

(1938) 06 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Original Decree No. 183 of 1935

Sm. Durgesh Nandini Dassi

APPELLANT

Vs

The Bhowanipur Banking Corporation Ltd.

RESPONDENT

Date of Decision : 06-06-1938

Acts Referred:

Citation : (1938) 06 CAL CK 0005

Final Decision : Allowed

Judgement

Nasim Ali, J.—This appeal arises out of a suit which was instituted upon a mortgage bond. The facts which are necessary for the purpose of the present appeal are:

2. Kalidas, husband of the Appellant, and Jitendra, her eldest son had separate accounts in their names with the Respondent bank. They made overdrafts and became indebted to the bank for a large amount. A dispute arose between Kalidas and the bank in the 1024 about the sufficiency of the securities given by him to cover the overdrafts. This dispute was not settled.

3. In April, 1925, the bank started a criminal case against Kalidas, Jitendra and some other persons under secs. 406, 420 and 120B of the Indian Penal Code on the allegation that they entered into a conspiracy and defrauded the bank by withdrawing four lakhs of rupees on insufficient securities.

4. The Magistrate summoned the accused.

5. This case was adjourned from time to time on the application of the parties for compromise and was ultimately withdrawn on the application of the bank on June 29th, 1925. During the pendency of this criminal case, the dispute about the civil liability of Kalidas and his son to the bank was settled by arbitration. The father and the son were found to be indebted to the bank for rupees two lakhs ten thousand one hundred and fifty. Certain shares deposited by the debtors were sold. On June 27th, 1925, that is two days before the withdrawal of the criminal case, Kalidas executed in favour of the bank a mortgage bond for Rs.

1,53,963-4-7 ps. and the Appellant executed another mortgage bond for Rs. 30,000 in favour of the bank. In the mortgage bond executed by Kalidas and his son it was stated that the Appellant paid off Rs. 25,000 out of the consideration money received by her for the mortgage executed by her.

6. The present suit was instituted on December 17th, 1933, upon the mortgage bond, which was executed by the Appellant in favour of the bank on the 27th June, 1925.

7. The only substantial point argued in this appeal is that the bond in suit is not enforceable by law against her as she did not execute it out of her own free will for a lawful consideration and with a lawful object.

8. In the bond in suit it is stated that the Appellant received the entire consideration, namely, Rs. 30,000 in cash from the bank. The trial Judge has found that this amount was paid by the bank to the Appellant at the time of the registration of the bond before the Sub-Registrar, but a sum of Rs. 25,000 was taken away from her immediately afterwards by an officer of the bank, and paid back to the bank in satisfaction of a part of her husband's debt to the bank. This finding is supported by the evidence in this case and was not challenged before us by the learned Advocate appearing for the Respondent bank. It is also clear from the evidence that the balance, namely Rs. 5,000, was kept in deposit for payment of the costs incurred by the bank in connection with the two mortgages, and about a month later after deducting from this amount these costs, a sum of Rs. 2,662 was credited to the account which the Appellant had with the bank.

9. The position then is that though the consideration of the bond in suit purports to be a loan in cash taken by the Appellant from the bank, it was really a security for a part of her husband's debt to the bank, namely, Rs. 25,000. Exhibits 1 (d) and 4 (c) show that the negotiations for this bond proceeded upon this basis. The bond was taken for Rs. 30,000 as some money was necessary for meeting the costs of the two mortgages, which the bank had to advance as Kalidas was not in position to pay in cash. The exact amount of costs was not known at that time.

10. The Defendant was under no obligation to the bank. She did not benefit by the bond. Why did she then execute the bond?

