

# CALCUTTA HIGH COURT

Sudhindra Kumar Rai Chaudhuri

Vs.

Ganesh Chandra Ganguli

(Derbyshire, C.J.)

04.08.1938

## JUDGMENT

### **Derbyshire, C.J.**

1. This is an appeal from a judgment of the Subordinate Judge of the 24-Parganas in Title Suit No. 124 of 1935 wherein the learned Judge found for the plaintiffs and decreed the sale of a certain property under a mortgage. The facts are stated as follows by the learned Subordinate Judge in his judgment: Defendant 1 had a half share in premises No. 1 Pudmapukur Lane and 46 Lansdowne Road; his mother Jaikali had a right of maintenance from and Residence in the same properties. On 22nd September 1916, they mortgaged their interest in the properties to Kalidas Roy Chowdhury for L 10,500 and on 16th February 1919, they executed a second mortgage in his favor for Rupees 1350. The mortgages were taken by Kalidas Roy Chowdhury in the benami of one Girindra Nath Mitra, who executed a deed of release in favor of Kalidas. From their dues to the plaintiff Bank, Kalidas and his-son Jitendra, defendant 3, executed in favor of the plaintiff Bank a bond on 27th June 1925, sub-mortgaging the above mentioned two mortgages. By partition the interest of defendant 1 and Jaikali was restricted to schedule 'kha' properties of the plaint. They executed a third mortgage in favor of Upendra Nath Kundu, the father of defendants 6 to 11 and a fourth mortgage in favor of defendant 12. Jaikali died leaving behind defendants 1 and 2 as her sons and heirs and Kalidas died leaving defendants 3 to 5 as his sons and heirs. The plaintiff Bank alleged that their claim exceeds L 50,000 but after remission they claimed only L 23,700.

2. Defendants 6 to 11 and defendant 12 filed two separate written statements denying knowledge of the plaintiff's allegations and, in case of a decree, praying for recovery of L 2000 and L 3000 respectively from the surplus sale proceeds. These defendants however did not appear at the trial. Defendants 3 to 5 pleaded inter alia that the plaintiff Bank brought a non-compoundable criminal case against Kalidas and Jitendra and that the case was com. promised or withdrawn on condition of Kalidas and Jitendra submitting to arbitration and executing the mortgage bond dated 27th June 1925 and that that bond was accordingly void and unenforceable. The learned Judge found that, having regard to the facts and circumstances, the debt in satisfaction of which the bond in suit was executed was a genuine one and existed previous to the criminal case and that the bond in suit was valid and enforceable in law. He therefore made an order for sale. Against that decision the appellants, defendants 3, 4 and 5, namely Jitendra, Sayendra and Sudhindra, all sons

of the said Kalidas, deceased, have appealed.

3. The question for decision in the case is whether the mortgage bond in question is invalid and unenforceable by reason of the alleged agreement to compromise a non-compoundable criminal charge. Kalidas Roy Chowdhury was a pleader whose brother Tara Das Roy was the Manager of the Bhowanipore Bank. Two nephews of Kalidas and Taradas, namely Birendra and Parendra, were employed in the Bank and Kalidas was the legal adviser of the Bank. Kalidas and Jitendra, it is common ground, had been speculating in shares and for that purpose had over-drawn their accounts at the Bank without, it is alleged, having given proper security. This had happened previous to 1924 and had been the subject of discussion between the Bank and the Chowdhuris. From 1st April 1924 onwards, the settlement of the claims between Kalidas Roy Chowdhury and the Bank was discussed between the parties. On 1st April 1924, Kalidas wrote to the Bank asking to discuss the matter with the Directors. On 22nd July 1924, Kalidas wrote to the Bank about the securities of his that they held and asked for a complete list thereof. On 29th August 1924, the Bank wrote to Kalidas enclosing a docquet of Kalidas's account and asked him to sign it. The docquet was as follows:

I have examined my account with the Bhowanipore Banking Corporation Ltd., Calcutta, as per Bank Pass Book showing balance of Rupees 2,42,700-7-11 only due by me as at 30th June 1924 which is correct.

4. Kalidas did not sign that docquet. On 11th September 1924, Kalidas wrote to the Bank in reply to a letter of theirs dated 8th September 1924, in which he claimed that he was entitled to get from the Bank a sum of L 31,048 and alleged that the Bank was not entitled to sell his securities. On 15th September 1924, Kalidas wrote to the Bank again repeating that he was entitled to get L 31,048 from the Bank as on 30th May, and asking for an interview with the Bank authorities. On 8th November 1924, the Bank directors met and passed a resolution relating to an arbitration which, it is alleged, Kalidas had suggested to one of the directors, Mr. Surendra Nath Mullick; they nominated an arbitrator and suggested the names of umpires in case of difference and requested Kalidas to choose either of the named gentlemen as umpire; they also stated that the reference included also the matter of his son Jitendra's indebtedness.

5. On 19th November 1924, Kalidas wrote a letter without prejudice; the prejudice has apparently been waived. On 25th November 1924, the Bank wrote to Kalidas pressing for the arbitration to be proceeded with and asked for a reply "before Saturday next" stating definitely whether he was willing to go to arbitration and if so before whom. There is no recorded reply to that letter, and nothing further appears to have been done by either party until 5th March 1925, when the Bank forwarded another docquet to Kalidas setting out that he owed them L 2,51,817-6-7. On 9th March 1925, Kalidas wrote to the Bank as follows:

I am in receipt of your letter of 5th March 1925 being No. 171/L and in reply I would refer you to my letter to you dated 15th September 1924 as reply to it.

