sent away so that his relations with them would be permanently cut off and he be prevented from having any access to them for a considerable time to come. No Court of law could tolerate such a conduct. Therefore, when the rights of the natural guardian are disputed on the ground that he cannot act, when there is no other legally constituted guardian, when there is danger of the minors being removed out of the jurisdiction of this Court and when such a course is not beneficial to the minors, it is absolutely necessary for us to interfere. I therefore agree in the order proposed by my Lord the CHIEF JUSTICE.

Solicitor for first respondent: *The Government Solicitor.*

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APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

PAKALAPATI VEERAYYA (PLAINTIFF), APPELLANT,

v.

DEVULAPALLI SOBHANADRI (DEFENDANT), RESPONDENT.*

1936, March 30.

Indian Contract Act (XI of 1872), sec. 23—Criminal prosecution —Withdrawal of—Part of consideration for promissory note being—Enforceability of promissory note in case of.

A promissory note was executed by the defendant in favour of the plaintiff on behalf of third parties who had launched a criminal prosecution against the defendant for cheating under section 420 of the Indian Penal Code. Part of the consideration for the promissory note was an agreement to withdraw

* Second Appeal No. 462 of 1932.

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the criminal prosecution and it was withdrawn accordingly. The offence under section 420 of the Indian Penal Code is not compoundable except with the permission of the Court before which the prosecution is pending but no such permission was obtained. In a suit upon the promissory note,

held that, as part of the consideration for the promissory note was the dropping of the criminal prosecution, it was unenforceable under section 23 of the Indian Contract Act.

It is enough if the dropping of the criminal prosecution formed part of the bargain. It need not have been the sole bargain.

Jones v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, and *Kamini Kumar* v. *Birendra Nath*, A. I. R. 1930 P.C. 100, relied upon.

Flower v. *Sadler*, (1882) 10 Q.B.D. 572, *Dwijendra Nath Mullick* v. *Gopiram Gobindaram*, (1925) I.L.R. 53 Cal. 51, and *Narasimhalu Naidu* v. *Naina Pillai*, A.I.R. 1929 Mad. 7, distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 28 of 1931 preferred against the decree of the Court of the District Munsif of Bezwada in Original Suit No. 159 of 1930.

The second appeal arose out of a suit upon a promissory note dated 6th August 1924 executed by the defendant in favour of the plaintiff. The defendant and his father had effected a sale of immovable property in favour of one Seshayya and four others. On the date of the said sale there was a mortgage on the property which was not disclosed to the vendees. A decree was obtained on the footing of the said mortgage and the property sold in execution thereof and a suit was instituted for recovery of possession from the vendees. Complaining of the non-disclosure of the said mortgage, the vendees launched a criminal prosecution against the defendant and his father for cheating under section 420 of the Indian Penal Code. The defendant was anxious that the criminal prosecution should be withdrawn and he negotiated for an adjustment of the disputes between him and the vendees. Pending the final settlement of the matter, the defendant executed the suit promissory note for Rs. 500 in favour of the

plaintiff, who had interested himself on behalf of the vendees, but finally an arrangement was come to which was embodied in a document, Exhibit V, dated 16th August 1924, in and by which it was arranged that a sum of Rs. 700 should be paid in full settlement of the disputes and that Rs. 200 should be paid immediately and the balance of Rs. 500 within a year from the date of the agreement to the plaintiff on behalf of the vendees and on failure to pay the same the vendees could have recourse to such civil proceedings as they might be advised to take. The criminal case against the defendant under section 420 of the Indian Penal Code was withdrawn on 16th August 1924, the date of Exhibit V. The offence under section 420 could be compounded only with the permission of the Court but no such permission was obtained. The defences to the suit were: (i) that the suit promissory note ceased to have any force after the matter was finally settled and (ii) that, in any event, as the suit promissory note was executed in consideration of the criminal case being withdrawn, it was unenforceable under section 23 of the Indian Contract Act.

P. Satyanarayana Rao for appellant.

V. Rangachari for respondent.

Cur. adv. vult.

JUDGMENT.

[His Lordship, after stating the facts of the case, the nature of the suit and the defences to it as stated above, found that Exhibit V was the final and concluded agreement between the parties; that the rights of the parties must be regulated according to the terms of the said agreement and that the intention of the parties was that on the execution of Exhibit V the liability under the suit promissory note should be treated as not subsisting; held that, after the execution of Exhibit V, the suit promissory note was superseded and the plaintiff was not therefore entitled to sue upon it; and proceeded :—]

Even if I am not right in this view, it seems to me that the plea taken by the defendant that

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the promissory note was unenforceable under section 23 of the Indian Contract Act must prevail. On 4th August 1924 when the promissory note was executed and sent with the date 6th August 1924, there was admittedly a criminal prosecution pending which the defendant was anxious to get rid of. It seems to be also clear from Exhibit B that the plaintiff expected that the said case would be withdrawn even on 6th August 1924. The last sentence in that letter clearly indicates it. It runs thus:

> "He said that he would get the case withdrawn, etc., on 6th August 1924 itself. Please get it arranged that it is withdrawn on that day itself. Kindly render this help without fail. Please reply."