11. The trial Judge held that the criminal case had no effect on Kalidas in settling his debt with the bank and consequently it had no effect on his wife. The Judge has relied on the statement of Kalidas in Exhibit 1, that there was no substance in the criminal case. This statement does not show that he was not alarmed by the criminal case. He was a pleader and a zemindar. Even if a false case is brought against a man he gets terrified. This is evident from the fact that before the criminal case he was not eager about the settlement of his dispute with the bank, but after the criminal case he wrote Exhibit 1 to the bank, expressing his willingness to have the dispute settled by arbitration. Again Exhibit 1 (c) shows that immediately after the amount of his debt was settled by arbitration, he asked the bank to withdraw the criminal case. He had no doubt a pre-existing

civil liability. There can be no doubt, as the trial Judge himself has said, that the criminal case brought about a speedier settlement or termination of the dispute about his civil liability. The criminal case, therefore, had some effect on Kalidas in bringing about the settlement of his debt with the bank. The Appellant was aware of this criminal case. The criminal case therefore had some effect on her also.

12. The trial Judge has observed that as a Hindu wife the Appellant was under no obligation to pay her husband's debt as far as it was possible for her. The learned Advocate for the Respondent said that this was a religious obligation. He also added that there was a moral obligation as well inasmuch as the properties mortgaged were purchased out of the sale proceeds of another property, which was purchased by her husband for her benefit. In this connection the learned Advocate drew our attention to certain statements contained in the plaint in a suit filed by her and her husband for a declaration of their right to the whole of the property mortgaged, although the purchase was in her name as well as in the names of the wives of the brothers of Kalidas. What happened to that suit is not known. Assuming that there was this religious and moral obligation, the fact remains that she is now repudiating this obligation in her old age.

13. The Defendant in her evidence says that three or four days before the execution of the bond in suit Nagen Babu, the manager of the bank, threatened her, saying that if she would sign the bond the criminal case would be withdrawn, otherwise there was a risk of her husband and son being sent to jail. She admits that she had no talk directly with Nagen Babu on that day, but Nagen Babu told this to her husband and she overheard this conversation from an adjoining room and that her husband also told her afterwards.

14. The story of threat is not corroborated by any evidence. Nagen Babu is dead. Many of her statements in her evidence are apparently not true. The story of threat, in my opinion, has not been substantiated by any reliable evidence.

15. Kalidas was alarmed at the criminal case. He realised that unless the security was given as demanded by the Plaintiffs, the criminal case would not be withdrawn. His properties were not sufficient or at least were not considered to be sufficient by the bank to secure the debt. This was his difficulty. His wife had properties. It is therefore, natural that he would inform her about his difficulties and would ask her to help him. It is also natural that in these circumstances she would come forward to save her husband and son from the criminal case. D.W.3, one of the sons of Kalidas and an Advocate of this Court, in his evidence stated,

My father told my mother that as the bank would still get Rs. 25,000 from me, it might withdraw the criminal case if you mortgaged your properties for that sum. My mother agreed to mortgage the properties according to my father's proposal as she was in terror.

16. Although this witness is interested in this litigation, I am not prepared to disbelieve him. The fear of the criminal case was the dominant influence under which the Defendant agreed to execute the bond in suit.

17. It was further contended by the learned Advocate appearing for the Plaintiff that even if the Defendant executed the bond for fear of the criminal case, this by itself was not sufficient to establish a promise by the bank to withdraw the criminal case. It was argued that while executing the bond she might have expected that the criminal case would be withdrawn, but the bank never gave her or her husband to understand that they would withdraw the criminal case.

18. It is, therefore, necessary to consider first whether there was any agreement or understanding with Kalidas about the criminal case. D.W.2, the pleader, who acted for Kalidas in the criminal case deposed that the case against Kalidas was withdrawn on compromise and that the compromise was that he should furnish security for the amount withdrawn and the criminal case would be withdrawn. He admitted in cross examination that the talk of compromise did not take place in his presence, but Kalidas said this to him and he mentioned it to the Magistrate. D.W.3 also said that it was settled that Kalidas would give security for the amount that would be found due by the arbitrator, and the criminal case would be withdrawn.