6. The letter of 15th September, referred to stated that they owed him L 31,000. It is evident that on 9th March 1925, the parties were disputing about the state of accounts between them; the Bank was pressing for arbitration to settle the matter, whilst Kalidas took up the position that the Bank owed him L 31,000. Kalidas appeared to be evading a submission to arbitration and there

was a deadlock. There is no suggestion in the correspondence up to this time that Kalidas or his son had been guilty of any criminal offence. On 1st April 1925, Prokash Chandra Bose, the Assistant Manager of the Bank, preferred a petition of complaint against (1) Tara Das Rai Choudhuri, (2) Kalidas Rai Choudhuri, (3) Jitendra Kumar Rai Choudhuri, (4) Birendra Kumar Rai Choudhuri and (5) Parendra Chandra Ghosh, which purported to be under Sections 406/120. B and 420, I.P.C. The petition set. out that Prokash was the Assistant Manager of the Bank, that Tara Das was the Manager of the Bank till he was suspended as from 27th August 1924, that Kalidas was the elder brother of Tara Das, that Jitendra was the son of Kalidas and that Birendra and Parindra were the nephews of Taradas and Kalidas. It also alleged that Kalidas was the legal adviser to the Bank and Birendra was a clerk, that when Tara Das was appointed Manager, Kalidas executed a security bond for him and that Tara Das did the same when Birendra was appointed. The petition went on to allege that Kalidas, Jitendra and Parindra indulged in extensive speculation in the share market; that the Choudhuri family having secured effective control of the working of the Bank and the passing of cheques, entered into a criminal conspiracy to bring about the commission of the offences of criminal breach of trust under Section 406, I. P. C, and cheating under Section 420 and that in pursuance of the conspiracy the accused persons drew large sums of money on overdraft on altogether insufficient securities by means of cheques which were passed under the orders of Tara Das. The petition went on to allege that in this way the accused persons defrauded the Bank to the extent of about L 4,00,000, and that the directors, when they learnt of this fraud, suspended Tara Das and "had the accounts carefully examined".

7. The petition prayed for warrants to be issued against the accused persons under the above mentioned Sections of the Penal Code. The matter came before Mr. Abdul Gafur, a Police Magistrate at Alipore on 1st April 1925 and Prokash gave evidence alleging that the accused had committed the above offences, that he was the Assistant Manager of the Bank, and had the permission of the directors to institute the case. Summons against all the accused were granted. On 6th April, the accused appeared before Mr. Abdul Gafur and were ordered to give P. R. of L 2000 each and the matter was adjourned until 15th April. The next piece of evidence which is relevant is that of Jitendra at the trial. Kalidas was dead at the date of the trial but Kalidas and his son Jitendra appear to have been concerned together in the matter which led to the giving of this mortgage.. Jitendra said (at p. 53 of the paper-book):

The overdraft was in connexion with share business. My father bought and Bold shares. In 1924 there was correspondence with father and the Bank for settling the dues and liabilities. The Bank said that it was to get money from father and father said he was to get money from the Bank. Ultimately in 1925, the plaintiff Bank brought a criminal case against me, father and others with a view to put pressure on us to come to a settlement The Secretary then was Nagendra Nath Banerji. Four or five days alter the criminal case he came to father and said that there had been such a case and if he would agree, the matter might be settled by reference to arbitration if father would pay the amount the arbitration (?) may be due to the Bank father agreed. There was the reference to arbitration and there was award....

8. The evidence does not state whether Jitendra was actually present when the Bank Secretary made the statement to Jitendra's father. Presumably, the evidence would not have been recorded

by the Sub-ordinate Judge unless it were legally admissible, and so presumably Jitendra was present and heard what Nagendra said. There was no cross-examination on this piece of evidence and Nagendra was dead at the time of the suit trial. Jitendra further said (at p. 54 of the paper-book):

After Nagendra Babu had spoken about the compromise, father took Chandra Babu to Babu Surendra Nath Mallik who was then a Director of the Bank. After that Nagendra Babu came again and said that if reference to arbitration were agreed upon and if the money to be found due according to award were received, the criminal case would be withdrawn. Then a deed of reference was drawn up by Bank and sent to us and we signed it. The arbitrator was Amarendra Nath Bose. He made the award....

9. The next piece of evidence relevant is that of Chandra Bhusan Banerji, witness 1 for the defendant, given before the trial Judge in the suit. Mr. Banerji is an advocate and knew Kalidas. He says in his testimony:

"One evening he" (i.e. Kalidas), "came to me and said" should I go to jail while you are here? I asked him what was the matter and he said that the Bank had started a criminal case against him. I said I was not concerned with the bank in any way and took him to late Babu Surendra Nath Mallik who, it is my idea, was a Director of the bank and requested him to save Kalidas anyhow. Leaving him with Surendra Mallik, I came away. I can't say what talk passed between Kalidas and Surendra Babu. Surendra Babu is dead. . .

10. This witness does not give the date of this call from Kalidas or the call on Mr. Mallik, but it is obvious that it took place soon after the criminal proceedings were started. It is obvious also that an appeal was made by both Mr. Banerji and Kalidas to Mr. Mallik, Director of the Bank (also a lawyer), about the criminal case.

11. On 15th April 1925, the date fixed for the accused to appear before the Magistrate, there is this note in the Magistrate's order sheet: There is a talk of compromise. Date 24th April. The Magistrate would not have said that there was a talk of compromise unless there had in fact been some such talk in his presence. Such talk could only have been that of one or both of the parties or their advocates. The bank has not called any witness to deny that there was such talk. I can only infer that the parties-the bank and Kalidas and Jitendra - were at this time (15th April) discussing a compromise of the criminal proceedings. On 24th April, when the matter again came before the Magistrate, he recorded "parties want time. Date 29th April." It is interesting here to note that Jitendra in his evidence (at p. 53 of the paper-book) says: "Till compromise we, both sides took time from the Criminal Court to compromise." On or before 25th April, there was, as appears from the bank resolution of 27th April referred to below, a discussion between Kalidas and the bank representative with regard to the differences between them. I will discuss the evidence as to what transpired later. On 26th April Kalidas wrote to the bank as follows:

In continuation of my previous correspondence with you I beg to state that although the bank has started a criminal proceeding against me and my son Jitendra Kumar Rai

Choudhury, I know that there is no substance in it. I am yet willing to place for settlement the dispute about the liabilities of my said son and myself to the bank in the hands of an arbitrator. If the bank has no objection to the appointment of Babu Amarendra Nath Bose, Vakil, High Court, or Babu Nagendra Nath Banerjee, Public Prosecutor, Alipore, as arbitrator in the matter, I would suggest their names and hope that the matter would thus be speedily brought to a termination.

12. On 28th April 1925 the bank wrote to Kalidas as follows:

Dear Sir,

A copy of a resolution passed by the Board of Directors at their meeting held on Monday the 27th instant is given underneath for your information and necessary action.

Yours faithfully,  
N. Banerjee,  
Secretary.

