
(1933) 04 BOM CK 0009
In the Bombay High Court
Case No : First Appeal No. 120 of 1930

Sayamma Dattatraya Narsingrao

APPELLANT

Vs

Punamchand Raichand Marwadi

RESPONDENT

Date of Decision : 05-04-1933

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 1933 Bom 413 : (1933) 35 BOMLR 850 : (1933) ILR (Bom) 678 : 147 Ind. Cas. 1096

Hon'ble Judges : Shingne, J; Baker, J

Bench : Division Bench

Judgement

Baker, J.—The plaintiff had taken in pledge certain ornaments from defendant No. 1. Defendant No. 1 asked for the loan of the ornaments for a festive occasion, promising to return them within a few days. The plaintiff allowed him to take them, but defendant No. 1 did not return them, and disposed of them elsewhere. Thereupon the plaintiff charged him with offences u/s 406, Indian Penal Code, criminal breach of trust, and Section 420, Indian Penal Code, cheating. During the pendency of the complaint the matter was settled by defendant No. 1, his brother-in-law defendant No. 2, and defendant No. 3 who is a sister of defendant No. 2, passing two promissory notes of Rs. 7,500. The plaintiff sued on these promissory notes, and the First Class Subordinate Judge of Poona has given him a decree. Defendant No. 3 has appealed, and the principal ground taken in appeal is that the consideration for the notes being the withdrawal of the complaint, is against the provisions of Section 23 of the Indian Contract Act, and therefore no suit can lie.

2. Before dealing with this point, I may briefly refer to the argument of the learned counsel for the respondent that this point was not taken in the written statement, the contention being that the plaintiff represented to the defendants that the promissory notes were hollow, and would not be acted upon. This is an argument which has now been given up, but the contention that the

consideration was against the law will be found in paras. 4, 5 and 6 of the written statement. Even if it were not so, it is a point of law, and can, therefore, be taken in appeal.

3. A number of cases have been quoted on both sides, but before considering them, it would be necessary to have an accurate statement of the facts.

4. The fact that the criminal proceedings terminated the day before the promissory notes were executed makes no difference, as there can be no doubt that the withdrawal of the criminal proceedings was due to the fact that the defendants had agreed to pass the promissory notes. A distinction must also be drawn between the position of defendant No. 1, who has not appealed, and defendants Nos. 2 and 3, of whom only defendant No. 3 has appealed. Defendant No. 1 had pledged the ornaments for Rs. 7,000 with plaintiff, and therefore, as he had got back the ornaments without paying the amount, he is undoubtedly liable to pay the amount with interest to plaintiff. Defendants Nos. 2 and 3, who are the brother and sister of defendant No. 1's wife, are in no way liable for the amount which defendant No. 1 owes to the plaintiff, and this will distinguish the case from any case in which persons passing the bond or document were themselves liable for the original claim. As nothing was admittedly paid by the plaintiff, the consideration for the promissory notes is clearly the withdrawal of the prosecution, and this is made clear by the statement of the plaintiff himself at page 10, where he says:-

I did not say that the promissory notes were to be hollow. I said clearly that I could not withdraw the prosecution unless they undertook the liability and passed the promissory note. Defendants passed the promissory note voluntarily, and next day I withdraw the prosecution.

Now, though the charge u/s 420 is compoundable with the permission of the Court u/s 345 of the Criminal Procedure Code, that u/s 406 is not, and we find from the record of the criminal case that the charge u/s 420 was compounded, and the accused was discharged on the charge u/s 406 as the complainant had no evidence to prove it. No evidence was adduced, and the only inference is that the complainant refrained from adducing any evidence because the defendants had agreed to pass the promissory notes in suit, which were passed accordingly a day later. It is immaterial whether the evidence available would have proved the charge u/s 406 or not. The complainant in his complaint states that defendant No. 1, i.e., the accused in the criminal case, had given him a written undertaking to return the ornaments. Whether this was so or not, the fact remains that the plaintiff did not proceed with the charge u/s 406, because the defendants passed him the promissory notes in suit. The law allows the compounding of the offence u/s 420, and we need not consider that aspect of the case. The effect of the compounding, apart from the acquittal of the accused, would be that a suit for damages on the facts constituting the original offence would not lie: *Sheikh Basiruddin v. Sheikh Khairat Ali* (1913) 17 C.W.N. 948

5. But it is otherwise with offences which the law does not allow to be compounded. In such cases the policy of the law is not to permit the parties to interfere with the progress of the prosecution by any private arrangement, which is precisely what has happened in the present case. I have stated the facts with some detail, because it is necessary to distinguish between the numerous rulings on the subject. Some of the rulings make a distinction between motive and consideration. There is no such distinction in the present case. The motive on the part of defendants Nos. 2 and 3 (defendant No. 1 may be omitted from consideration) was to save defendant No. 1 from being prosecuted, and the consideration on the part of the plaintiff was refraining from proceeding with the prosecution. There is no other consideration, as the plaintiff practically admits, and omitting the compounding of the offence u/s 420, the plaintiff on being assured that the promissory notes will be passed, stated that he had no evidence to prove the charge u/s 406, Indian Penal Code, and the accused was consequently discharged for lack of evidence, In these circumstances I am unable to accept the argument of the learned counsel for the respondent that there is nothing on record to show that a non-compoundable offence was compounded. The result was to stifle the prosecution, which is what the law says one may not do. The effect is to defeat the provisions of the law, as the offence u/s 406 is not compoundable. Therefore, u/s 23 of the Indian Contract Act the consideration for the promissory notes is bad.