19. Now, if there was no such compromise or settlement as is stated by these two witnesses, why were the Plaintiffs getting the criminal case adjourned from time to time on the ground that it would be compromised or settled? Why did they keep the case pending till the two mortgage bonds were executed and withdraw it immediately afterwards? Much reliance was placed by the Plaintiffs upon the following extract from the minutes of the meeting of the directors of the bank, held to consider Exhibit 1 (c), the letter of the Defendant to the bank, asking the latter to withdraw the criminal case in accordance with the previous arrangement immediately after the arbitrator's award.

The directors cannot do anything about the criminal case. It is only his civil liability to the Bank which he wanted to settle by arbitration and the Directors agreed. But they can only say before the Court this that the liability of Kalidas Roy Chowdhury and his son has been fully adjusted with the Bank when Kalidas Babu makes payment of the sum decreed against him. He may make payment by selling his securities, shares and by paying the balance in cash or by mortgaging properties of the value equal to twice the amount of the balance of security for payment of the same at 9 per cent per annum with half-yearly rest. The Bank is not prepared to take a conveyance from him of the properties proposed by him but the bank is ready only to purchase from him such properties in which the bank has half share and Kalidas or his son has half share at the present market value when in the manner aforesaid Kalidas Babu has paid off the decree under the award against him, then alone the Bank will be in a position to consider that his debt has been adjusted.

20. Though this resolution begins by denying any arrangement about the criminal case it ends by saying that after the debt of Kalidas is adjusted in the manner indicated therein, they would say before the criminal Court that the liabilities of Kalidas and his son had been adjusted. This suggests that there were

some sort of arrangement or understanding between the parties about the criminal case. If the arrangement was that they would only make a statement before the Magistrate about the settlement of Kalidas's civil liability that would not save Kalidas and his son from the criminal case. What is to happen after such a statement is made before the Court? Will the Plaintiffs thereafter proceed with the case or adduce evidence in the case? The resolution is silent on this point. Why was the silence? It was apparently to make it appear in the proceedings of the meeting of the directors that there was no agreement to stifle prosecution but they were prepared only to place the matter in the hands of the Court. The object of the directors was to avoid in writing any statement on the basis of which the award or the security taken later on could be attacked on the ground of illegality, although the real intention of the directors was that if the dues of the bank were adjusted in the manner indicated by them, they would not proceed with the case or give any evidence in the case, with the result that the accused would be discharged. This is evident from Exhibit A (1), a petition which was filed on behalf of the bank in the criminal case on the 29th June, 1925, that is only two days after the debt of Kalidas was adjusted to the satisfaction of the directors of the bank.

21. That Kalidas also understood the real intention of the directors to be so is evident from the fact that inspite of this resolution he agreed to adjust the debt in the manner indicated in the resolution.

22. I, therefore, hold that there was an arrangement or agreement between the parties that the criminal case would be withdrawn if the dues of the bank from Kalidas and his son were adjusted to the satisfaction of the bank. I have already found that the bond in suit, though ostensibly drawn up as for consideration paid in cash, was in reality a part of the scheme of adjustment of her husband's debt with the bank.

23. The Plaintiffs knew that although the Defendant was under no obligation to them and was not to be in any way benefited by the transaction, she was going to take upon herself the obligation of paying Rs. 30,000 to the Plaintiffs. What then was the object of the Defendant in executing the bond, it was evidently to save her husband and son from the criminal case. The withdrawal of the criminal case was therefore the only condition on which she executed the bond. Why did the bank accept the bond? They did not dissent. They did not intimate to the Defendant that they took it for a different purpose or upon a different term or condition. P.W. 1, the Assistant Manager of the bank, stated in his deposition that there was no understanding with the Defendant that the criminal case against her husband and son would be withdrawn on her executing a mortgage bond. He, however, admits that he had no talk with the Defendant about the criminal case. He does not say that he told the Defendant that the criminal case would not be withdrawn on her executing the bond. The formality of payment of Rs. 30,000 in cash before the Sub-Registrar was also no indication that the bond in suit was accepted for a different purpose or upon different condition or term as

both parties knew this to be a subterfuge to conceal the real nature of the transaction. The bond in suit therefore given and accepted on condition that the criminal case would be withdrawn. The object or purpose of the bond in suit was, therefore, to drop the prosecution for non-compoundable offence.

