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because the number of persons armed with deadly weapons was so considerable that those who carried lathis must have had good reason to believe that the deadly weapons were likely to be used with deadly effect. The fact that the attacks inflicted did not stop at one victim but that three persons were killed, that of those persons Anandi had 25 injuries, Jhunak had 13 and Biranchi 27, makes it impossible to hold that the intentions of the assembly as a whole were comparatively peaceful and were exceeded by merely one or two members.

I would dismiss the appeal.

CHATTERJI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Agarwala and Rowland, JJ.

BRAHMDEO NARAYAN

v.

BRAJBALLABH PRASAD.*

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Jan. 25, 26.

Contract Act, 1872 (Act IX of 1872), section 23—sale deed—conveyance being part of consideration for dropping criminal proceeding—consideration for the agreement, whether illegal—suit for refund of unpaid portion of consideration money or for recovery of the land—maintainability.

Whoever is a party to an unlawful contract, if he has once paid the money stipulated to be paid in pursuance thereof, he is not entitled to the help of a court to recover it.

*Appeal from Appellate Decree no. 997 of 1938, from a decision of Rai Bahadur Bhuvaneshwar Prasad Pande, Additional District Judge of Patna, dated the 31st August, 1938, reversing a decision of Babu Jugal Kishor Narayan, Subordinate Judge of Patna, dated the 30th September, 1936.

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An agreement that there shall be no prosecution in a criminal case is illegal even though sanctioned by the presiding Judge.

Keir v. *Leeman*(1), referred to.

No refund of money or return of consideration given under such an agreement will be allowed unless circumstances disclose pressure or undue influence.

Mere fear of punishment in a criminal case does not constitute undue influence.

Amjadennessa Bibi v. *Rahim Buksh Shikdar*(2), followed.

Where the execution of a sale deed by the plaintiff in favour of the defendant was a part of the consideration for dropping a criminal proceeding against himself;

Held, (*i*) that the consideration for the agreement was illegal and by reason of section 23, Contract Act, 1872, the agreement was void;

(*ii*) that the plaintiff did not act under any pressure or undue influence; and

(*iii*) that the plaintiff was therefore not entitled to get the unpaid portion of the consideration or the land.

Kamini Kumar Basu v. *Birendra Nath Basu*(3) and *Collins* v. *Blantern*(4), followed.

Browning v. *Morris*(5), distinguished.

An obliger is not precluded from pleading any matter which shows that a document is given upon an illegal consideration, whether consistent or not with the condition of the bond.

Collins v. *Blantern*(4) and *Paxton* v. *Popham*(6), referred to.

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(1) (1844) 6 Q. B. 308.
(2) (1914) I. L. R. 42 Cal. 286.
(3) (1930) L. R. 57 Ind. App. 117.
(4) 1 Sm. Leading Cases (13th Ed.) 406.
(5) (1778) 2 Cowp. 791; 98 E. R. 1364.
(6) (1808) 9 East, 408; 103 E. R. 628.

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Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

Hareshwar Pd. Sinha and *Rati K. Chowdhury*, for the appellant.

B. K. Saran, for the respondents.

AGARWALA, J.—This is an appeal by the plaintiff from a decision of the Additional District Judge of Patna reversing a decision of the Subordinate Judge. The appeal arises out of a suit for recovery of the unpaid portion of the consideration of a sale deed executed by the plaintiff in favour of defendant no. 1 or alternatively, for recovery of the subject-matter of the sale deed. There is also a prayer for the refund of Rs. 800 deposited by the plaintiff with defendant no. 3 in circumstances which will appear presently, and also for one month's salary alleged to be due to the plaintiff from defendant no. 1. Defendant no. 1 is the owner of an estate in the Gaya district and the plaintiff was his tahsildar. In March, 1935, defendant no. 1 initiated a prosecution against the plaintiff on a charge under section 408 of the Penal Code alleging that he had misappropriated a sum of Rs. 1,535-1-9 out of the rents which he had collected from the tenants of defendant no. 1. The case of the defendant no. 1 is that in order to induce him to withdraw from this prosecution the plaintiff agreed to repay the money misappropriated and to convey 40 bighas of land which is the subject-matter of the sale deed. The plaintiff in fact deposited Rs. 800 with a person whom both parties trusted and executed a handnote for Rs. 750 in favour of a relative of defendant no. 1. This handnote was executed on the 22nd of July, 1935, the same date as that on which the sale deed was executed. It is necessary to state a few particulars with regard to

