

CALCUTTA HIGH COURT

Rameshwar Marwari

Vs

Upendranath Das Sarkar

(E Greaves, C.J. Mukerji, J.)

30.04.1925

JUDGMENT

Mukerji, J.

1. This appeal arises out of a Suit instituted by the plaintiff for recovery of a sum of Rs. 7,662-8-0 due on an instalment bond executed by the defendant on the 13th May 1899, in favour of the plaintiff and his deceased brother, Ram Kumar Marwari. The suit has been dismissed by the learned Subordinate Judge and the plaintiff has, thereupon, preferred this appeal. The execution of the bond was not denied by the defendant in his written, statement but several objections were taken by him as to why the plaintiff should not be granted a decree on the bond. Apart from the objections of a formal nature, the first objection was that the bond was not executed by the defendant out of his free will; the second objection was that the sum of Rs. 18,051 that was mentioned in the bond as being the amount for which the defendant had been found liable on adjustment of accounts was not really due to the plaintiff as the accounts has not been properly adjusted and the third objection was that the bond had been executed by the defendant at a time when there was a case of a criminal breach of trust pending against him at the instance of the plaintiff and the bond was executed, because it was stipulated that if it was executed the criminal case would be withdrawn. These objections were substantially dealt with by three of the issues that were framed in the suit, namely, Issues Nos. 6, 7 and 8., The learned Judge in his judgment has taken up all these" issues together. He has found that there was no proper adjustment of accounts. He has also found that the plaintiff and his brother took the law into their own hands and force the defendant to execute the bond and that the defendant executed the bond under pressure of a criminal prosecution. In dealing with the case as he has done it seems to me that the learned Judge has not kept in view the distinction between the different lines of defense upon which the defendant relied for the purpose of avoiding the liability under the bond. I propose to deal with these defences separately.

2. Taking the last one first, namely, as to whether the bond was executed for a consideration or object which was unlawful, that is to say, as having been entered into with a view to stifle a criminal prosecution and so, as being opposed to public policy, it appears to me that the facts that are necessary to be established in order to bring the case under Section 23 of the Indian Contract Act have not been established in the present case. The defendant has not produced any of the papers relating to the said criminal case. An application was filed on his behalf asking for time in

order to enable him to file copies of the proceeding in that case, and time was granted to him for that purpose. Thereafter, nothing further was done and all that appears upon the record with regard to this matter is the oral evidence of the defendant himself which is to the effect that Ram Kumar, the plaintiff's brother, and one Srilal instituted a case against him for criminal breach of trust and warrant of arrest was issued against him and that he, therefore, executed the bond in order to get rid of the criminal case. He says further that as he executed the bond the criminal case was withdrawn. He admits in cross-examination that he received no summons in connection with the criminal case and also that no warrant of arrest was served upon him' but that there was a search for his khatas in the house in which he lived. This is all the evidence on the side of the defendant. On the other hand, the witness examined on behalf of the plaintiff proved that Ram Kumar did not institute the criminal case. This witness, however, was not in a position to say whether any of the other partners instituted the case. Now in order to show that the object of the agreement was to stifle the criminal prosecution it is necessary to prove that there was an agreement between the parties, express or implied, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, and that the contracting parties should enter into a bargain to that effect. This is what was laid down in the leading case of *Collins v. Blantern*¹ and other cases, amongst which reference may be made to those of *Keir v. Leeman*² and *Williams v. Bayley*³ On the particular facts of the case before us it will have to be shown that there was really a criminal case in respect of a non-compoundable offence pending at the time when this agreement was entered into and it will also have to be shown that one of the objects for which this agreement was entered into was to stifle the prosecution in that case. It cannot be said that these facts have been established in the present case. As is well-known the same transactions may give rise to a civil as well as a criminal liability and an agreement to settle a dispute amicably will not be invalid unless the object of the agreement is to stifle a criminal prosecution. This rule enunciated in the cases to which I have referred has been adopted in our Courts as well. See *Rai Charan Purkait v. Amrita Lal Gain*⁴

3. Then as to the question whether the document was executed by the defendant out of his own free will. In this connection reference must be made to the provision of Section 14 and also, upon the facts of the present case, to Sections 15 and 16 of the Indian Contract Act, because the consent in the present case is said to have been vitiated by coercion and undue influence. The learned Judge has found that the defendant had been forced and coerced to execute the bond. He has come to this conclusion upon the evidence that was before him to the effect that the defendant was threatened by the plaintiff's brother that the criminal case which had already been instituted against him would not be withdrawn. Now these facts, even if established, would not bring the case within Section 15 of the Contract Act, which defines coercion. As regards undue influence the contract would be vitiated if it has been induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. It is, however, urged that there are facts from which this domination of the will may be justly presumed. We have been referred to certain circumstances for the purpose of coming to the conclusion that the case comes within subs. (3) to Section 16 of the Contract Act. These circumstances are that although the defendant was only a partner to the extent of 1/3rd share in the business, yet by the bond he acknowledged a liability to the extent of Rs. 18,000 or Rs.

19,000, which, it is stated is much in excess of the amount for which he was really liable. It has also been stated that the stipulation in the bond for payment of interest on default of payment of any of the instalments as well as other stipulation with regard to stock-in-trade show that the transaction was an unconscionable one. As I have already stated the defendant himself was examined in the case; but in his examination-in-chief I do not find that he made the least attempt to make out a case of undue influence at all. In cross-examination he states that at the time when the bond was executed the matter was settled by one Devendra Nath Ghose, who is apparently an independent man and coal merchant and also by his own eldest brother one Prem Chand Sarkar. The terms of the bond may be considered to be stringent but there is no reason to suppose that the bargain was an unconscionable one. I am, therefore, of opinion that it has not been proved that there was any undue influence in consequence of which the defendant was made to execute this bond. So long as there is no agreement not to prosecute, and as I have said, there are no materials in this case upon which it may be held that there was such an agreement, there is nothing to prevent a creditor from taking a security for the payment of his debt, even if the debtor is induced to give the security by a threat of criminal proceedings: *Flower v. Sadler*⁵ and *Jai Kumar v. Gauri Nath*⁶

4. The argument advanced before us to the effect that there was no proper adjustment of liabilities does not commend itself to me inasmuch as I am unable to find that there was either coercion or undue influence or want of free consent for any other reason which may be taken to have vitiated the transaction. Unless the bond can be impugned on that ground the admission made by the defendant himself as to his liabilities must be taken to be binding on him

5. For these reasons, I am of opinion that the judgment of the learned Subordinate Judge cannot be supported and that it should be set aside and that a decree should be entered in favour of the plaintiff for a sum of Rs. 7,662-8-0 with interest pending the suit at the rate of six per cent, per annum.

6. The plaintiff appellant will be entitled to his costs in this Court and in the Court below.

Ewart Greaves, J.

7. I agree.

Cases Referred.

1(1765) 1 Sm. L.C. (11th Ed.) 269 : 3 Wils. K.B. 342 : 95 E.R. 847

2(1846) 9 Q.B. 371 : 15 L.J.Q.B. 360 : 10 Jur. 742 : 115 E.R. 1315 : 72 R.R. 298

3(1866) 1 H.L. 200 : 35 L.J. Ch. 717 : 12 Jur (N.S.) 875 : 14 L.T. 802

45 Ind. Cas. 98 : 11 C.L.J. 131

5(1883) 10 Q.B.D. 572

628 A. 718 : 3 A.L.J. 506 : A.W.N. (1806) 213