24. The learned Subordinate Judge was in doubt as to whether the withdrawal of the criminal case amounted to stifling prosecution. He was of opinion that the bank might have been advised honestly to proceed against Kali-das and his son. But they gave up the case against them as they found later on that the charge against them did not lie. The evidence of P.W. 1 is that the case was withdrawn as the bank failed to get adequate evidence. I do not believe this evidence. There cannot be any doubt from the facts and circumstances of this case that the bank did not adduce any evidence and withdrew the case as there was an agreement or understanding that it would be withdrawn after the debt of Kalidas and his son had been adjusted.

25. If the case was a true one, the Plaintiffs made a trade of felony so far as the Defendant in this suit was concerned, as she was under no obligation to them and received no benefit under the bond in suit. If it was a false one, the bond was extorted from her.

26. The purpose or object of this bond was, therefore, illegal. The bond, therefore, is not enforceable by law and is void.

27. It was admitted by the learned Advocate appearing for the Defendant that the sum of Rs. 2,662 which was credited to the Defendant's account in the bank was withdrawn by the Defendant subsequently. The question, therefore, is whether the Defendant is under an obligation to refund this amount to the Plaintiffs. Sec. 65 of the Indian Contract Act provides:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

28. This section deals with (a) agreements, (b) contracts. Every promise and every set of promises form the consideration for agreement. An agreement the object of which is unlawful is not enforceable and is void. An agreement enforceable by law is a contract. Sec. 65, therefore, deals with agreements not enforceable by law, and agreements enforceable by law. If an agreement was not enforceable by law for unlawful consideration or object, it was not a contract at all and cannot be said to be a contract, which becomes void within the meaning of this section. Again an agreement for unlawful consideration is void ab initio. It cannot be said that such an agreement is an agreement discovered to be void within the meaning of this section, if both the parties knew at the time when it was made that the object of the agreement was illegal. I am inclined to think that sec. 65 does not apply where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In the absence of any

other section in the Indian Contract Act, the best guide is the rule of English law on this point. The general rule of English law is that money paid under an unlawful agreement cannot be recovered back. The principle underlying this rule is that persons who have entered into a transaction forbidden by law must not expect any assistance from law. The matter has thus been put by Lord Mansfield :--

The objection, that a contract is immoral or illegal as between Plaintiff and Defendant, sounds at all times very ill in the mouth of the Defendant. It is not for his sake, however, that the objection is ever allowed: but it is founded in general principles of policy, which the Defendant has the advantage of, contrary to the real justice, as between him and the Plaintiff, by accident, if I may so say. The principle of public policy is this *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise *ex purpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes: not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. So if the Plaintiff and Defendant were to change Bides, and the Defendant was to bring his action against the Plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio Defendantis*.

29. The test for the application of this rule is whether the Plaintiff can make out his claim otherwise than through the medium of the illegal transaction to which he himself was a party.

30. From the circumstances of this case it is clear that at the time when the bond in suit was given and accepted, both the parties knew that its object or purpose was illegal. The sum of Rs. 2,662 paid under the bond cannot, therefore, be recovered back.

31. The result, therefore, is, that this appeal is allowed, the judgment and decree of the Subordinate Judge are set aside, and the suit is dismissed. In view of the facts and circumstances of this case I direct the parties to bear their own costs throughout this litigation.

Henderson, J.