It is thus apparent that the object of sending the promissory note was to enable the case being withdrawn on the faith of it. Again, Exhibit V also indicates that the sum of Rs. 700 was in settlement of all the disputes between the parties, not only the adjustment of the civil liability but the dropping of the criminal prosecution. No doubt Exhibit V does not specifically state so but it is very clear from the concluding portion of Exhibit V which provides that, in case of default of payment of Rs. 500 within a year, Rs. 200 should be appropriated towards the expenses of the criminal case. In fact the criminal case was withdrawn on 16th August 1924, the date of Exhibit V. Mr. Satyanarayana Rao relied upon a number of cases to show that where a transaction between the parties involves a civil liability as well as a criminal offence, a settlement of the civil liability is not vitiated by the fact that the criminal prosecution is also withdrawn. But I think the true rule is that where there is an

existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. In *Jones* v. *Merionethshire Permanent Benefit Building Society*(1) LINDLEY L. J. points out :

> " In order to amount to a defence on the ground of illegality there must be an agreement not to prosecute—an agreement as it is called to stifle a prosecution " ;

and, as BOWEN L. J. points out, reparation for an obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise, and it would be absurd to lay down as an impossible counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party injured. But what he emphasises is that the abstention from or the dropping of the criminal prosecution should not be made a matter of bargain. He observes :

> " I agree with what Mr. Reid said, that the law certainly is not anxious to discourage reparation. But you must come back after reparation made to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and others? He must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the Court will not enforce."

(1) [1892] I Ch. 173.

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Therefore the test in each case is, did it form part of a bargain, namely, the dropping of the criminal prosecution ? In this case, there can be no doubt that the object of the execution of the promissory note was the dropping of the criminal prosecution. It is enough if it formed part of the bargain. It need not have been the sole bargain. I think this is made clear by the recent decision of the Privy Council in *Kamini Kumar* v. *Birendra Nath*(1). There was a dispute as to title to a property. In regard thereto there was also a criminal prosecution launched. One of the parties was very anxious to have this criminal prosecution withdrawn. Then there was a reference to arbitration and an award thereupon and the civil dispute was settled and the criminal prosecution was in consequence withdrawn. It was found that the object of this reference and the award was to bring about a reconciliation including the dropping of the prosecution. Their Lordships during the course of the judgment observe :

> " 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 ekrarnama was unlawful and, if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful."

Their Lordships also point out that the agreement need not specifically state that part of the consideration was an agreement to settle the criminal proceedings but it is enough to give evidence from which the inference necessarily

(1) A.I.R. 1930 P.C. 100.

arose that a part of the consideration is unlawful. In this case, the evidence makes it clear that part of the consideration was the dropping of the criminal prosecution in which all the vendees were interested. The decisions relied on by Mr. Satyanarayana Rao are all distinguishable. He relied strongly on *Flower* v. *Sadler*(1). In that case, no prosecution was launched or dropped, but there was a threat to take criminal proceedings and by means of that threat promissory notes were obtained in respect of a debt justly due. Therefore it was rightly pointed out that 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. Even in that case, if there had been an agreement not to prosecute, the decision would have been different. The next case relied on by him is *Dwijendra Nath Mullick* v. *Gopiram Gobindaram*(2). It is not necessary to consider whether the actual decision can be supported but that decision does not conflict with the principle which I have stated. MUKERJI J., at page 62, stated :

> " 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."

But he found in that case that the consideration or the object of the agreement was not the withdrawal of the criminal case. On that finding the decision may be correct. Mr. Satyanarayana Rao laid considerable emphasis on the decision of

(1) (1882) 10 Q.B.D. 572. (2) (1925) I.L.R. 53 Cal. 51.

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JACKSON J. in *Narasimhalu Naidu* v. *Naina Pillai*(1). But that case can be distinguished on the following observation by the learned Judge :

> "There is nothing against public policy if a person accused of breach of trust or misappropriation chooses to acknowledge the liability and refund the amount. And if after receiving the amount the complainant withdraws from the prosecution of his complaint it need not necessarily be presumed that there was a contract that he should do so."

It seems to me that if the learned Judge was of opinion that there was a contract to withdraw the prosecution, he would have decided the case differently. Therefore it is unnecessary to deal with some of the observations of the learned Judge which I think are not relevant for the decision of this case. There can be no doubt that in this case the offence must be deemed to be non-compoundable as the permission of the Court to compound was not obtained. Part of the consideration for the promissory note was the agreement to withdraw the criminal prosecution and therefore the promissory note is unenforceable.

In the result the second appeal fails and is dismissed with costs.

A.S.V.

(1) A.I.R. 1929 Mad. 7.