

1958

*Present* : Basnayake, C.J., and de Silva, J.

FERNANDO, Appellant, and PIYADASA, Respondent

*S. C. 294—D. C. Kandy, 2,030/MB**Contract—Purpose of stifling criminal prosecution—Illegal consideration.*

The defendant executed a mortgage bond in favour of the plaintiff for the purpose of stifling a criminal prosecution of his brother-in-law for criminal breach of trust. When the bond was put in suit, the defendant pleaded that it was executed for an illegal consideration.

*Held*, that "all bargains tending to stifle criminal prosecution whether by suppressing investigation of crime, or by deterring citizens from their public duty of assisting in the detection or punishment of crime are void as against public policy."

The fact that the same act creates a criminal liability as well as a civil obligation will not render void a contract for the settlement of the civil obligation even though a prosecution has been instituted and proceedings are pending. In such a case, however, the bond creating the civil obligation should not disguise the true nature of the transaction; it should contain a clear indication of the fact that it is given to secure the civil liability.

**A**PPPEAL from a judgment of the District Court, Kandy.

*H. W. Jayewardene, Q.C.*, with *N. D. M. Samarakoon* and *P. Ramasinghe*, for Plaintiff-Appellant.

*E. B. Wikramanayake, Q.C.*, with *P. Somatilakam*, for Defendant-Respondent.

*Cur. adv. vult.*

March 21, 1958. BASNAYAKE, C.J.—

The plaintiff-appellant (hereinafter referred to as the plaintiff) sought to enforce a mortgage bond executed in his favour by the defendant-respondent (hereinafter referred to as the defendant) for a sum of Rs. 12,000. The defendant resisted the action on the ground that the bond was executed for an illegal consideration, viz. for the purpose of stifling the criminal prosecution of his brother-in-law. The learned District Judge upheld the defendant's plea and dismissed the plaintiff's action. This appeal is from that judgment.

Shortly the material facts are as follows: The defendant's cousin, one H. Francis, was in January 1954 a storekeeper of the Gampola Kerosene Oil Depot of P. S. Fernando & Bros. of which firm the plaintiff was a partner. Francis suddenly disappeared on 10th January 1954 from his place of work. The defendant was informed of Francis's disappearance by the latter's wife. He thereupon went in search of him and found him at Mirissa. He recovered from him a sum of Rs. 2,800 and a key, the property of his employer. He then took Francis to the house of one Aladdin Fernando, another partner of P. S. Fernando & Bros., and delivered to him the money and the key. Meanwhile on 25th January

1954 Juan de Silva Patabendige Samuel de Silva, the Chief Clerk of P. S. Fernando & Bros., lodged a complaint with the Police to the effect that Francis had committed criminal breach of trust in respect of 6,807 gallons of Kerosene oil valued at Rs. 7,419/63. On 11th February 1954 G. Jayasinghe, Inspector of Police, made a report to the Magistrate under section 121 (2) of the Criminal Procedure Code intimating that he had inquired into the complaint made on 25th January 1954 by Juan de Silva Patabendige Samuel de Silva of P. S. Fernando & Bros., Kandy, to the effect that H. Francis of Keerapane who was employed as the storekeeper of the Kerosene Oil Depot at Gampola since 1939 had committed criminal breach of trust in respect of 6,807 gallons of Kerosene oil valued at Rs. 7,419/63, an offence punishable under section 391 of the Penal Code, and that further inquiries were being made. On the same day Francis appeared in Court and was allowed bail in Rs. 1,000 to appear on 25th February 1954. When Francis appeared in Court on that day the Magistrate made the following order: "Prosecution to file plaint on 11.3". On that day Inspector Jayasinghe stated that the inquiries were incomplete as a large number of account books had to be scrutinised. The case was then fixed for 24th March 1954. On that date Inspector Jayasinghe stated that he was not filing a plaint. The Magistrate then made order discharging Francis. On 14th February 1954, three days after Inspector Jayasinghe made his report under section 121 (2) of the Criminal Procedure Code, the defendant executed the mortgage bond in suit for a sum of Rs. 12,000 in favour of the plaintiff. It was a secondary mortgage of certain lands which had been transferred to him by Francis's wife on 11th February 1954, the very day on which the Inspector made the report of his investigation to the Magistrate. The bond made no reference to the circumstances under which it was given. It purported to be a bond given to secure a loan of Rs. 12,000. The material clauses read as follows:—