32. The suit out of which this appeal arises was instituted by the Plaintiff bank in order to recover money said to be due on a mortgage bond, which was admittedly executed by the Defendant. Various defences were taken at the trial which have now been abandoned. Before us the substantial point pressed in support of the appeal was that the contract cannot be enforced, firstly, because the Defendant gave her consent under coercion, and secondly because it was against public policy.

33. There is now no dispute about the actual disposal of the sum of Rs. 30,000,

which is said to be the sum advanced on the bond. Rs. 25,000 was credited towards the deduction of the over-draft account of the Defendant's husband. Rs. 2,338 was credited to the bank on account of the costs incurred by them in connection with the execution of the two mortgages: the small remaining balance was eventually taken by the Defendant herself. In my opinion, the defence that the Defendant gave her consent under coercion within the meaning of sec. 15 of the Indian Contract Act cannot be successfully maintained. Such a contract is not void but voidable. In the present case, however, after the threat had been removed by the withdrawal of the criminal case, the Defendant actually receive part of the consideration in cash. In these circumstances she must be held to have ratified the contract.

34. The defence that the contract is against public policy is based on the Defendant's allegation that the consideration which she received was the withdrawal of a non-compoundable criminal case, which had been instituted by the bank against her husband and her eldest son. There is ample authority for the proposition that such a consideration is unlawful, and I only propose to refer to the decision of their Lordships of the Judicial Committee in the case of *Kamini Kumar Basil Thakur v. Birendra Nath Basu Thakur* 34 C.W.N. 489 (P.C.) (1930). Dealing with this question Sir Binod Mitter who delivered their Lordships' judgment, observed as follows:

If it was an implied term of the reference that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration for the reference is unlawful.

35. On behalf of the bank Mr. Chakravorty contended that before this defence can succeed the Defendant must prove that the charge was a true one. It would clearly lead to great practical inconvenience if a Judge presiding over a Civil Court were compelled to decide the guilt or innocence of a person who had never been tried by the criminal Court under circumstances in which the prosecutor would endeavour to establish the innocence of the accused, while in many cases the accused himself might be tempted to run the risk of proving his own guilt. In the "case to which I have just referred their Lordships certainly never came to any such finding: nor was such an issue even raised:-- " If the accused person is innocent, the law is abused for the purpose of extortion; if guilty the law is eluded by a corrupt compromise screening the criminal for a bribe." If the law on this point were otherwise, it would almost certainly soon become a dead letter.

36. In support of this contention Mr. Chakravarty relied upon a decision of this Court in the case of *Rameshwar Marwari v. Upendranath Dos Sarkar* 29 C.W.N. 1029 (1925). The fact there was that the Defendant never even showed what the criminal charge in question was, and there was no evidence to establish whether it was compoundable or non-compoundable. This decision, therefore, gives no support to Mr. Chakravarty's proposition.

37. Our decision must, therefore, rest upon our determination of a question of

fact whether the case set up by the Defendant is true. Such a question of fact must always be difficult in cases of this kind when parties at the time will endeavour to conceal the real nature of the transaction. It is more than usually difficult in the present case when both sides have given false evidence.

38. Briefly, the material points at issue are these:--According to the Plaintiff the Defendant's motive was to pay her husband's debts: According to the Defendant it was to save him and her eldest son from the risk of conviction on a serious criminal charge. According to the Plaintiff the consideration which she received was the credit of a sum of money to her husband's account in the bank, the payment of the costs incurred by the bank in connection with the mortgages and a small balance in cash: according to the Defendant the consideration she received was the dropping of the criminal case. In the present case the Defendant was under no sort of obligation to the bank, and owed them nothing: Hence if the Plaintiff's case with regard to this matter is false, the Defendant's must be true: at any rate I for my part can see no other explanation of the admitted facts.