6. Turning to the cases, the first case on which the learned counsel for the appellant has relied is *Kessowji Tulsidas v. Hurjivan Mulji and Shamkuvarvahu* ILR (1887) Bom. 566 the facts of which are practically indistinguishable from those of the present case. One Hurjivan having misappropriated or having failed to account for certain moneys entrusted to him by the plaintiffs, they threatened criminal proceedings, and thereafter a woman who stood in the position of a mother to Hurjivan executed a promissory note, the consideration for which was the stoppage of the impending prosecution. It was held that the consideration was illegal. 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 securities, agree not to prosecute. He must not, however, by stifling a prosecution, obtain a guarantee from third parties. Of course it makes no difference whether the criminal proceedings have been actually instituted, as in the present case, or whether there is still only a threat of them, provided the consideration is the stopping of the criminal proceedings, whether actual or contemplated. To the same effect is *Dalsukhram v. Charles De Bretton* ILR (1904) Bom. 326 6 Bom. L.R. 73 where the plaintiffs sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable, and which were then pending between the parties in a criminal Court. It was held that the object of the agreement being to stifle a

prosecution, was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of law. The latest case of the Privy Council is Kamini Kumar Basu Thakur Vs. Birendra Nath Basu Thakur, where it was held that where it is an implied term of a reference to arbitration and a subsequent agreement executed to give effect to the arbitrator's award, that a criminal complaint for a non-compoundable offence would not be further proceeded with, the award and the agreement are invalid, as opposed to public policy and founded on an unlawful consideration, even though no prosecution within the meaning of the Code has in point of law been started : cf. also Majibar Rahman v. Muktashad Iiossein ILR (1912) Cal. 113 where it was held that it is contrary to public policy to compound a non-compoundable criminal case, and any agreement to that end is wholly void in law. None of the cases relied on by the respondent lay down a principle contrary to this. In Jai Kumar v. Gauri Nath ILR (1806) All. 718 there was a distinct finding that the promissory note was not for the purpose of stifling a criminal prosecution, and the case of Kessowji Tulsidas v. Hurjivan Mulji and Shamkuvarvahu ILR (1887) Bom. 506 was quoted with approval. In Onkar Mal v. Ashiq Ali ILR (1927) All. 540 it was held that a compromise, which is otherwise a fair and reasonable one, is not invalidated because in connection therewith a trifling charge of theft between the servants of the parties has been withdrawn. It was held there that one of the motives of the compromise may have been the withdrawal of the criminal case, but it could not be said to be the only motive. Dwijendra Nath Mullick v. Gopiram Gobindaram ILR (1920) Cal. 51 was one decided upon peculiar facts, and at p. 61 it is stated that if the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy. In that case it was held that the administration of justice was not taken out of the hands of the authorities. In the other case quoted by the learned counsel for the respondent, Sukhdeo Das v. Mangal Chand (1917) 2 P.L.J. 630 it was held that where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise. In all these cases, therefore, the principle laid down in Kessowji Tulsidas v. Hurjivan Mulji and recently by the Privy Council in Kamini Kumar Basu v. Birendra Nath Basu, namely, that the prosecution is not to be stifled by any private agreement between the parties, has been followed, and in any event we are bound by the decision of the Privy Council in Kamini Kumar Basu v. Birendra Nath Basu. The present case is a very clear case where the consideration for the agreement, i.e., the promissory notes, is the withdrawal of the prosecution, I am, therefore, of opinion that the consideration for the promissory notes in the present case being the compounding of a non-compoundable criminal charge, the agreement is void in law. The decree of the lower Court will, therefore, be reversed as far as defendants Nos. 2 and 3 are concerned, and the suit against them will be dismissed, although defendant No. 2 has not appealed. The respondent will bear the costs of defendant No. 3 in both Courts.

Shingne, J.

7. I agree. On the facts of the present case, the conclusion is inevitable that the consideration for the promissory notes in the present case was the compounding of a criminal charge which could not have been compounded. If so, u/s 23 of the Indian Contract Act, the consideration was unlawful and the promissory notes cannot be enforced against defendants Nos. 2 and 3. Reference may also be made to illustration (h) to Section 23, of the Indian Contract Act, 1872.