## **RESOLUTION**

The Directors have received an application from Babu Kalidas Roy Choudhury for the settlement of the claim of the bank as against him and his son Jitendra K. Roy Chowdhury. It appears that he is willing to refer the matter to arbitration of Babu Amarendra Nath Bose, Vakil, High Court. On Saturday last the Directors at a full meeting of the Board considered the matter informally at the request of Babu K.D. Roy Choudhury and thought that the matter could be referred to the arbitration of either Mr. H.D. Bose or Mr. B.L. Mitter or Rai Bahadur Kailash Ch. Bose or Babu Tarak Nath Chakarberthy or Babu Amarendra Nath Bose as Babu Kalidas is willing to refer the matter to the arbitration of Babu A.N. Bose and as the gentleman is willing to arbitrate and do so expeditiously in the course of a week or so the Directors hereby resolved:

That the matter be submitted to the said Babu A.N. Bose for his decision as arbitrator appointed both by the bank and Babu K.D. Roy Chowdhury on behalf of himself and his said son. It is further resolved that the bank and Babu K.D. Roy Chowdhury execute a proper deed of reference to the arbitrator for his decision and that the Secretary forthwith prepare an abstract of the accounts of Babu Kalidas Roy Chowdhury and his said son and also a statement of claims on behalf of the bank for submission before the said arbitrator and that the matter be placed before the said arbitrator by Wednesday the 29th instant without fail. It is further resolved that if Babu K.D. Roy Chowdhury fail to execute the said joint deed of reference to the arbitrator on or before the 29th instant, then this resolution referring the matter to the said Babu Amrendra Nath Bose for his decision would stand automatically cancelled. The cost of the arbitration will be borne by Babu Kalidas Roy Chowdhury.

N. Banerjee

13. It is clear from the resolution that the bank directors met on Saturday 25th April to consider

"informally" the request of Kalidas that the matter should be referred to arbitration and that that request must have been made on or before 25th April. From 9th March there had been no letter from Kalidas referring to the dispute with the bank, before the one cited above of 26th April. Therefore Kalidas must have had talks with the bank directors or their representative about the differences with them before he wrote his letter of 26th April.

14. On this point the evidence of Sudhindra Nath Basu, a pleader, and acting for the present defendants, is interesting. Sudhindra was called by the bank at the trial. He said (at pp. 44 and 45 of the paper-book):

Plaintiff bank brought a criminal case against Kalidas Babu. Bank withdrew the case. Kalidas Babu executed a mortgage bond in favor of the plaintiff bank during the pendency of the criminal case. There was reference to arbitration and award both during the pendency of the criminal case. I can't exactly say why there was the reference to arbitration because I was asked by Kalidas to walk out while he had talk with Nagendra Babu, who was then the Secretary of the Bank. This took place on several occasions in Kalidas Babu's room in his own house. This talk took place during the pendency of the criminal case. It was after these talks that I came to know that there was reference to arbitration. After the award there was the mortgage by Kalidas Babu in favor of the bank and after the mortgage the criminal case was withdrawn. I had to visit Kalidas Babu every morning in his house.

15. It is clear that the talks that Sudhindra refers to were just before the reference to arbitration. Budhindra appears to have been the adviser of Kalidas about this time. Why was he excluded from the talks Kalidas had with the Bank's Secretary? I can only infer that there was something that Kalidas wished to keep secret as between himself and the Bank. That could not be the simple reference to arbitration. Had it been so, Kalidas would surely have been glad to have the assistance of another lawyer in determining the conditions and terms of the reference. It must be remembered that Kalidas, the Chairman of the Bank, and Mr. S. N. Mullick, the Director of the Bank above referred to, were all lawyers and so was Sudhindra. The lawyers would know the difficulties and dangers of a bargain to compromise any offences which are not compoundable. That may be, and I think was, the cause of the secrecy of the meetings between Kalidas and the Bank's Secretary. When Kalidas wrote the above letter of 26th April to the bank proposing arbitration, he made no reference to the interview that he had had with a representative of the bank. Why this omission? The omission is explained if in that interview there had been a talk between him and the bank representative about compromise of the criminal proceedings.

16. The letter of 26th April mentioned the criminal proceedings, but made no direct suggestion that the prosecution should be withdrawn if arbitration- was agreed to. Yet between the lines the inference is there. It is difficult to see why Kalidas and Jitendra should agree to an arbitration of this kind with a criminal charge hanging over their heads, unless the criminal charge was to be withdrawn. The bank's resolution states that Mr. A.N. Bose was "willing to arbitrate and do so expeditiously in the course of a week." The bank must have ascertained that from Mr. Bose. They had gone to the trouble of ascertaining that Mr. Bose would deal with the matter very expeditiously. If it were an ordinary arbitration and nothing more than the ascertainment of the

amount of the liabilities of Kalidas and Jitendra, what was the need for this expedition? I do not suggest anything against Mr. Bose in this matter. I think he played the part of an arbitrator and nothing more. The concluding part of the resolution records:

If Babu Kalidas Roy Chowdhury fail to execute the said joint deed of reference to the arbitrator on or before 29th instant, then this resolution referring the matter to the said Babu Amarendra Nath Bose for his decision would stand automatically cancelled. The cost of the arbitration would be borne by Babu Kalidas Roy Choudhury.

17. The cancellation of the deed of reference would defer the ascertainment of the debt which the bank said that Kalidas owed them; that would be to the advantage of Kalidas, but not to the advantage of the bank. I can only infer that the cancellation of the arbitration meant and the bank intended it to mean that in that event the criminal proceedings would go on. The 29th April was the date fixed for the adjourned hearing of the criminal proceedings. Kalidas got the bank's letter of 28th April containing the resolution of 27th April, on 28th April and asked the bank to send a draft copy of the deed of reference "so that the same may be executed by tomorrow." Kalidas did not get the deed that day and on the next day, 29th April, he wrote again to the bank sending his own draft for their approval and a rupee for stamp and asking for it to be approved and returned to him "for our signature as I am ready to do it." Kalidas was clearly anxious to comply with the bank's resolution. If there were nothing more than a submission to arbitration involved why should Kalidas be so anxious? The only inference is that he hoped to get rid of the criminal proceedings pending. Kalidas did not get the draft deed of reference on 29th April and on that day the adjourned criminal charge again came before the Magistrate who recorded as follows:

Case adjourned to 4th May at the request of both parties on which date either the P. Ws. to be produced or the case settled. Accused as before.

