

**(1912) 06 CAL CK 0019**

**Calcutta High Court**

**Case No:** None

Sheikh Nujebbar Rahman

APPELLANT

Vs

Syed Muktashed Husain

RESPONDENT

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**Date of Decision:** June 11, 1912

**Acts Referred:**

- Contract Act, 1872 - Section 23
- Criminal Procedure Code, 1898 (CrPC) - Section 345

**Citation:** 15 Ind. Cas. 259

**Hon'ble Judges:** Chapman, J; Carnduff, J

**Bench:** Division Bench

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### **Judgement**

Carnduff, J.

The appellant before us was the gomashta of the respondent. He was prosecuted by the respondent for criminal breach of trust u/s 40S of the Indian Penal Code in respect of certain moneys collected in the course of his duty. The Magistrate, before whom the case was being tried, suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly, the matter was settled out of Court. The appellant executed a mortgage-bond for the amount embezzled, and, though the withdrawal of the criminal prosecution is not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the respondent after the execution of the deed and the appellant was then acquitted or discharged. The suit, out of which this appeal arises, was afterwards brought upon the mortgage-bond executed in the circumstances just described, and it has been decreed by both the Courts below. The defendant has now preferred this second appeal to the High Court.

2. In my opinion, the appeal clearly must be allowed. The lower Appellate Court has held that no general rule as to what is, or what is not, contrary to public policy can be, or has been, laid down; and, relying on Nubhee Buksh v. Musammat Bibee

Hingon 8 W.R. 412 , has declared that its conscience felt no repugnance towards the agreement between the respondent and the appellant and that it entirely failed to see any danger to the public good therein. Now, the case cited by the learned District Judge stands, as far as I know, absolutely alone, and it appears to me to run counter to the trend of all authority. It is a case, moreover, of 1867, that is to say, at a time when the law on the subject had not been codified by the Indian Contract Act of 1872 and when the Code of Criminal Procedure in force contained no provision such: as that to be found in Section 345 of the present Code for the compounding of offences. The law, therefore, as to where there might be a compromise in a criminal case was not settled and the law as to agreements contrary to public policy was probably equally unsettled. Now, we have for our guidance Section 345 of the Code of Criminal Procedure of 1898 and Section 23 of the Indian Contract Act of 1872 with its Illustration (h) and there can, so far as I can see, be no doubt as to what the legal position is.

3. The broad principle is laid down by Lord Westbury in *Williams v. Bayley* L.R. 1 H.L. 200 at p. 220 : 12 Jur (N.S.) 875 : 35 L.J.Ch. 717 : 14 L.T. 802 and the learned District Judge has himself referred to that decision, although he seems to have failed to appreciate its effect. If a criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law. Criminal breach of trust is (see Section 345 of the present Code of Criminal Procedure) non-compoundable, either with or without the sanction of the Court. *Keir v. Leeman* (1844) 13 L.J.Q.B. 359 : 6 Q.B. 308 : 8 Jur. 846 : 66 R.R. 392 , which was affirmed by the Exchequer Chamber in *Keir v. Leeman* 9 Q.B. 371 : 72 R.R. 298 : 15 L.J.Q.B. 359 : 10 Jur 742 and followed by the Court of Appeal in *Windhill Local Board of Health v. Vint* 45 Ch. D. 351 : 59 L.J. Ch. 608 : 63 L.T. 366 : 38 W.R. 738 , is ample authority for holding the view that the circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference whatever. And the principle, established by *Collins v. Blantern* 1 Sm. L.C. 11th Ed. at p. 369, that illegality may be pleaded as a defence to an action or a bond has been so often recognised and is so well settled that it would be useless to enter into any discussion regarding it.

4. This appeal, therefore, must be allowed, the decrees of the Courts below discharged and the respondent's suit dismissed with costs throughout.

Chapman, J.

5. I agree but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case, the compromise of which is expressly forbidden by the Code of Criminal Procedure.