bond was valid and enforceable in law, and did not come within the mischief of s. 23, Indian Contract Act.

The propriety of this view has been challenged by Dr. Basak who appears for the appellant before us. He has contended, in the first place, that, as, according to the findings of the Sub-Judge himself, the criminal case was purposely kept hanging till the adjustment was made and the money payable was duly secured, the object of and at least a part of consideration for the transaction was the withdrawal of the criminal case, and as such the bond was tainted with illegal consideration and was not enforceable in law. He has argued further that the fact that there

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Mukherjea J.

was a pre-existing civil liability does not really alter the nature of the contract and make it enforceable in law, if the object was to stifle a criminal prosecution.

[After dealing with the evidence in the case, the learned Judge proceeded as follows] :—

The question now is, whether, on the facts mentioned above, the mortgage bond is void and unenforceable, under s. 23 of the Indian Contract Act.

The law on the point seems to me to be perfectly well settled. It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges, and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with [vide *Kaminikumar Basu* v. *Birendranath Basu* (1); *Gopal Chandra Poddar* v. *Laksmi Kanta Saha* (2)]. If the *quid pro quo* or consideration for a bond is the withdrawal of a criminal prosecution obviously it is hit by s. 23, Indian Contract Act. But the fact that a prosecution was actually withdrawn as a result of the execution of the bond does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction, and its object or consideration and it is not enough that the motive which impelled the party who executed the bond was that the criminal case against him might be dropped [*Dwijendra Nath Mullick* v. *Gopiram Govindaram* (3); *Deb Kumar Roy Choudhury* v. *Anath Bandhu Sen* (4)]. Dr. Basak, in his argument

(1) (1930) I. L. R. 57 Cal. 1302; L. R. 57 I. A. 117.
(2) (1933) 37 C. W. N. 749.
(3) (1925) I. L. R. 53 Cal. 51.
(4) (1930) 35 C. W. N. 26.

before us, assailed the propriety of the view taken in some cases [*e.g.*, *Deb Kumar Roy Choudhury* v. *Anath Bandhu Sen* (*supra*)] that the provision of s. 23, Indian Contract Act, does not apply, when there is an already existing civil liability on the part of the person who executes the deed, even though there has been a withdrawal of a non-compoundable criminal case against him. The decisions in *Kaminikumar Basu* v. *Birendranath Basu* (*supra*) and *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) are relied upon in support of this contention. It seems to me that the question really is one of fact not of law. To bring a case within the purview of s. 23, Indian Contract Act, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and *bona fide* debt owing by the accused against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. [*Shaikh Gafoor* v. *Hemanta Shashi Debya* (2)]. There, as between the debtor and the creditor there is no trading on felony, which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage, or emolument coming to him for withdrawing the prosecution against his debtor. As observed by Cotton L. J. in *Flower* v. *Sadler* (3) :—

> A threat to prosecute is not of itself illegal ; and the doctrine contended for does not apply, where a just and *bona fide* debt actually exists, where there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as, possibly a criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt, which he justly owes to his creditor.

The cases relied upon by Dr. Basak, have no bearing on this question. In *Kaminikumar Basu* v. *Birendranath Basu* (*supra*), there was no pre-existing

(1) [1892] 1 Ch. 173. (2) (1930) 35 C. W. N. 28.
(3) (1882) 10 Q. B. D. 572, 576.

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Mukherjea J.

civil liability and it was expressly found by the Judicial Committee that the *ekrârnâmâ* for settlement of dispute was not a *bona fide* reference but was resorted to only for the purpose of securing withdrawal of the criminal proceedings. In *Jones* v. *Merionethshire Permanent Benefit Building Society* (*supra*) the pronotes were given by an outsider who was under no obligation to the Building Society. This distinction between getting a security for a debt from a debtor and getting it from a third person who is under no obligation to the creditor was pointed out clearly by Cotton L. J. in *Flower* v. *Sadler* referred to above. When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not entertainable in law [vide *Kessowji Tulsidas* v. *Hurjivan Mulji* (1); *Sayamma* v. *Punamchand Raichand Marwadi* (2)]. The position in my opinion is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law.

Coming to the facts of this case I must say that I had considerable hesitation at first in differing from the finding arrived at by the trial Judge, *viz.*, that—

> Though one of the motives for the execution of the deed of reference and the bond in suit was the withdrawal of the prosecution, but the consideration for the bond in suit was not that but the debt itself which was found due by the arbitrator chosen by Kali Das himself.

On careful consideration, however, I have come to find that there are certain facts appearing in evidence, from which it is difficult to resist the inference that a part at least of the consideration for entering into the *ekrârnâmâ* was the withdrawal of the criminal proceeding that was already started.

(1) (1887) I. L. R. 11 Bom. 566. (2) (1933) I. L. R. 57 Bom. 678.

It cannot be disputed that both Kali Das and his son were indebted to the plaintiff bank on account of the overdrafts taken by them. The exact amount of their indebtedness was a matter of dispute between the parties and Kali Das and his son rightly or wrongly took exception to the way in which the interest and compound interest were charged by the bank. It appears also from the letter Ex. 5(b) dated April 1, 1924, that the talk of arbitration commenced at least earlier than April, 1924. It continued till November of that year. And on November 8, 1924, there was a resolution passed by the board of directors, nominating one of the arbitrators and asking Kali Das to nominate the other. Kali Das then attempted to put off the reference on certain frivolous excuses, and in spite of the bank's letter [Ex. (B 3)] dated November 25, 1924, asking him to state definitely as to whether he was willing to submit to arbitration, he did not move any further in this matter, and maintained a rigid silence over it. The talk of arbitration therefore practically came to an end in November, 1924.