18. Evidently both Kalidas and the bank were trying to postpone the criminal proceedings, and again there was talk of a settlement; the Magistrate also was getting tired of the adjournments. Kalidas not having had the opportunity of signing the refer, once to arbitration on 29th April, the bank's resolution of 27th April stood "automatically cancelled." The bank directors met on 30th April and passed a resolution in general similar to that of 27th April with altered dates. The same day, 30th April, a deed of reference to arbitration was executed by the bank, and Kalidas and Jitendra appointing Mr. Bose as arbitrator. Mr. Bose was according to the deed, to make his award within seven days. On 1st May, Kalidas wrote a letter to the bank (at page 51, Part II of the paper-book) asking if Mr. Bose had fixed any time for a sitting and also asking for a line in reply. Kalidas was still anxious to get the arbitration proceedings completed. At this point I can only infer that the reference to arbitration was the result of and in return for a promise made by some one on behalf of the bank, either a director or Nagendra, the Secretary, that if Kalidas and Jitendra would agree to the reference and implement the award that would be made, the bank would drop the criminal proceedings. On 14th May, Mr. Amarendra Nath Bose made an award that Kalidas was to pay to the bank in liquidation of his debt L 1,54,650 and Jitendra L 55,500. On 16th May Kalidas wrote to the bank (at p. 55, Part II of the paper-book) referring to the award offering to pay the amount awarded against himself and his son by transferring to the bank all their securities at the bank and pay the balance by conveying certain real property to the bank. He concludes by saying:

... I have 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 ....

19. On the same day, 16th May, at 6.30 P. M, the bank directors held a meeting, the minute of which is as follows:

The letter of Babu Kalidas Roy Choudhurj dated 16th May 1925 being placed before the meeting resolved : 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 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 as security for payment of the same at 9 per cent. per annum with half-yearly rests. 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. It is clear from Kalidas's letter that he was contending that the bank promised to withdraw the criminal case if he made satisfaction under the award. It is clear too that the directors said that they could not do anything about the criminal case and they denied that there was any arrangement to withdraw it. I have given reasons above which support Kalidas's contention. Are they supported or diminished by what happened subsequently? On 18th May the file of the criminal proceedings was transferred from Mr. Abdul Gafur to Mr. I. J. Cohen, an Honorary Magistrate at Alipore. The record of the proceedings on that date is:

Parties not ready. Application for adjournment filed. Put up on 1st June. Accused as before.

21. From 26th May 'to 29th May Kalidas and Jitendra executed authorities in favorof the bank to enable the bank to sell the securities which Kalidas and Jitendra had deposited with them. They were therefore making efforts to satisfy the conditions laid down by the directors of the bank on 16th May, in respect of the satisfaction of the debt. On 1st June the criminal proceedings again came before the Magistrate who recorded this order:

The complainant puts in a petition for time. To 15th June 1925 for the last time. Accused as before.

22. It is evident from this that the bank authorities were still staying their hands in the matter of the criminal proceedings. The Magistrate was getting impatient. It must be remembered that at the same time the accused Kalidas and Jitendra were handing over their securities to the bank in settlement of their claims. It is difficult to resist the inference that the one act is connected with the other. From 1st June to 8th June and on 15th June also, Kalidas and Jitendra were again directing the bank to realize the further securities they held. On 15th June, when the criminal proceedings again came before the Magistrate, it was recorded:

Accused Kalidas Roy Chowdhury, is reported to be ill. Medical certificate filed and an application for adjournment filed. To 29th June 1925 for the . last time. Accused as before.

23. Kalidas was now applying for an adjournment. It is interesting to note that on 16th June, the day after this, Kalidas by a letter (at page 72, part II of the paper-book) authorized the Bank to realize certain shares of his in satisfaction of the bank's claim. On 19th June, both Kalidas and Jitendra authorized further realization of their securities. On 27th June, Kalidas and Jitendra executed the mortgage in question in favor of the bank and the mortgage deed was duly registered. The mortgage purports to be for the sum of L 1,53,965-4-7 stated to be the balance for which the mortgagees have been found indebted to the bank by Mr. Bose after crediting Kalidas and Jitendra with certain amounts paid or realized by sales of shares. The debts were stated in the mortgage to be the result of overdrafts on the bank. In the mortgage deed it is stated that the wife of Kalidas and the mother of Jitendra took a loan of L 30,000 from the bank by mortgaging her personal properties with them by a separate deed and paid Rupees 25,000 out of the same to the bank on account of the mortgagor's indebtedness. This twenty-five thousand rupees form part of the payments made in reduction of the amount awarded by Mr. Bose. Jitendra's evidence as to this (at page 53, part I of the paper book) is as follows:

Alter the award, my father and I executed one mortgage and as Nagendra Babu said that our mortgage was not sufficient, another was to be executed by mother and so mother also executed a mortgage. After that the criminal case was withdrawn.

24. Why should the wife of Kalidas mortgage her private property to the Bank and use part of the mortgage money to pay off her husband's debt except to relieve her husband of a very serious situation? If it had been to relieve him of the payment of a debt found due under an award she would not have done it. She would have kept her property for the use of herself and Kalidas later when Kalidas had parted with his property and they both needed something to live on. The sacrifice could only have been made to relieve Kalidas of the prosecution that was hanging over his head. Two days after the execution of the mortgage, Prokash Chandra Bose, the Assistant Manager of the bank and the complainant in the criminal proceedings, presented a petition to Mr. Cohen, the Honorary Magistrate at Alipore, before whom the proceedings were pending. It is headed:

Section 420/120-B, I.P.C., That in the above case Babu Kalidas Roy Chowdhury and his son Babu Jitendra Kumar Roy Chowdhury have made up their differences with the bank and have voluntarily made arrangements for the payment of the moneys 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 420/120-B, I.P.C., has been framed against them 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 honor will be pleased to discharge the accused....

25. The Magistrate recorded the following order on that date:

The prosecution puts in a petition saying that under the circumstances stated therein they do not offer any evidence. Accused discharged under Section 253, Criminal P.C.