39. I agree with my learned brother that the Defendant herself is an unreliable witness. She undoubtedly has not told the truth on the question whether she understood what she was doing, and the question whether the deed was properly attested. She was also guilty of glaring prevarication about her signature on the application for a loan. It would, therefore, be impossible to rely upon her evidence unless it is corroborated aliunde. But in my opinion the circumstantial evidence proves that her version with regard to these relevant matters is the true version.

40. I will deal first with the question of motive. The learned Subordinate Judge accepted the Plaintiff's contention and said this,

AS a Hindu wife it was natural for her to pay off so much of her husband's debt as she could and she did this after adequate consideration and out of her own free will.

41. Now, every day the Courts have to deal with cases in which wives endeavour to assist their husbands in evading payment of their debts by giving evidence in support of benami transactions. This is the first case of the present kind that has ever come before me. The reason is not far to seek. When a wife is able and willing to pay her husband's debts, she does so and such transactions naturally never come before the Courts at all.

42. The very fact that the present case has come before the Courts emphasises the most important point that actually the Defendant has paid nothing at all. If she had been desirous of paying her husband's debts in so far as she could, she could have sold her property and used the proceeds for that purpose. If she was not prepared to go so far as that, she might have made payments out of the income of the property, and she could most certainly have credited to the bank the sum which she actually received in cash in connection with this transaction.

She has in fact done none of these things. On the contrary she is now using her utmost endeavours to escape paying anything. Hence there is no escape from the conclusion that, if it be the duty of a pious Hindu wife to pay her husband's debts, the Defendant at any rate is not a pious wife in that sense of the term.

43. Then again if the Plaintiff's case were true, the first step would have come from the Defendant herself. As soon as she was informed by her husband of the existence of this debt she would have approached the bank and told them that she was willing to discharge it to the utmost of her ability. That nothing of the kind was done in the present case will appear from the following facts.

44. On the 22nd July, 1924, Kalidas wrote a letter to the bank from which it appears that the position taken by the bank was that, inasmuch as the securities deposited by him were not sufficient to cover his over-draft, immediate action must be taken by him to regularise the matter. Kalidas disputed this proposition and said that he was not willing to make any suggestion. He demanded a verified list of his securities actually in the bank's custody, and he suggested that he was entitled to compensation on account of the failure of the bank to realise some of these securities before they depreciated. That was the position at the beginning of the negotiations. (Vide Exhibit 1

45. On the first April, 1925, the bank instituted a criminal case under secs. 406, 420 and 120B, I.P.C. against Kalidas, his eldest son and others. The Magistrate immediately issued summons. On the 15th April the case was adjourned on the ground that there was a talk of compromise.

46. The tone of Kalidas then completely changed. On the 26th April he wrote another letter, (vide Exhibit 1) to the bank. He protested complete confidence in his own innocence, but at the same time he offered to go to arbitration. At a meeting of the directors held on the 27th this proposal was accepted and the arbitrator eventually gave his award on the 14th of May. [Vide Exhibit 2 (b)]. He found that Kalidas was indebted to the extent of Rs. 1,54,650, and his son Jitendra to the extent of Rs. 55,500. He also held that Kalidas would be responsible for this latter sum jointly and severally with his son.

47. That being the result of the arbitration, it became necessary for Kalidas to make what arrangement he could for payment. He accordingly wrote to the bank two days later [vide Exhibit 1 (c)]. He informed them that he had no money, and he made certain proposals for the discharge of his liability. He incidentally referred to an arrangement made between him and the bank that the criminal case would be withdrawn.

48. The directors held a meeting that very same day [vide Exhibit 4 (b)]. They made certain other counter-proposals, but made it quite clear that they could only accept a mortgage upto 50 per cent of the value of the property so transferred.

49. Kalidas replied on the 20th [vide Exhibit 1 (d)]. He was unable to do what

the bank had suggested, and made other proposals. The directors held another meeting on the 22nd to deal with this matter. They decided that the shares in custody of the bank must be immediately sold regardless of the state of the market. The balance must be paid either in cash or secured by mortgages. They further intimated that suitable arrangements must be made without any delay.

