

The Bhowanipur Banking Corporation, Limited - - - - - *Appellants*

v.

Sreemati Durgesh Nandini Dasi - - - - - *Respondent*

FROM

THE HIGH COURT OF FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 23RD JUNE, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* LORD ATKIN]

This is an appeal from a decree of the High Court of Judicature in Bengal which reversed a decree of the Subordinate Judge in favour of the present appellants, the plaintiffs in the suit. The suit was to recover a sum due upon a mortgage bond executed by the respondent and for the usual relief in a mortgage suit in default of payment. The bond reciting that the husband of the mortgagor was indebted to the bank in the sum of Rs. 1,78,965 and that the mortgagor desired to reduce his debt by borrowing money by mortgage of her own property, provided that the mortgagor borrowed from the bank Rs. 30,000 and mortgaged to them the immoveable property there stated. The plaintiff alleged that no part of the principal or interest had been paid. The defendant by her written statement set up a number of defences such as that she was a purdanashin lady and was not fully advised of the nature of the bond, that she was coerced into executing it, that it was not duly executed or attested and that she did not receive the consideration money. All these defences were negatived by the trial judge and nothing further has been heard of them. But the defence remained which was also rejected by the trial judge but accepted by the High Court and is the question in issue in the present appeal. It was that the mortgage bond in question was given as part of the consideration for a promise by the bank to withdraw criminal proceedings against one Kalidas the mortgagor's husband. If established this would plainly afford a defence under s. 23 of the Indian Contract Act. The law in regard to agreements to stifle prosecutions is reasonably clear. The Board were referred to the various considerations set out at length in the well-known judgment of Vaughan Williams, J., in *Jones v. Merionethshire Permanent Building Society* in [1891] 2 Ch. 597. The learned judge is in fact doing nothing more than considering the elements that go to the making of a simple contract, for it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. It is of course impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Vaughan Williams J. inadvertently says "must be cognisant of the crime." Proof that there has actually been a crime committed is obviously unnecessary. But it is also of course necessary that each party

should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

It is not difficult to apply these principles to the facts of the present case. Kalidas the defendant's husband was a vakil of the High Court. He had been employed as legal adviser of the plaintiff's bank: his brother Taradas had been manager: a nephew Birendra was a clerk in the bank. Kalidas and his son Jitendra had accounts with the bank, and apparently had been allowed overdrafts against security. In 1924 the bank discovered that both Kalidas and Jitendra had been allowed to overdraw far beyond the value of their securities. They suspended the manager, and began to require payment from Kalidas without much apparent result. On April 1st 1925 the bank commenced criminal proceedings against Taridas, Kalidas, Jitendra, Birendra and one Parindra also a nephew of Kalidas and a customer of the bank, charging them with conspiracy to cheat and defraud the bank of 3 to 4 lakhs of rupees. There were apparently other concurrent proceedings against the three accused other than Kalidas and his son Jitendra; but the nature of these was not fully explained. The order sheet of the Magistrate is significant.

Secs. 120B, 420, 408 and 406 I. P. C.

- 1-4. Summon accused under section 120B, 420, 408 and 406 I. P. C. for the 6th.
- 6-4. Accused appear. They will give P. R. of Rs. 2,000 each, date 15th April.
- 15-4. There is a talk of compromise. Date 24th April.
- 24-4. Parties want time. Date 29th April.
- 29-4. Case adjourned to 4-5 at the request of both parties, on which date either the P. Ws. to be produced or the case settled. Accused as before.
- 18-5. To Mr. I. J. Cohen for favour of disposal.
- 18-5-25. Parties not ready. Application for adjournment filed, put up on 1st June 1925. Accused as before.
- 1-6-25. The complainant puts in a petition for time. To 15th June 1925 for the last time (illegible) Accused as before.
- 15-6-25. Accused Kalidas Roy Chowdhury is reported to be ill m. c. filed and application for adjournment filed. To 29th June 1925 for the last time (illegible). Accused as before.
- 29-6-25. The prosecution puts in a petition saying that under circumstances stated thereon they do not offer any evidence. Accused discharged under Section 253 Cr. P. C.

Now while these proceedings were being adjourned after the "talk of compromise" on April 15th negotiations were proceeding between the bank and Kalidas initiated by a letter of April 26th in which he states that though there is no substance in the criminal proceedings he is willing to place for settlement the dispute about the liabilities of his son and himself in the hands of an arbitrator. He suggests certain names and "hope that the matter would thus be speedily brought to termination." The bank are now pressing. On April 27th they accept the proposal for arbitration as the arbitrator is willing to arbitrate expeditiously in a week or so, but the matter must be placed before the arbitrator by the 29th without fail. If the submission was not signed by the 29th the