Then on April 1, 1925, the bank started the criminal prosecution. The petition of complaint was filed on that date. Five persons were named as accused in that case including Kali Das and Jitendra, and there was a definite charge of conspiracy against all the accused, in pursuance of which, it was said that they overdrew large sums of money on insufficient security by cheques, which were passed by accused No. 1. The charges were under ss. 406, 420 and 120B, Indian Penal Code. The Magistrate directed summons to be issued against all the accused. On the 6th of April following, all the accused appeared, and were let off on personal recognisance of Rs. 2,000 each, the 15th of April next being fixed as the date of hearing. On 15th April, it was stated to the Magistrate, that there was a talk of compromise and the case was adjourned to 24th April, following. There is no doubt, and the Subordinate Judge also is of that opinion, that the criminal prosecution was

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Mukherjea J.

started as a threat to compel Kali Das and his son to settle their affairs with the bank and give security for their debts. This by itself would not make the security for the debt illegal, unless the abandonment of the criminal case was proved to be a part of the consideration for the same.

It appears from the evidence of Chandra Bhushan Banerji, a senior pleader of the Alipur bar, that Kali Das approached him soon after the criminal case was started and asked Chandra Bhushan to save him from jail. Chandra Bhushan says that he took Kali Das to Mr. Surendra Nath Mallik who was a director of the bank and an influential person, and requested Mr. Mallik to save Kali Das somehow.

We have no evidence as to what Mr. Surendra Mallik actually did, but we have the evidence of Jitendra, the son of Kali Das, who says that Nagendra Nath Banerji, the secretary of the bank, approached his father soon after and assured him that the criminal case would be withdrawn, if Kali Das would agree to refer the matter to arbitration and pay up the money that would be fixed by the arbitrator. "We would not have referred the matter to arbitra-"tion" says Jitendra "and would not have executed "the bond, unless we were assured that as result of "this, the criminal case would be withdrawn". This statement of Jitendra, it must be noted, was not challenged in cross-examination, on the plaintiff's side. Their own witness is one Tara Pada Datta, a ledger-keeper, who has no personal knowledge of the affair and can't say, what the terms of settlement were, and whether or not it was agreed upon by the parties that the criminal case would be withdrawn, if Kali Das would pay up his dues.

Kali Das's own letter is dated April 26, 1925 and he states there that though the bank had started criminal proceeding against him, yet he was still willing to place for settlement, the dispute about the liabilities of himself and his son to the bank, in the hands of an arbitrator. He himself suggested the

names of several persons including Mr. Amarendra Nath Bose, an advocate of this Court. This offer was accepted by the bank, and their resolution is dated April 28, 1925. They agreed to have Mr. A. N. Bose as arbitrator and resolved that the letter of reference must be executed and the matter placed before the arbitrator, prior to June 29, 1925. It may be noted here, that 29th June was the date fixed for hearing of the criminal case, and the bank was certainly not willing to say anything in the criminal case unless the matter was placed before the arbitrator. The agreement of reference was actually executed on April 30, 1925, and on the day before the criminal Court recorded the following order in the order sheet:

"Case adjourned to 4th May, at the request of "both parties, on which date, either the prosecution- "witnesses to be produced or the case settled." The arbitrator's award was given on May 14, 1925 and on May 16, Kali Das wrote a letter to the bank, suggesting in what way, he can liquidate his dues as fixed by the arbitrator. The last sentence in his letter runs as follows:—

> I am willing to execute an agreement pending the completion of necessary documents to transfer and in the meantime as arranged before the criminal case against us will be withdrawn.

The bank in their reply undoubtedly denied that there was any agreement about the criminal case. What they said was that if Kali Das would pay up the amount found due by him, they might represent to the criminal Court that the liabilities were adjusted. It is difficult, however, to resist the conclusion from the facts stated above that it was one of the understood terms of agreement between the parties that the criminal case would be withdrawn, if Kali Das would agree to refer the matter to arbitration and either pay up or give security for the amount found due by the arbitrator. In my opinion, there was a distinct bargain to that effect which is proved by the evidence of Jitendra and is supported by the statement of Chandra Bhushan and the records

1938

Sudhindra Kumar Ray Chaudhuri v. *Ganesh Chandra Ganguli.*

Mukherjea J.

of the criminal case. The mortgage bond was executed on June 27, 1925 and the criminal case was withdrawn on the 29th June following. In the petition of withdrawal it is expressly stated that as Kali Das and his son had made up their differences with the bank and had made arrangements for payment of the monies, the complainant did not desire to proceed further with the case or adduce evidence.

I hold, therefore that though Kali Das and his son undoubtedly owed money to the bank, yet the mortgage cannot be enforced as the consideration for the agreement to reference and consequently of the mortgage itself was partly the withdrawal of a non-compoundable case which comes within the mischief of s. 23, Indian Contract Act. It would be open to the bank to enforce their civil rights which existed independently of the award, in such ways as are recognised by law. I agree with my Lord the Chief Justice that the appeal should be allowed and the suit dismissed, but no costs should be given to the successful appellants either here or in the Court below.

Appeal allowed; suit dismissed.

A. A.