50. Inasmuch as Kalidas's property was insufficient to satisfy the conditions imposed by the bank, a complete impasse in the negotiations was reached. It was only then that the Defendant appeared on the scene for the first time on the 24th of June with a request to the bank for a loan of Rs. 30,000 for herself. There was no reference in the application to or suggestion of a proposal that she would use the money to discharge her husband's liabilities. Her application was assented to. The whole transaction was then rushed through in the most extraordinary way and the two mortgages were actually executed only three days later.

51. It is thus abundantly clear that there was nothing spontaneous in this matter about the Defendant's action. When Kalidas was unable to provide the bank with the security which they demanded, they must have told him that something must be done in the matter. I have, therefore, no doubt that the Defendant's evidence that the proposal came from the bank and not from herself is perfectly true.

52. Again although the Plaintiff suggests a desire on the part of the Defendant to discharge her husband's debts, I have already shown that in fact she has paid nothing. Apart from the admission made by her in the mortgage bond itself, the Plaintiff has not proved anything to suggest that she ever did or said anything which would evince a desire on her part to pay this debt. In these circumstances in my opinion her evidence with regard to the motive which influenced her must be accepted as true.

53. I now pass to the question of the consideration. On the Bank's version I am satisfied that the consideration was entirely illusory. It is true that her husband was credited with a sum of Rs. 25,000 in the books of the bank. But the directors had already decided that this was a bad debt. Kalidas himself had no money and was unable to give them such security as they demanded. Thus in crediting him with this sum they did themselves no harm and him no good. It was in fact a mere paper transaction.

54. There remains the small sum which was advanced to her later on in cash. It is, however, clear that it was not part of the original intention of the parties that she should receive anything in cash. The whole of the sum of Rs. 30,000 was taken away from her house by the officers of the bank as soon as the Sub-Registrar had left. This is perfectly natural conduct on their part. They would certainly not have allowed such a large sum of money to remain with the Defendant and her husband when there was a risk that they might spend it for other purposes, in which case the position of the bank would be worse. In my

opinion the learned Subordinate Judge was quite right when he found that the story of the bank with regard to this matter is false. It is thus abundantly clear that it was not the intention of the bank that the Defendant should ever touch a penny of this money. Important evidence in this connection has been given by defence witness No. 3, the Defendant's son, when he said this, "The bank people said that they would deduct Rs. 25,000 on account of my father's dues and would keep the balance for the deduction of the costs of execution and registration of that document." I accept this evidence as true and the only reason why the Defendant eventually got something in cash was that the actual costs in connection with the execution of the mortgages were less than had been anticipated.

55. In my opinion these facts taken together show that the consideration suggested by the Plaintiff is nothing at all.

56. On the other hand it cannot be disputed that the consideration alleged by the Appellant was actually received. The case was withdrawn at the very first hearing after the execution of the mortgage. The result is, while the consideration suggested by the bank is purely imaginary, that suggested by the Defendant is an actual fact.

57. It remains to consider whether the proposal for this consideration came from the bank. In the circumstances it must be so. It could hardly be suggested that if the bank were insisting that the prosecution must go on to the bitter end, regardless of what Kalidas might or might not do, Kalidas would himself invent a false story that the bank would withdraw the case provided his wife gave them a mortgage of this property. That the proposal did in fact come from the bank is, in my opinion, proved by their own conduct.

58. The evidence to which I have referred shows that, perhaps not unnaturally, the directors of the bank were far more anxious to get their money than to bring the accused persons to justice. As soon as the Magistrate became difficult in the matter of granting adjournments, Kalidas was informed that he must take action quickly, and the final transactions were rushed through in the manner to which I have already adverted. As soon as the mortgages were executed, the case was withdrawn against Kalidas and his son but was allowed to proceed against the other accused. It is, therefore, perfectly idle to contend, as it was contended on behalf of the bank, that the prosecution of the criminal case was entirely divorced from the transactions in connection with the mortgages.