26. It is to be noted that the petition of Prokash Chandra Bose asking for proceedings to be started was headed "Sections 406/120.B and 420, Penal Code". It is to be noted also that the summonses were issued under Sections 120.B, 420, 408 and 406, Penal Code. It is also to be noted that the petition of Prokash to drop the criminal proceedings is simply headed "Section 420/120-B, Penal Code".

27. Section 120-B 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 : see Section 345, Criminal 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 Sees. 406 and 408. In any event the accused were discharged in respect of all the offences, not merely Section 420, but also Sections 120-B, 406 and 408 which are non-compoundable. Finally, there are the words of the withdrawal petition, namely:

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

28. "The above case" (i.e., the words within inverted commas) is the criminal proceedings in which summonses had been issued at the instance of the Bank against Kalidas and Jitendra and the others under Sections 120-B, 406, 408 and 420, Penal Code. The Bank has never denied that Prokash had authority from it to start the criminal proceedings or to petition for their withdrawal. It is clear to me that Kalidas and Jitendra agreed (1) to submit to the arbitration, (2) to sell their securities and hand over the proceeds to the bank in the way they did, and (3) to execute the mortgage in question in return for a promise made by the bank through its Directors or Secretary that when there had been arbitration and satisfaction made and/or security given for the sum awarded, the bank would drop the prosecution. I find that such a promise was made by Nagendra to Kalidas on various dates in April, May and June 1925 when Nagendra visited Kalidas. I am further of opinion that the existence of the agreement aforesaid is to be inferred from and is implicit in the dealings between the parties as and from 15th April to the execution of the mortgage. The consideration for the submission by Kalidas and Jitendra to arbitration was, in my

view, the promise to drop the criminal proceedings. There were two considerations for the granting of the mortgage: (a) the promise to drop the criminal proceedings, and (b) the debt expressed in the mortgage deed to be owing by Kalidas and Jitendra to the Bank consequent on the award. To compound a charge of a non-compoundable offence is both opposed to public policy and forbidden by law, and so unlawful and therefore an agreement in which such compounding is either a consideration or an object is void: see Section 23, Contract Act. By Section 24, Contract Act, if any part of a consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

29. The operation of the law here is illustrated in the Privy Council case in *Kamini Kumar Basu v. Birendra Nath Basu*<sup>1</sup>, there were disputes between certain persons who claimed to have purchased certain land. A complaint to a Magistrate was made by one of the parties alleging that others had been guilty of uncompoundable offences in relation to the attempted or alleged purchase of the land; no summons was issued, but the complainant was directed by the Magistrate to prove his case. One of the parties charged suggested and procured a reference of the disputes to arbitration in which some of the disputants took part and an award was made. Later an ekrarnama in pursuance of the award was entered into between some of the parties to the award. The complainant put in a petition to the Magistrate alleging that his witnesses had been won over and also that the dispute was settled. On this petition the Magistrate dismissed the case under Section 203, Criminal P.C., for non-production of evidence. The plaintiffs in the suit (respondents in the Privy Council) claimed a declaration of title to a part of the land under the arbitration award and agreement (ekrarnama). The Subordinate Judge held that the reference to arbitration and the agreement were made to stifle a prosecution for a non-compoundable offence and were unenforceable.

30. The High Court held the award and agreement valid. The Privy Council set aside the decree of the High Court and restored the decision of the Subordinate-Judge. At page 121 of the report Sir Binod Mitter, in delivering the judgment, said:

The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful, and not whether any prosecution within the meaning of the Criminal Procedure Code had been started or dropped. If it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama as the case may be is unlawful, see *Jones v. Merionethshire Permanent Benefit Building Society*<sup>2</sup> and the award or the ekrarnama was invalid, quite irrespective of the fact whether any prosecution in law had been started.

31. Further at page 122:

<sup>1</sup> AIR 1929 PC 100 : AIR 1930 PC 100 : 1930-31-LW 811

<sup>2</sup>(1892) 1 Ch 173

In a case of this description it is unlikely that it would be expressly stated in the ekrarnama. that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful.

32. Before us in the present case it was contended that the mortgage was valid notwithstanding the agreement to compound a non-compoundable offence because there was still a pre-existing debt to support the mortgage as good consideration for it. That contention seems to me to ignore Section 24, Contract Act, and to be contrary to the language of the Privy Council above cited at p. 122 of the report. Moreover, in this case as the consideration for the submission to arbitration was unlawful, the award was invalid, and the "preexisting debt" rested upon and was determined by that invalid award. Under these circumstances such debt cannot, as I view the matter, be good consideration for the mortgage.

33. In my judgment both the award and the mortgage are invalid, and the judgment and decree of the Subordinate Judge must be set aside. There will be no order as to costs either in this Court or in the Court below.

### **B.K. Mukherjea, J.**

34. I agree with my Lord the Chief Justice in holding that this appeal should be allowed. The appeal is on behalf of defendants 3, 4 and 5 and it arises out of a suit commenced by the plaintiff bank for enforcement of a mortgage bond. The material facts may be shortly stated as follows : Defendant 1 was interested to the extent of 8 annas share in the properties described in Schedule (ka) to the plaint, and on 22nd September 1916 he executed a mortgage bond in favor of one Kali Das Roy Choudhury, predecessor of defendants 3 to 5, and hypothecated his interest in the said properties to secure an advance of L 10,500 only. His mother Joy Kali Debi who had a right of maintenance and residence in respect of the said properties, joined with him in the mortgage. Defendant 1 took a further loan of L 1350 from Kalidas, and as security for the same executed a second mortgage in respect of the identical properties in favor of the latter. Kalidas, together with one of his sons Jitendra who is defendant 3 in the suit, were indebted to the plaintiff bank for various sums of money, and they jointly executed a mortgage in favor of the bank on 27th June 1925, mortgaging inter alia the two mortgage bonds of defendant 1, to one of which his mother Joy Kali was also a party. By subsequent partition with their co-sharers, defendant 1 and his mother got the properties described in schedule (kha) of the plaint exclusively in their share. The mother died later on and her heirs are defendant 1 himself and defendant 2. Kali Das is also dead and his heirs are defendants 3, 4 and 5.