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the 40 bighas of land which is the subject-matter of the sale deed. It is alleged in the pleadings that while the estate of defendant no. 1 was under the management of the Court of Wards a decree for rent was obtained in respect of 63 bighas of land. The plaintiff as a tahsildar of the estate bid for this property at the sale in execution of the rent decree but instead of purchasing it on behalf of the estate he purchased it in his own name. Thereafter he reimbursed himself for the price of the property by selling 23 bighas of the land for the price which he had paid for the whole of 63 bighas. When called upon to convey to defendant no. 1 the remaining 40 bighas he declined to do so. This area of land, therefore, although it was not in any way directly concerned with the charge of criminal misappropriation, was a matter of contention between the parties at the time when the prosecution was pending. On the 23rd of July, 1935, a petition was filed in the court of the Magistrate before whom the prosecution was pending stating that the parties had compromised and asking the permission of the court to terminate the proceeding. Although the charge was under section 408 of the Penal Code, and was not a compoundable offence, the Magistrate permitted the dispute to be compromised and passed an order of acquittal on the 26th of July, 1935. In order to be able to do this the Magistrate was constrained to hold that the charge disclosed against the present plaintiff was one under section 403 of the Penal Code and not under section 408, the former offence being an offence compoundable with the permission of the Court. It is difficult to appreciate how the Magistrate came to take this view. The charge was that the plaintiff as tahsildar of defendant no. 1 had misappropriated monies which he had collected from the tenants of defendant no. 1. Those facts, if proved, constituted an offence under section 408. However that may be the plaintiff was acquitted in the criminal proceeding. Having secured his

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acquittal he then showed reluctance to complete the agreement with defendant no. 1 and declined to register the sale deed which he had executed as part of the consideration for the compromise. Defendant no. 1 accordingly, on the 22nd of August, 1935, applied for compulsory registration of the sale deed. This was ordered by the District Registrar on the 18th of May, 1936. In the meanwhile, on the 23rd of November, 1935, the plaintiff instituted the suit out of which this appeal has arisen.

The plaintiff alleged in his plaint that the consideration for the compromise was the payment of Rs. 1,550 but as he had only Rs. 800 he executed a handnote for the balance of Rs. 750 but defendant no. 1 not being agreeable to accepting a handnote in lieu of cash the plaintiff agreed to convey the disputed 40 bighas to him for a consideration of Rs. 4,000 out of which consideration defendant no. 1 was to deduct Rs. 1,550 and pay the balance to the plaintiff. The suit as originally instituted was for the recovery of the balance of the consideration money for the sale and for refund of Rs. 800 which had been deposited with defendant no. 3. After the sale deed had been registered the plaintiff amended the relief portion of the plaint and inserted a prayer for the recovery of possession of the 40 bighas.

The Court of appeal below has disbelieved the plaintiff's version of the terms of compromise and accepted the version of defendant no. 1, namely, that the conveyance of the 40 bighas was a part of the consideration for defendant no. 1 withdrawing from the prosecution. On behalf of the plaintiff-appellant it has been contended that the Court was not entitled to entertain evidence intended to show that the sale deed was something other than it purported to be, namely, a sale for a consideration of Rs. 4,000. Section 92 of the Evidence Act is relied upon for that contention. The first proviso to the section, however, permits the proof of any fact which would

invalidate any document referred to in the section on grounds such as fraud, intimidation and illegality. The validity of a document may, therefore, be challenged in the present case on the ground of the illegality of the transaction. The first proviso appears to adopt the law as laid down in *Collins* v. *Blantern*(1). In that case two persons who had been indicted on a charge of perjury by one Rudge agreed to give Rudge a note for £ 350 as a consideration for his not appearing to give evidence at the trial. In a suit on the note the defendant pleaded that the transaction was an illegal one and that it was unenforceable in law. It was held that illegality may be pleaded as a defence to an action on a bond. In a later case the doctrine was carried further in *Paxton* v. *Popham*(2) where Lord Ellenborough observed, "Since the case of *Pole* v. *Harrobin* in 1782, it has been generally understood that an obliger is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond". So far as the law of this country is concerned it would appear to be the same. In *Kamini Kumar Basu* v. *Birendra Nath Basu*(3) the Privy Council held that if it be an implied term of an ekrarnama or a reference to arbitration that a criminal complaint would not be further proceeded with then the consideration for the ekrarnama or the reference, as the case may be, is unlawful, and the ekrarnama or the award is invalid, quite irrespective of the fact whether any prosecution in law has been started or there is something for which it is to be dropped, and that it was not necessary that an agreement to settle criminal proceedings should be expressly stated as part of the consideration. It is enough if the inference

(1) 1 Smith's Leading Cases (13th Ed.), 406.

(2) (1808) 9 East, 408, 421; 103 Eng. Rep. 628, 634.

(3) (1930) L. R. 57 Ind. App. 117.

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necessarily follows from the evidence that the consideration was such. This was the finding of the Court below and I have no hesitation in accepting that finding that the execution of this sale deed was a part of the consideration for dropping the criminal proceedings against the plaintiff. It is clear that the consideration for the agreement between the parties was illegal and, therefore, that by reason of section 23 of the Contract Act the agreement was void.

