# Birendra Nath Basu Thakur and Another Vs Basanta Kumar Basu Thakur and Others

**Court:** Calcutta High Court

**Date of Decision:** May 28, 1925

**Acts Referred:** Contract Act, 1872 â€" Section 23
Registration Act, 1908 â€" Section 77

**Citation:** 91 Ind. Cas. 624

**Hon'ble Judges:** Hugh Walmsley, J; B.B. Ghose, J

**Bench:** Division Bench

## Judgement

Hugh Walmsley, J.
This appeal is preferred by the plaintiffs. They are Sirendra Nath and Surendra Nath, Basu Thakur, members of the

Malkhanagar Basu family. The principal defendants, and most of the pro forma defendants belong to the same family.

2. The none of contention is the Taltola hat and bazaar, an old established hat of considerable repute. It was held on land belonging to the Basu

family, on the bank of the Dhaleswari River. Its site had to be changed from ""time to time"" owing to the action of the river, but all went well until the

only available site was on land not in the possession of any members of the Basu family. This untoward event happened in the latter part of 1916.

The site to which the hat had to be removed was on some land belonging to a Mussal man family, and held by it as chirdgi; lakhiraj. Relations were

at the time strained between the plaintiffs and the principal defendants, and each side endeavoured, to defeat the other. Various members of; the

Mussalman family executed eight kobalas in favour of the plaintiffs and others executed nadabipatras, while the principal; defendants secured five -

documents of each kind. All this activity took place within the space of a few weeks. The aggregate, of the shares sold and relinquished exceeds

sixteen annas. One member of the Mussalman family, Abdul Aziz, is claimed as a vendor by both parties. He admitted execution of the kobala in

favour of the plaintiffs on November 9, a few days later, he denied, execution of a kobala in favour of the defendants. On December 9th, however,

he, appeared before the Sub-Registrar and admitted execution a few days later he declared that the admission was untrue and had been wrung

from him by improper means. Just before he did so, however, one Rohini, a servant of the plaintiffs presented a complaint before the Magistrate in

which he accused thirteen persons of forging the kobala produced by the defendants. Among the accused were several of the principal defendants

Paresh, Gopal, Krishna and Benoy also Kamini, son of Ananta Kumar Bose deceased. The substance of the change was that Paresh, Gopal,

Krishna and Benoy with the assistance of a stranger named, Harendra (Jhandra De, had forged the kobala, and that the others had acted as

attesting witnesses. The Magistrate called for evidence before issuing process. Meanwhile the defendants had taken steps before, the Registrar for

registration of the document executed in their favour by Aziz, and they afterwards instituted a suit against Aziz u/s 77 of the Registration Act. It

does not appear when the suit was instituted, but it was decreed ex parte on March 21st, 1917.

3. The criminal charge served to bring matters to a head, and in December it was decided that the quarrel should be referred to the arbitration of

one Aswini Kumar Basu, a member of the family, and a retired Subordinate Judge. This gentleman did make an award. There is no dispute about

the fact that he did so, or about, the terms. The award was followed by an ekrarnama which was signed by some but not all of the principal

defendants. The plaintiffs say that they were put in possession under the terms of the award and of the ekrarnama and that they shared in the baslu

puja which was celebrated a few weeks later at the beginning of the Bengali year. This, however, is denied by the defendants. They say that after

the arbitration possession remained unchanged, although the criminal proceedings, were dropped, and that they lost no time in taking up the

position, which they have taken up in defending the suit, that an arbitration made under such conditions is void.

4. The learned Judge has held that the submission to arbitration was inoperative because the consideration of the agreement was contrary to public

policy, that the five executants of the ekrarnama had not authority to bind other members of the family, that the valid purchases by the plaintiffs only

amounted to 1 anna 4 gandas share of the whole and that the plaintiffs must bring a suit for partition to get possession 1 of that share.

5. For the plaintiffs it is urged that they are entitled to the share mentioned in the arbitrator''s award: that if they are not entitled to that share as

against all the defendants, they are, at any rate, entitled to that share as against those who made the reference to the arbitrator and those who

executed the ekrarnama; that if their claim on the award or the ekrarnama is disallowed, they should have their title to a share of 6 annas declared

by virtue of purchases from different members of the Mussalman family; and that, whatever their share may be found to be they should be given a

decree for joint possession.

6. The first question is whether the reference to arbitration amounts to an agreement for stifling a prosecution. The Statute Law of this country on

that subject is a contained in Section 23 of the Contract Act, and is as follows: ""The consideration or subject of an agreement is lawful, unless...the

Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful.

Every agreement of which the object or consideration is unlawful is void,"" and the illustration bearing on this sub-clause is this: ""A promises B to

drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken."" The agreement is void as

its object is unlawful.

7. The essential element in what is described by English lawyers as stifling, a prosecution" is the tampering with the administration of justice by a

private individual. It is quite true that in this case, a complaint of a criminal offence was laid by the plaintiffs servant against several of the

defendants, and that after the award had been made, no steps were taken to produce the evidence for which the Magistrate had called. The

defendants, however, were never brought before the Court as accused persons: on the contrary the learned Magistrate expressed grave doubts

about the truth of the complaint, and directed the complainant to establish a prima facie case before he issued process; and he dismissed the

complaint u/s 203, Cr.P.C. when the complainant said that his witnesses had been gained over. In these circumstances I do not think it can be said

that a prosecution was dropped still less do I think that there was any tampering with the administration of justice by the complainant, or that the

complainant usurped the functions of the Judge.