35. The plaintiff bank has commenced this suit as a sub-mortgagee of Kali Das, for recovery of money due on the first mortgage bond, by sale of the properties described in schedule (kha) which are owned by defendants 1 and 2. Defendants 3, 4 and 5 were impleaded as parties defendants, as it was considered desirable that the suit should be decided in their presence. The suit was contested principally by defendants 3, 4 and 5 and their contention in substance was that the mortgage bond, executed by Kali Das in favor of the Bank was void and unenforceable under Section 23, Contract Act, inasmuch as the consideration for the bond was the stifling of a non-compoundable criminal case, which was proceeding between the bank on the one hand and Kalidas and his son on the other. The decision in the case really hinges on this one point. The trial Court decided the point in favor of the plaintiff and against the defendants and decreed the plaintiffs' suit. It found on evidence that though one of the motives of the executant in executing the bond in suit might have been the withdrawal of a criminal case that was pending between the parties at that time, yet that was not the consideration of the bond; the real consideration was the debt that was found by the arbitrator, chosen by Kali Das himself, to be due by Kali Das and his

son to the plaintiff bank. The Sub-Judge accordingly was of opinion that the bond was valid and enforceable in law, and did not come within the mischief of Section 23, Contract Act.

36. The propriety of this view has been challenged by Dr. Bysak who appears for the appellant before us. He has contended in the first place that as according to the findings of the Sub-Judge himself, the criminal case was purposely kept hanging till the adjustment was made and the money payable was duly secured, the object of and at least a part of consideration for the transaction was the withdrawal of the criminal case, and as such the bond was tainted with illegal consideration and was not enforceable in law. He has argued further, that the fact that there was a pre-existing civil liability does not really alter the nature of the contract and make it enforceable in law, if the object was to stifle a criminal prosecution. To appreciate these contentions it would be necessary to refer briefly to the material evidence that has been adduced by the parties in support of their respective cases.

37. It is admitted that Kalidas and his son Jitendra had dealings in shares, and both of them had overdraft accounts with the plaintiff Bank. A brother of Kalidas was the manager of the Bank, and he himself was their legal adviser. Both the father and the son had taken overdrafts for considerable sums of money, and they were taken on the security of certain shares which were deposited with the Bank. It appears from the evidence that from the beginning of the year 1924, the Bank authorities suspected, rightly or wrongly, that Kalidas by taking advantage of his position in the Bank had overdrawn money much in excess of what could reasonably be covered by the shares deposited by him. There was also dispute as to accounting between the parties, and Kalidas did not admit the correctness of the figures at which the Bank assessed his liability in respect of the overdrafts. As early as the first of April 1924 we find Kalidas writing a letter to the Bank (Ex. 5-b) asking them to fix a time and date for settlement of his affairs; and on 22nd July 1924 he stated in another letter (Ex. A-6) that as the price of shares had gone up, the Bank need not have any apprehension on the score of the securities being insufficient.

38. On 29th August 1924, the Bank sent a docquet to Kalidas (Ex. B-4) intimating that his overdraft account showed a sum of L 2,42,714-7-11 as being due by him to the Bank, on 30th June 1924. Before this intimation reached Kalidas, he had already written a letter to the Bank (Ex. A.5) stating that if proper accounts were taken, he would be entitled to get a sum of L 31,048 from the Bank. He reiterated this assertion in another letter dated 15th September 1924, (Ex. A-4), written after the receipt of the docquet mentioned above, and said that the accounts, share registers and balance sheets of the Bank were all incorrect. After this, we find that on 8th November 1924, the Bank passed a resolution, accepting the offer of Kalidas to have the differences between them settled by arbitration. The Bank nominated Mr. T. N. Chakravarty as one of the arbitrators, and requested Kalidas to appoint the other. The names of two umpires were also suggested in case there was difference of opinion between the arbitrators. After receiving the resolution, Kalidas, it seems, attempted to delay matter, and by his letter dated 19th November 1924 (Ex. 5-C) he said that he was not able to select any arbitrator as yet, and suggested that necessary issues which are to be referred to the arbitrators might be framed in the meantime. He further stated that as his son Jitendra was absent, he was not in a position to say "anything about him. To this the Bank replied by a letter (Ex. B-3) which is dated 25th November 1924. Kalidas was definitely asked to let the Bank know before Saturday next whether he was agreeable to have the disputes settled by arbitration. It pointed out that there was no necessity to frame issues beforehand and the whole case might be placed before the arbitrators. Nothing was done by

Kalidas for some months after this, and on 1st April 1925 the Bank through its Assistant Manager filed a petition of complaint against Kalidas, Jitendra and several other persons, before the Police Magistrate at Alipur, charging them with offences under Sections 420, 120-B, 406 and 408, I.P.C. On the very same day summonses were issued. On 6th April 1925, all the accused appeared and were let off on personal recognizance of L 2000 each, 15th of April next having been fixed as the date of hearing. The talk of settlement by reference to arbitration which was apparently abandoned seems to have been revived after the institution of the criminal case. On 15th April 1925, which was the date fixed for hearing of the criminal case, we find an order recorded by the Magistrate in the following terms : "There is a talk of compromise. Date 24th April." On 24th April 1925, again the order sheet shows that the parties wanted time, and the case was adjourned to 29th April next. On 26th April 1925, Kalidas wrote a letter to the Bank in the following terms:

In continuation of my previous correspondence with you I beg to state that although the Bank has started a criminal proceeding against me and my son Jitendra Kumar Rai Chowdhury, I know that there is no substance in it. I am yet willing to place for settlement the dispute about the liability of my said son and myself to the Bank in the hands of an arbitrator. If the Bank has no objection to the appointment of Babu Amarendra Nath Bose, Vakil, High Court or, Babu Nagendra Nath Banerjee, Public Prosecutor, Alipore, as arbitrator in the matter, I would suggest their names and hope that the matter would thus be speedily brought to termination.