59. Then again there is the extraordinary manoeuvring,--Dr. Basak described it in his opening as "stage management,"--to which the bank thought it necessary to resort, in order to carry through what, after all, must have been an extraordinarily simple transaction. The natural way would have been for the Defendant to offer herself as a surety and mortgage her property as security. Instead of this simple and obvious course, a solemn farce was enacted. The Defendant applied for a loan, as though she required the money for herself. The

money was actually brought in notes to the Defendant's house in order that it might be shown to the Sub-Registrar, and was immediately afterwards taken back again to the bank. The very fact that proceedings of this sort were considered necessary shows that the directors of the bank were well aware of the fact that they had something to conceal.

60. It was suggested that the case might have been compromised by some officious subordinate behind the back and without the knowledge of the directors. No such case was made or suggested at the trial. In fact the bank's case then was that the criminal case was an entirely separate transaction. The directors were undoubtedly nervous about their position and were holding frequent meetings in connection with the various stages of this negotiation. It is absurd to suppose that in such circumstances a subordinate would take upon himself the responsibility of taking such a serious step. No director has been put into the witness box to swear that the directors were not responsible for the compromise and I have no doubt that this suggestion is entirely without foundation.

61. There are two features in the evidence which appear to support the Plaintiff's case. In the first place there is the recital in the mortgage bond itself: But as was said by Sir Binod Mitter, "In a case of this description it is unlikely that it would be expressly stated in the deed that a part of its consideration was an agreement to settle criminal proceedings." But apart from that, the recitals themselves are undoubtedly peculiar. It is stated that the Defendant thought it her duty to free her husband from his debts as far as possible. It is further stated that she required some money for her own personal needs. There is no reference to the precise proportion of the Rs. 30,000 which is to be allocated to the discharge of the husband's debt. It seems to me incredible that in circumstances such as these, the bank would have been willing to advance her any money at all for her own personal needs. I have shown above that in fact this statement was false. It was not the intention of the bank that she should receive anything. This recital was therefore, put in order to disguise the real nature of the transaction, and no importance can be attached to it.

62. Then there remains the resolution of the directors made on the 22nd May to which my learned brother has specifically referred. The position then was that they were dealing with a letter from Kalidas which stated that there was an agreement that the prosecution would be dropped. They obviously had to say something about it, and they could not possibly record officially that they were entering into an unlawful contract.

63. Actually, however, this resolution is inconsistent with the bank's own conduct both before and after it. At the very time when it was passed, the bank had already informed the Magistrate that proposals for compromise of the criminal case were going on. Subsequently the terms of this resolution were not carried out. The complainant bank did not inform the Magistrate that the liabilities of the accused persons, Kalidas and his son, had been fully adjusted, and then leave it to the Magistrate to proceed with the case and frame a charge or discharge the

accused, as he might see fit. On the contrary the Magistrate was informed that these accused persons had made up their differences with the bank and that the bank did not desire to proceed further with the case and would not adduce any evidence. The terms of this petition show that the evidence given at the trial to the effect that the prosecution was dropped for want of evidence is a subsequent concoction.

64. Apart from this resolution everything goes to show that the chief anxiety of the directors was to recover their money and that they used the criminal case as a weapon to extort terms. As soon as those terms were extorted, the weapon was laid aside. I have, therefore, no doubt that the resolution does not represent the real intention of the directors, but was recorded in such terms solely for the purpose of creating evidence.

65. I agree with my learned brother that in the circumstances of this case, the Plaintiff is not entitled to recover the sum actually advanced under the provisions of sec. 65 of the Indian Contract Act. It has been made plain that the bank were well aware of the fact that they were making an illegal contract, and they did everything they could to conceal its real nature. I therefore, agree that this appeal must be allowed, and the Plaintiff's suit dismissed.