The next question is whether the plaintiff is entitled to recover either the balance of the consideration money for the sale or the land which is admittedly in possession of defendant no. 1. On the authorities I think it is clear that he must fail. The reason why the plaintiff cannot recover is stated by Lord Justice Wilmot in the case of *Collins* v. *Blantern*(1) in this language: "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for inequity.* All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, O! procul este profani*". This is more succintly rendered by the maxim: *in pari delicto melior est positio possidents.* To the generality of this rule, however, there is an exception on which the plaintiff-appellant relies. That exception has been stated by Lord Mansfield in *Browning* v. *Morris*(2) as follows: "Where

(1) 1 Smith's Leading Cases (13th Ed.), 406, 410.
(2) (1778) 2 Cowp. 791; 98 E. R. 1364.

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contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract". It is contended that the plaintiff-appellant was not *in pari delicto* with defendant no. 1 in the transaction which resulted in the dropping of the criminal prosecution inasmuch as he was in the power of defendant no. 1 by reason of the pending prosecution. The answer to that contention is afforded by the decision in the case of *Amjadunnessa Bibi* v. *Rahim Buksh Shikdar*(1) where it was held that "no refund of money or return of consideration given under an agreement not to prosecute a criminal case will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitute undue influence". In the present case the Court below has found that there was no evidence whatsoever to justify an assertion that the plaintiff had acted under any undue influence, duress, compulsion or fear practised upon him by defendant no. 1. It was also suggested on behalf of the plaintiff-appellant that as the Magistrate had agreed to the compromise of the criminal proceedings the Civil Court is not entitled to say that it was illegal. The contention is negatived by the decision in *Keir* v. *Leeman*(2) where it was held that an agreement that there shall be no prosecution is illegal even though sanctioned by the presiding Judge.

It was next contended that the plaintiff did not put the defendant into possession of the land in

(1) (1914) I. L. R. 42 Cal. 286.
(2) (1844) 6 Q. B. 308.

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consequence of the agreement which he had entered into but that defendant no. 1 succeeded in obtaining possession only at a later stage after the acquittal in the criminal case had been recorded and the sale deed had been subsequently compulsorily registered. The plaintiff, however, had executed the sale deed prior to the acquittal and did not resile from it until it had achieved its object. The fact that he subsequently endeavoured to frustrate the defendant in obtaining the benefit of the sale does not, in any way, improve his position.

The last point on behalf of the plaintiff-appellant is with respect to the claim for salary. The amount involved is Rs. 35. The Court below held that the onus of proving that the salary was due from the defendant to the plaintiff lay primarily on the plaintiff and that the mere denial of the plaintiff that the money had been received by him was not sufficient to discharge the onus. It is contended that the onus was wrongly placed on the plaintiff in view of the defendant's admission that the plaintiff was, at the time in question, his tahsildar. It is not necessary, in my view, to decide whether the Court was right in its view regarding the onus, for it is quite clear that the learned Additional District Judge did not believe what the plaintiff stated on oath whereas he regarded the defendant as a respectable zamindar who was not likely to perjure himself for a comparatively small sum of money. Quite apart, therefore, from the question of onus, it is clear to my mind that the Additional District Judge would have accepted the denial of defendant no. 1 that anything was due from him to the plaintiff on account of salary in preference to the plaintiff's assertion that he had not been paid.

In the result, therefore, I would dismiss this appeal but in view of the fact that the parties were *in pari delicto* in the matter of the compromise of

the criminal proceeding I would direct each party to bear his own costs of this appeal.

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ROWLAND, J.—I agree.

In the Courts below the parties were at variance as to whether the document sued on was a sale deed or a deed of surrender. As I understand section 92 it operated to preclude the defendants from asserting that it was not a sale deed when it was expressed as a deed of sale on a consideration of Rs. 4,000. But this, as my learned brother has said, was no bar to the defence proving anything that they were entitled to under the proviso to the section. That this deed was a part of an illegal bargain in the same transaction with the deed it hardly required any extraneous evidence to establish, for in the recitals of the document itself there is a reference to the fact that the executant as tahsildar had been using his master's collection money for his own purpose and that thereby over Rs. 1,500 of his master's money was outstanding with him for which a criminal case was started and was pending.

On other points I agree with what has been said by my learned brother.

K. D.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

1939-40.

Sep. 25, 26, 27, 28, 29. Oct. 2, 3, 4, 5, 6, 9, 10, 11, 13, 16, 17. Nov. 1, 2, 3, 6, 7, 8, 9, 20, 21. Jan. 29.

RAJA SRI SRI JYOTI PRASAD SINGH DEO BAHADUR,

v.

SAMUEL HENRY SEDDON.*

Landlord and Tenant—lease—lessor preventing lessee from enjoying demised premises for certain period—lessor, whether entitled to royalty—construction of document—

* Appeal from Original Decree no. 5 of 1936, from a decision of Babu Narendranath Banerji, Subordinate Judge of Purulia, dated the 25th September, 1935.