39. The Bank agreed to arbitration by Mr. Amarendra Nath Bose, and on 30th April 1925 the agreement of reference to arbitration was executed. It was stated in the agreement that the Bank was claiming a sum of L 2,57,260 annas odd from Kalidas and a sum of L 76,012 annas odd from Jitendra but both of them challenged the correctness of the accounts upon which the Bank arrived at those figures. Exception was also taken by Kalidas and his son to the amounts interest and compound interest charged by the Bank. The arbitrator was to examine the accounts and find out what was exactly due by Kalidas and his son to the Bank. He was also empowered to make any remission if he thought proper. The award of the arbitrator, would have the force and validity of a Civil Court decree. On 14th May 1925, the arbitrator made his award. He found that the Bank was entitled to a sum of L 1,54,650 from Kalidas and a sum of L 55,500 from Jitendra and for the last amount both the father and the son would remain jointly and severally liable to the Bank. On 16th May 1925, two days after the award was made, Kalidas wrote a letter to the Bank, suggesting the transfer of certain properties with a view to liquidate his dues under the award. In conclusion he stated:

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.

40. The Bank in its reply denied that there was any arrangement with Kalidas about the criminal case. It was only the civil liability to the Bank, which, it was said, Kalidas wanted to settle by arbitration and to that only the directors agreed. The Bank however was prepared to say before the Criminal Court that the liabilities of Kalidas and his son were adjusted after they had made

payments in accordance with the award. On 18th May 1925, the following order was recorded in the order sheet in the criminal case. "Parties not ready; application for adjournment filed. Put up on 1st June 1925. Accused as before." On 1st June 1925, the case was adjourned on the application of the complainant to 15th June next. On 15th June, Kalidas was reported to be ill and the case was again adjourned to 19th June. On 27th June 1925, the mortgage bond in suit was executed and the consideration for the same was stated to be the sums fixed by the arbitrator as payable by Kalidas and his son Jitendra. On 29th June, the complainant put in a petition stating inter alia that Kalidas Roy Chowdhury and his son Jitendra Kumar had made up their differences with the Bank and had voluntarily made arrangement for the payment of moneys due by them. Under the circumstances the complainant did not desire to proceed further with the case or adduce any evidence. Upon this the Court discharged the accused' under Section 253, Criminal P.C. It is not disputed that after the execution of the mortgage some payments were made by Kalidas and his son, on the basis of the award, which was treated as valid and binding, and no attempt was made by any of the parties to challenge or impeach the same.

41. The question now is, whether on the facts mentioned above, the mortgage bond is void and unenforceable, under Section 23, Contract Act. The law on the point seems to me to be perfectly well settled. It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with: vide *Kamini Kumar Basu v. Birendra Nath Basu*<sup>3</sup>, and *Gopal Chandra Poddar v. Lakshmi Kanta Saha*<sup>4</sup>, If the quid pro quo or consideration for a bond is the withdrawal of a criminal prosecution, obviously it is hit by Section 23, Contract Act. But the fact that prosecution was actually withdrawn as a result of the execution of the bond does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction, and its object or consideration and it is not enough that the motive which impelled, the party who executed the bond was that the criminal case against him might be dropped : *Dwijendra Nath Mullick v. Gopiram Gobindram*<sup>5</sup>, and *Deb Kumar Roy v. Anath Bandu*

<sup>3</sup> AIR 1929 PC 100 : AIR 1930 PC 100 : 1930-31-LW 811

<sup>5</sup> AIR 1926 Cal 59

<sup>4</sup> AIR 1933 Cal 817 : 147 Ind. Cas. 492

*Sen*<sup>6</sup>, Dr. Bysak, in his argument before us, assailed the propriety of the view taken in some cases, e. g. *Deb Kumar Roy v. Anath Bandu Sen*<sup>7</sup>, that the provision of Section 23, Contract Act, does not apply, when there is an already existing civil liability on the part of the person who executes the deed, even though there has been a withdrawal of a non compoundable criminal case against him. The decisions in *Kamini Kumar Basu v. Birendra Nath Basu*<sup>8</sup>, and *Jones v. Merionethshire Permanent Benefit Building Society*<sup>9</sup> are relied upon in support of this contention. It seems to me that the question really is one of fact, not of law. To bring a case within the purview of Section 23, Contract Act, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and bona fide debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction: *Shaikh*

*Gafoor v. Hemanta Sashi Debya*<sup>10</sup>, There, as between the debtor and the creditor, that is no trading on felony, which public policy condemns, and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage, or emolument coming to him for withdrawing the prosecution against his debtor. As observed by Cotton L. J. in *Flower v. Saddler*<sup>11</sup>

A threat to prosecute is not of itself illegal and the doctrine contended for does not apply when a just and bona fide debt actually exists, when there is good consideration for giving a security and where the transaction between the parties involves a civil liability as well as a possible criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give a security for a debt what he justly owes to his creditor.

42. The cases relied upon by Dr. Bysak have no bearing on this question. In *Kamini Kumar Basu v. Birendra Nath Basu*<sup>12</sup>, there was no pre-existing civil liability and it was expressly found by the Judicial Committee that the ekramnama for settlement of disputes was not a bona fide reference but was resorted to only for the purpose of securing withdrawal of the criminal proceedings. In *Jones v. Merionethshire Permanent Benefit Building Society*<sup>13</sup> the pronotes were given by an outsider who was under no obligation to the Building Society. This distinction between getting a security for a debt from a debtor, and getting it from a third person who is under no obligation to creditor, was pointed out clearly by Cotton L. J. in *Flower v. Saddler*<sup>14</sup> referred to above. When security is given by an outsider, who is under no, existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not entertainable in law : vide *Kessonji Tulsi Das v. Hurjivan Mulji*<sup>15</sup> and *Sayamma Dattatraya v. Punamchand Raichand*<sup>16</sup>, The position in my opinion is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of .prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot

<sup>6</sup> AIR 1931 Cal 421

<sup>8</sup> AIR 1929 PC 100 : AIR 1930 PC 100 : 1930-31-LW 811

<sup>7</sup> AIR 1931 Cal 421

<sup>9</sup>(1892) 1 Ch 173

<sup>10</sup> AIR 1931 Cal 416

<sup>12</sup> AIR 1929 PC 100 : AIR 1930 PC 100 : 1930-31-LW 811

<sup>11</sup>(1883) 10 QBD 572

<sup>13</sup>(1892) 1 Ch 173

<sup>14</sup>(1883) 10 QBD 572

<sup>15</sup>(1887) 11 Bom 566

<sup>16</sup> AIR 1933 Bom 413 : ILR 1933 57 Bom 678 : (1933) 35 BOM LR 850 : 147 Ind. Cas. 1096

be enforced in law.