"Know all men by these presents that, I, Imbulgalagedera Piyadasa of No. 196/2 Hill Street, Dehiwela in the Island of Ceylon, (hereinafter called and referred to as the said Obligor) am held and firmly bound unto Palamandadige Cyril Dervin Fernando, J.P. of "Maveli" Galle Road, Moratuwa, (hereinafter called and referred to as the said Obligee) in the sum of Rupees Twelve Thousand (Rs. 12,000) of lawful money of Ceylon being money borrowed and received by me the said Obligor from him the said Obligee. I therefore hereby renouncing the *Beneficium non numeratae Pecuniae* do engage and bind myself to pay on demand unto the said Obligee or to his heirs, executors, administrators or assigns the said sum of Rupees Twelve Thousand (Rs. 12,000/-).

"And until such repayment and in the meantime I the said Obligor do hereby further promise and undertake to pay interest on the said sum of Rupees Twelve Thousand (Rs. 12,000) at and after the rate of Eight Per centum Per annum to be computed from the date hereof."

In the attestation clause, however, the notary who gave evidence on behalf of the plaintiff stated—

“ No part of the consideration hereof was paid in my presence but this Bond was executed to secure the monies said to have been due to Messrs P. S. Fernando & Bros. from Mr H. Francis of Gampola (cousin of the Obligor herein named). ”

The defendant's version is that the bond was given on the suggestion of Aladdin Fernando, who died after the commencement of this action, as he undertook to get the case withdrawn if it was given. The defendant says he then satisfied himself by looking into the accounts that Francis had committed criminal breach of trust and at Francis's instance he gave the bond as Francis was anxious to get back his job and have the case withdrawn. Francis also gave evidence in support of the defendant's version.

The plaintiff, who gave evidence, had no first-hand knowledge of what passed between the deceased partner Aladdin on the one side and the defendant and Francis on the other. He says he thought the defendant executed the bond in order that Francis may be leniently treated by the Court.

The learned District Judge has accepted the evidence of the defendant that the bond was given in order to ensure the withdrawal or abandonment of the criminal prosecution. We are unable to say that the District Judge has erred in doing so. The plaintiff has failed to call the Inspector of Police who after making his report under section 121 (2) of the Criminal Procedure Code and after taking time to make further investigations decided not to file a written report under section 148 (1) (b) of the Criminal Procedure Code accusing Francis of an offence under section 391 of the Penal Code. Nor did he call his accountant Samarakoon or Juan de Silva, his chief clerk, to establish the amount of his loss which he says he discovered after the bond was executed to be Rs. 16,000. Certainly there are many infirmities in the plaintiff's case. Firstly in the complaint of the chief clerk Juan de Silva to the Police the amount of loss was stated to be Rs. 7,419/63 the value of 6,807 gallons of Kerosene oil. In the bond a sum of Rs. 12,000 was mentioned, and in his evidence the plaintiff stated the loss was Rs. 16,000 ; but even when he gave evidence the plaintiff was not certain of the exact amount Francis had taken. If the bond had been taken for the innocent purpose of securing the loss occasioned by Francis's dishonesty it would not be unenforceable. For apart from Francis's criminal liability for his breach of trust there was his civil liability for appropriating to his own use his employer's property. The fact that the same act creates a criminal liability as well as a civil obligation will not render void a contract for the settlement of the civil obligation even though a prosecution has been instituted and proceedings are pending [Williston Vol. 6 (1938 Edn.) Sec. 1718, pp. 4859-4860]. In such a case, however, the bond should not disguise the true nature of the transaction ; it should contain a clear indication of the fact that it is given to secure the civil liability. The bond under consideration speaks of “ money borrowed and received ” by the defendant, a completely

untrue statement which lends colour to the defendant's version which has been accepted by the learned Judge. It is settled law that a contract for stifling a prosecution cannot be enforced. *Ex turpi causa non oritur actio* (No right of action arises from a disgraceful or immoral consideration—Trayner) is a well established maxim which has now acquired the force of law. Agreements to compromise pending criminal prosecutions are illegal and void (*Re Campbell* 14 Q. B. D. 32, *Lound v. Grimwade*, 39 Ch. D. 605). The law on the subject is discussed at some length in section 1718 of Williston on Contracts (Vol. 6—1938 Edn. p. 4856). It is sufficient to quote the following passage from it :—

“ All bargains tending to stifle criminal prosecution whether by suppressing investigation of crime, or by deterring citizens from their public duty of assisting in the detection or punishment of crime are void as against public policy. ”

The appeal is dismissed with costs.

DE SILVA, J.—I agree.

*Appeal dismissed.*

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