reference "would stand automatically cancelled." The submission was signed on April 30th: and on May 14th the arbitrator made his award that Rs. 1,54,650 was due from Kalidas and Rs. 55,500 from Jitendra for which Kalidas also was liable. On May 16th Kalidas makes proposals for paying his liabilities by transferring to the bank all his securities and conveying to the bank certain named premises. "I have already told you that I have no cash money to pay. I am willing to execute an agreement pending the completion of the necessary documents of transfer, and in the meantime as arranged before the criminal case against us will be withdrawn." The bank obviously cannot let this last statement remain unanswered. "The directors cannot do anything about the criminal case. They deny that there was any arrangement with him about his 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 and his son has been fully adjusted with the bank when Kalidas makes payment of the sum decreed against him." They go on to say that the suit can only be adjusted by payment or by mortgaging properties of value double the amount for which they are the security. On May 20th Kalidas for the first time suggests that he may give the bank a property with a net income of Rs. 7000 a year, which was in fact the property the subject of the present suit. The bank reply on May 22nd that they will take the property in mortgage as security for such portion as it is worth. They add the significant sentence "For the balance Kalidas Babu, if he wants a settlement, must make arrangement without delay." Negotiations as to the mortgage of the property in question must have commenced after this, for on June 27th the defendant first appears on the scene by signing on the bank form a proposal for the mortgaging of the property in suit which states that the title deeds have been already supplied, and states the amount required as Rs. 30,000. At this date the criminal proceedings stood adjourned from June 15th to June 29th "for the last time." On June 25th the draft mortgage prepared by the bank was sent to the defendant and on June 27th it was executed, and registered. 30,000 rupees was handed to the defendant, 25,000 was paid by her husband to the bank in respect of his debt on the same day: and as found by the judge Rs. 5,000 was retained by the defendant until July 25th, when it was paid into the bank on her behalf by Jitendra. Of this sum Rs. 2338 was retained by the bank for the costs of the mortgage and another mortgage of the same date by her husband: and the balance was drawn in different sums by the defendant over the next 2 or 3 months. As has been said the mortgage was completed on June 27th, the criminal case having been adjourned to June 29th for the last time. On that date a petition was presented to the Court on behalf of the Bank as follows:—

In the Court of the Honorary Magistrate, Alipore.

Prokash Chandra Bose,

versus

Kalidas Rai Chowdhury and others

Section 420/120B I. P. C.

The humble petition of Prokash
Chandra Bose complainant abovenamed.

Most respectfully sheweth:—

That in the above case Babu Kalidas Roy Chaudhury and his son Babu Jitendra Kumar Roy Chaudhury have made up their differences with the Bank and have voluntarily made arrangements for the payment of the monies due from them.

That the other three accused persons are undergoing trial in the Court of the Police Magistrate Alipore and a charge under Section 420/120B I. P. C. has been framed against him along with other charges and there is no necessity for another trial.

That your petitioner therefore does not desire to further proceed with the case or adduce any evidence.

Your petitioner therefore prays that your honour will be pleased to discharge the accused.

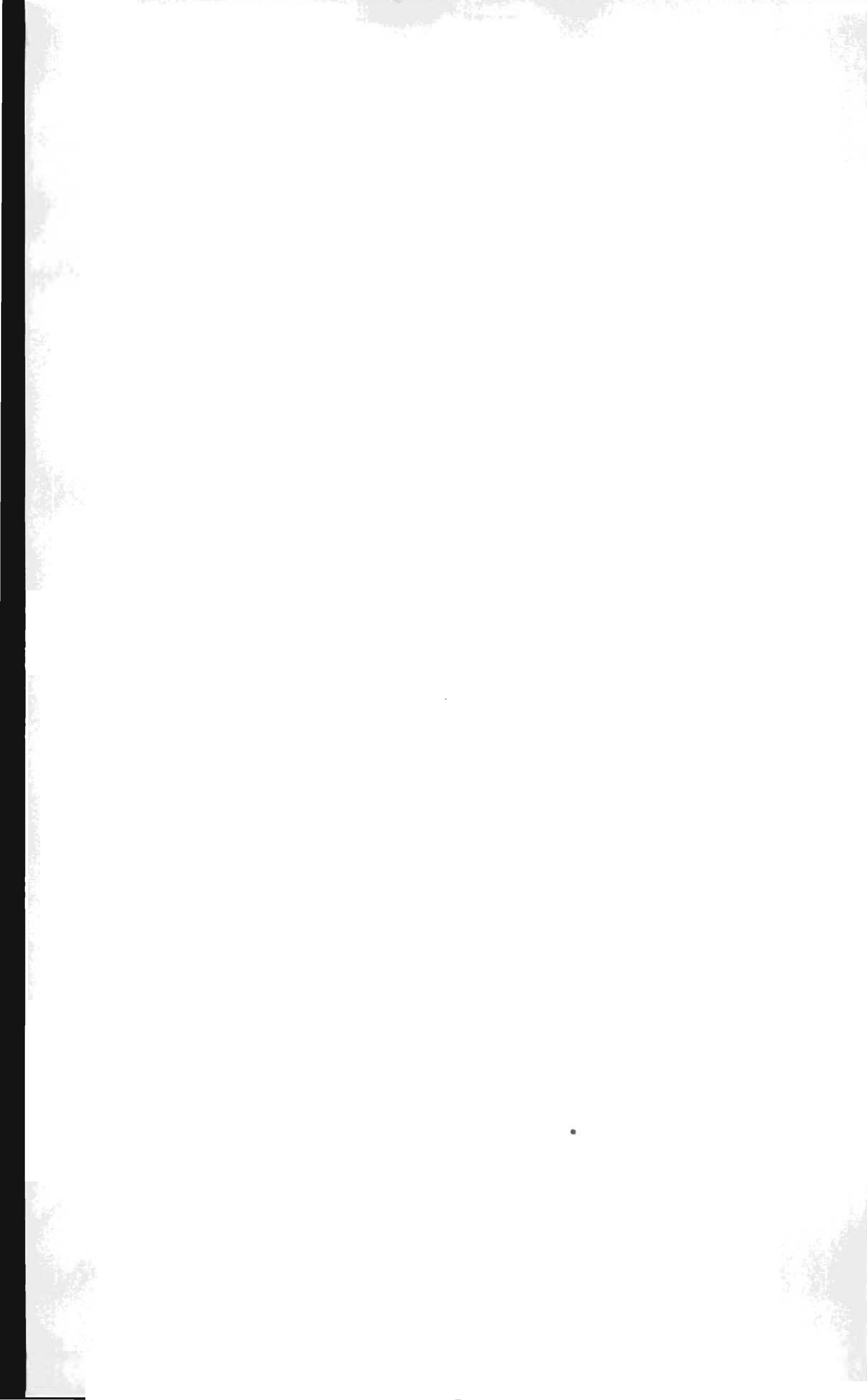
And your petitioner, as in duty bound, shall ever pray.