43. Coming to the facts of this case, I must say that I had considerable hesitation at first in differing from the finding arrived at by the trial Judge, viz. that though one of the motives for the execution of the deed of reference and the bond in suit was the withdrawal of the prosecution, but the consideration for the bond in suit was not that but the debt itself which was found due by the arbitrator chosen by Kalidas himself.

44. On careful consideration however I have come to find that there are certain facts appearing in evidence, from which it is difficult to resist the inference that a part at least of the consideration for entering into the ekramnama was the withdrawal of the criminal proceeding that was already started.

45. It cannot be disputed that both Kalidas and his son were indebted to the plaintiff Bank on account of the overdrafts taken by them. The exact amount of their indebtedness was a matter of dispute between the parties and Kalidas and his son, rightly or wrongly, took exception to the way in which the interest and compound interest were charged by the Bank. It appears also from the letter Ex. 5 (b) dated 1st April 1924 that the talk of arbitration commenced at least earlier than April 1924. It continued till November of that year and on 8th November 1924, there was a resolution passed by the Board of Directors, nominating one of the arbitrators and asking Kalidas to nominate the other. Kalidas then attempted to put off the reference on certain frivolous excuses, and in spite of the Bank's letter (Ex. B-3) dated 25th November 1924 asking him to state definitely as to whether he was willing to submit to arbitration, he did not move any further in this matter, and maintained a rigid silence over it. The talk of arbitration therefore practically came to an end in November 1924.

46. Then on 1st April 1925 the Bank started the criminal prosecution. The petition of complaint was filed on that date. Five persons were named as accused in that case including Kalidas and Jitendra, and there was a definite charge of conspiracy against all the accused, in pursuance of which, it was said that they overdrew large sums of money on insufficient security by cheques, which were passed by accused 1. The charges were under Sections 406, 420 and 120-B, I.P.C. The Magistrate directed summons to be issued against all the accused. On 6th April following, all the accused appeared, and were let off on personal recognizance of L 2000 each, 15th April next being fixed as the date of hearing. On 15th April, it was stated to the Magistrate that there was a talk of compromise and the case was adjourned to 24th April, following. There is no doubt, and the Subordinate Judge also is of that opinion, that the criminal prosecution was started as a threat to compel Kalidas and his son to settle their affairs with the Bank and give security for their debts. This by itself would not make the security for the debt illegal, unless the abandonment of the criminal case was proved to be a part of the consideration for the same.

47. It appears from the evidence of Chandra Bhusan Banerji, a senior pleader of Alipur Bar that Kalidas approached him soon after the criminal case was started and asked Chandra Bhusan to save him from jail. Chandra Bhusan says that he took Kalidas to Mr. Surendra Nath Mallik, who was a Director of the Bank and an influential person, and requested Mr. Mallik to save Kalidas somehow. We have no evidence as to what Mr. Surendra Mallik actually did, but we have the evidence of Jitendra, the son of Kalidas, who says that Nagendra Nath Banerjee, the Secretary of the Bank, approached his father soon after and assured him that the criminal case would be withdrawn, if Kalidas would agree to refer the matter to arbitration and pay up the money that would be fixed by the arbitrator. "We would not have referred the matter to arbitration," says Jitendra "and would not have executed the bond, unless we were assured that as a result of this, the criminal case would be withdrawn."

48. This statement of Jitendra, it must be noted, was not challenged in cross-examination on the plaintiff's side. Their own witness is one Tara Pada Dutt, a ledger keeper, who has no personal knowledge of the affair and can't say what the terms of settlement were, and whether or not it was agreed upon by the parties that the criminal case would be withdrawn, if Kalidas would pay up his dues. Kalidas's own letter is dated 26th April 1925 and he states there that though the Bank had started criminal proceedings against him, yet he was still willing to place for settlement, the dispute about the liabilities of himself and his son to the Bank, in the hands of an arbitrator. He himself suggested the names of several persons including Mr. Amarendra Nath

Basu, an advocate of this Court. This offer was accepted by the Bank, and their resolution is dated 28th April 1925. They agreed to have Mr. A.N. Bose as arbitrator and resolved that the letter of reference must be executed and the matter placed before the arbitrator prior to 29th June 1925. It may be noted here that 29th June was the date fixed for hearing of the criminal case, and the Bank was certainly not willing to say anything in the criminal case unless the matter was placed before the arbitrator. The agreement of reference was actually executed on 30th April 1925, and on the day before the Criminal Court recorded the following order in the order sheet:

Case adjourned to 4th May at the request of both parties, on which date, either the prosecution witnesses to be produced, or the case settled.

49. The arbitrator's award was given on 14th May 1925 and on 16th May Kalidas wrote a letter to the Bank, suggesting in what way he can liquidate his dues as fixed by the arbitrator. The last sentence in his letter runs as follows:

I am willing to execute an agreement pending the completion of necessary documents to transfer and in the meantime as arranged before, the criminal case against us will be withdrawn.

50. The Bank in their reply undoubtedly denied that there was any arrangement about the criminal case. What they said was, that if Kalidas would pay up the amount found due by him, they might represent to the Criminal Court that the liabilities were adjusted. It is difficult however to resist the conclusion from the facts stated above that it was one of the understood terms of agreement between the parties, that the criminal case would be withdrawn, if Kalidas would agree to refer the matter to arbitration and either pay up or give security for the amount found due by the arbitrator. In my opinion, 'there was a distinct bargain to that effect which is proved by the evidence of Jitendra and is supported by the statement of Chandra Bhusan and the records of the criminal case. The mortgage bond was executed on 27th June 1925, and the criminal case was withdrawn on 29th June following. In the petition of withdrawal, it is expressly stated that as Kalidas and his son had made up their differences with the Bank and had made arrangements for payment of the moneys, the complainant did not desire to proceed further with the case or adduce evidence.

51. I hold therefore that though Kalidas and his son undoubtedly owed money to the Bank, yet the mortgage cannot be enforced, as the consideration for the agreement to reference and consequently of the mortgage itself was partly the withdrawal of a non-compoundable offence which comes within the mischief of Section 23, Contract Act. It would be open to the Bank to enforce their civil rights which existed independently of the award, in such ways as are recognized by law. I agree with my Lord the Chief Justice that the appeal should be allowed and the suit dismissed but no costs should be given to the successful appellants either here or in the Court below.