8. As to the principles deducible from decided cases, the following propositions can be laid down:-

Firstly, where the consideration for an agreement is a promise not to prosecute for an offence which is non-compoundable, the agreement is not enforceable at law.

Secondly. But this limitation on the freedom of contracts will only be enforced when it is quite clear that the consideration for the agreement was such an illegal promise as stated above.

Thirdly, a man to whom a debt is due may take securities for that debt from his debtor, even though the debt arises out of a non-compoundable offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties.

9. The first proposition is illustrated by the following cases :- Kessowji Tulsidas v. Hurjivan Mulji and Shamkuvarvahu ILR (1887) Bom. 566 Dalsukhram v. Charles De Bretton ILR (1904) Bom. 326 6 Bom. L.R. 73 Majibar Rahman v. Mukhtash Hossein ILR (1912) Cal. 113 Bani Ramchandra Salvi Vs. Jayawanti Govind Pandit, ; and the latest decision of the Privy Council in Kamini Kumar Basu Thakur Vs. Birendra Nath Basu Thakur, My learned brother has discussed most of these cases and I agree with his observations.

10. The first proposition is also illustrated by the English decisions in Jones v. Merionethshire Permanent Benefit Building Society [1892] 1 Ch. 173 Williams v. Bayley (1866) L.R. 1 H.L. 200 and Collins v. Blantern (1767) 1 Sm. L.C. 406 In Collins v. Blantern, for instance, it was agreed between Rudge the prosecutor, the plaintiff" in the action and five persons indicted for perjury, that the plaintiff should give the prosecutor Rudge his note for ₹.350 in consideration for not appearing to give evidence at the trial of the said charge and that the five persons should execute a bond to the plaintiff as indemnity for giving such note. The plaintiff gave to Rudge, the prosecutor, the note for ₹. 350 for not appearing as prosecutor and giving evidence. Thereupon the five persons executed the bond as settled. An action was brought on the bond. The Lord Chief Justice in delivering the judgment observed that one of the questions to be considered was (p. 409) "Whether it both not appear, from the facts alleged... that the

consideration for giving the bond is an illegal consideration ?" and while deciding the question His Lordship observed (p. 409):-

As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so as to him there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day ; the manner of the transaction was to gild over and conceal the truth ; and wherever the courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void ; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void ? They are both bad, the consideration for giving them being wicked and unlawful.

11. The second proposition stated above is borne out by the following cases:-Jai Kumar v. Gauri Nath ILR (1906) All. 718 Dwijendra Nath Mullick v. Gopiram Gobindaram ILR (1925) Cal. 51 Onkar Mal v. Ashiq Ali ILR (1927) All. 540 and Sukhdeo Das v. Mangal Chand (1917) 2 P.L.J. 630

In all these cases, the rule of law stated in the first proposition was accepted as correct, but on the peculiar facts of the cases it was held that the evidence did not justify the conclusion that the withdrawal of a prosecution for a non-compoundable offence was the consideration for the agreement sued upon in each of the cases. In Dwijendra Nath's case, mentioned above, Walmsley J. observed (p. 56):-

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.

Very soon after the decision in Dwijendra Nath's case, Walmsley J., sitting with another Judge, decided a case in which it was held that the agreement or ekrarnama put forth in the case was not made with the object of stifling the prosecution for non-compoundable offences, vide Birendra v. Basanta Kumar AIR [1926] Cal. 519 On appeal the Privy Council reversed the decision holding that the view taken by the High Court of Calcutta was wrong. This decision of the Privy Council is the one reported in Kamini Kumar Basu v. Birendra Nath Basu,

stated in connection with the first proposition, mentioned above. Out of the English cases illustrating the second proposition, reference may be made to *Flower v. Sadler* (1882) 10 Q.B.D. 572. It was held in that case that the evidence failed to disclose "even a vestige of an agreement to stifle a prosecution for felony." Cases of this kind are clearly distinguishable from the present case and my learned brother has discussed many of them in his judgment.

12. The third proposition is supported by the decisions in *Kessowji Tulsidas*" case and *Sukhdeo Das*" case. Vide also *Ward v. Lloyd* (1843) 7 S.N.R. 499

13. The present case is governed by the rule stated in the first proposition inasmuch as the consideration for the undertaking on the part of defendants Nos. 2 and 3 was the withdrawal of the criminal complaint in respect of a non-compoundable offence.

14. The result is that we must reverse the decree of the lower Court so far as defendants Nos. 2 and 3 go. Though defendant No. 2 has not joined in the appeal, we think that this is evidently a case where we should exercise our power under Order XLI, Rule 33. We, therefore, dismiss the plaintiff's claim so far as defendants Nos. 2 and 3 are concerned.

15. Plaintiff will pay the costs of defendant No. 3 both in this Court and in the lower Court. The rest of the decree of the lower Court is confirmed.