8. Again, looking at the broader features of the case I should be very reluctant to hold that the institution of the complaint rendered void the

reference to arbitration. On the one side the defendants had recourse to the summary provisions of the Registration Act, and afterwards to a suit

u/s 77 of that Act, while the plaintiffs filed a complaint about the truth which the Magistrate was not satisfied. It would be carrying the doctrine of

public policy to an absurd length to hold that the presentation of the complaint debarred the parties from restoring to the sensible method of

arbitration.

9. As for the argument that the complaint put pressure upon the defendants, and that in consenting to arbitration they were acting upon coercion, it

is abundantly clear that the complaint had no such effect. The defendants know that Abdul Aziz had expressly admitted execution of the document

which was alleged to have been forged, and they had no reason to think that his later repudiation could wipe out the effect of that admission: they

knew that the Magistrate had received the complaint with scepticism, and they knew that the actual forgery was attributed to a stranger of

unknown parentage without an address, while the accusations against the others were of the vaguest description. Lastly one of the defendants

admits that Ananta Bjabu, now dead, but at the time the chief man on defendants'' side, entered into the compromise with the avowed intention of

repudiating it afterwards on this very ground. It is impossible to hold that the defendants were not acting with complete freedom of Will.

10. In my opinion, therefore, the agreement to refer the dispute to arbitration cannot be treated as void.

11. The plaintiffs ask for a declaration of their right to a share of 3 annas 12 gandas, in accordance with the award and the ekrarnama that

followed it. It appears, however, that there was no proper submission to arbitration, such as would bind all the defendants. Ananta, Benoy, Paresh

and Krisfina Kumar pressed Aswini Babu to settle the dispute, and they said that they represented the absent defendants. In spite of his legal

experience the arbitrator accepted these assurances, but, of course, they were not sufficient. Apart from the ekrarnama, and that was executed

only by five of the defendants, there is no evidence on which it can be held that the defendants other than the four mentioned agreed to refer, the

dispute to arbitration. The plaintiffs, therefore, cannot succeed on the basis of the award against more than four of the defendants.

12. The award, however, was succeeded by an ekrarnama, executed by Ananta Kumar Basu, now dead, Joyanto Kumar Basu, Debendra Kumar

Basu, Sanat Kumar Basu and Surendra Kumar Basu, (defendants Nos. 3, 5, 10 and 6). This is a formal document: the executants declared that

they were satisfied that Birendra and Surendra had no title to a share of 3 annas 12 gandas: they promised for themselves and their co-shareis to

execute an appropriate deed in regard thereto, and they also undertook, if they failed to persuade their co-sharers, to execute a deed ""making up

your 3 annas 12 gandas share from our own shares alone."" Their shares amounted to 4-annas, as Ananta had 1 anna 5 gandas, Joyantahad 15

gandas and tile other three 2-annas between them.

13. The ekrarnama cannot bind those who were not parties to it, but there is no reason why the executants should not be bound by the undertaking

made for themselves.

14. The case for the plaintiffs is that posses sion to the extent of 3 annas 12 gandas was actually given to them. The arbitrator'' says that Benoy,

defendant No. 14 told him so, but Benoy says this is incorrect. More important evidence is a letter written by Birendra to Ananta on Chaitra 21,

1323: this letter contains as assertion of possession and a suggestion that both parties should let the hat to one jarodar for the ensuing year. On the

back is an answer said by the plain tiffs to be in the Writing of Bipin and signed by Ananta. A witness deposes that he took the letter/heard Ananta

dictate and saw Bipin write and Ananta sign. Against this evidence there is only Joyahta''s half-hearted denial. I have no doubt that the

endorsement is genuine, and the only interpretation that can be put upon it is that Ananta recognised that possession had been given to the plaintiffs

to the extent of 3 annas 12 gandas. As the plaintiffs have expressly asked for their share to be fixed on the basis of the award or the ekrarnamu, I

do not think it necessary, after the finding''s are recorded, to deal with their alternative prayer for a declaration of their title on the. basis of their

transfers from various members of the Miissalman family. On that point I only '' wish to say that as the case was put before us the claim was for a

fraction over 6-annas and not for the 10-annas mentioned in the plaint.

15. The remaining question is as to the form of relief to be granted to the plaintiffs. The learned Judge has held that he cannot go beyond declaring

their title. Whether that view was right or not on the findings recorded by him, I need not discuss, because my findings are different. On the

undertaking set out in the ekrarnama, supplemented by the facts that the plaintiffs were actually put in possession and that they remained in

possession for a time I think it is clear that they are entitled to a decree directing that they be pull in possession to the extent of 3 annas 12 gandas

jointly with the defendants.

16. The result is that the appeal is allowed in a modified form. The judgment and decree of the lower Court are set aside; the plaintiffs'' title to the

extent of 3 annas 12 gandas is declared as against the defendants, Benoy Chandra Basu (No. 14),. Paresh Chandra Basu (No. 16), Krishna

Kumar Basu (No. 18), ''the two representatives'' of the late Ananta Kumar Basu (Nos. 2 and 2ka), Jpyanta Kumar Basu (No. 3), Debendra

Kumar Basu No. 5), Surendra Kumar Basu (No. 6),. Sanat Kumar Basu (No. 10). Their suit is dismissed as against the other defendants except

to the extent that the plaintiffs, will get joint possession with them.

17. The plaintiffs are also entitled to recover mesne profits (to be ascertained by the lower Court hereafter) from the defendants named, above for

the period as claimed in the plaint that is for the period from the, 31st August 1917 up to the date of delivery of possession or until the expiry of

three years from this date whichever event first occurs.

18. The plaintiffs will be entitled to recover their costs in both Courts from the defendants mentioned above. The defendants will bear their own

costs in both Courts.

19. The cross-objections are dismissed but without costs.

Ghose, J.

20. I agree.