Alipore—29-6-25.

It is difficult to see what more cogent proof there could be of an agreement to stifle a prosecution. "The accused" "have made arrangements for the payment of the moneys due from them." . . . "Your petitioner therefore does not desire to proceed further with the case." The reason why this petition is in this ingenious form, and was acceded to by the Magistrate is probably that suggested by the Chief Justice in his judgment in the similar case against Kalidas which is also under appeal. The accused were charged under sections 120B, 420, 408, and 406 of the Indian Penal Code. As the Chief Justice said, "section 120B is the offence of conspiracy to commit a criminal offence and is not compoundable. Section 406 is an offence to commit a criminal breach of trust and is not compoundable. Section 408 is the offence of criminal breach of trust by a clerk or servant and is not compoundable. Section 420 is the offence of cheating by dishonestly inducing the delivery of property and is, with the permission of the Court before whom the prosecution for such offence is pending, compoundable by the person cheated (section 345 C.P.C.). It may be due to inadvertence, or it may not be, that the petition for the discharge of the accused mentioned section 420 but not sections 406 and 408. In any event the accused were discharged in respect of all the offences not merely section 420 but also sections 120B, 406 and 408 which are non-compoundable." The case therefore seems to be one in which the prosecutors have plainly stated that they have compounded a non-compoundable offence: and it cannot be disputed that part of the terms of composition was the mortgage given by the defendant. But the evidence does not rest there. The defendant and her son Satyendra both give evidence that the defendant was told by her husband that there were criminal proceedings pending and that the mortgage was for the purpose of having them withdrawn. It is true that they are both unreliable witnesses in that some of their evidence as to the payment of the consideration, the facts of the execution and other matters are untrue. But this only means that a statement made by such a witness cannot be relied on unless supported by independent evidence. When the bank state before the Magistrate that there is talk of compromise, take adjournments obviously to arrange the compromise, make a compromise which includes taking the mortgage in question, and then ask to withdraw the case because of the compromise there seems little doubt that the lady and her son were in this respect telling the truth. It was contended that even if the illegal agreement with Kalidas were proved, yet there was no reliable evidence that the wife knew of the criminal proceedings, and that she would have come to the relief of the husband merely to discharge the civil debt. Their Lordships must not be taken to accede to the view that even on this state of facts the wife's security obtained by the husband to effectuate his unlawful agreement would not be invalidated. But from the facts of this case the knowledge of the wife seems an irresistible inference. Their Lordships therefore agree with the decision of the High Court, though they do not follow the reasoning of one of the learned judges that the money consideration to the wife was illusory. It was real enough: but it was not the only consideration. They desire also to point out that the learned Subordinate Judge has attached undue weight to the fact that here there was a debt really due from Kalidas. In this class of case that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence.

Their Lordships will humbly advise His Majesty that this appeal be dismissed.

The respondent having relied on an infringement of public policy has successfully maintained on appeal her contention: and is entitled to her costs of this appeal.



In the Privy Council.

THE BHOWANIPUR BANKING
CORPORATION, LIMITED

v.

SREEMATI DURGESH NANDINI DASII

DELIVERED BY LORD ATKIN

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