Then paragraph 19 of the resolution proceeded to deal with the conditions and this is what it said: (p. 442).

"The conditions, on which this arrangement will be entered into, are that the garasia shall consent to abandon, for the future, his claims against the village communities, and in return the allowance he has hitherto enjoyed shall be continued by the State hereditarily (during good behaviour) to the male issue of the first person who receives the garas from the British treasury....."

It would thus be obvious that an important condition which underlay the resolution, on the basis of which or in the light of which the provisions of s. 3 of the Toda Giras Allowance Act (VII of 1887) would appear to have been enacted, was that the allowance was to be continued hereditarily to the male issue of the first person who received the *garas* from the British treasury. In our opinion, the descent of the allowance from a ruling Thakore to his eldest son on the death of the Thakore would amount to a continuity of the allowance hereditarily to the male issue of the first recipient. Thus we see that the contention of Pushpasinhji respondent No. 4 that the allowance vests only and exclusively in the Thakore of Miyagam for the time being and descends, on the death of a ruling Thakore, to his eldest son and that the junior sons of the Thakore have no share in it is supported on all hands, i.e., by the terms of the grant itself (exhibit 572), by the terms of the resolution under which the toda giras allowance was recognised by Government and by the provisions of s. 3 of the Toda Giras Allowance Act. That being so, the plaintiff's case must fail in this behalf as well.

In the result, I agree with my learned brother that both these appeals must fail and be dismissed with costs.

Appeals dismissed.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

RAMCHANDRA LAXMAN GOLWALKAR (ORIGINAL DEFENDANT No. 3), APPELLANT *v.* THE BANK OF KOLHAPUR (ORIGINAL PLAINTIFF), RESPONDENT.*

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Indian Registration Act (XVI of 1908), s. 17—Indian Contract Act (IX of 1872), s. 23—Indian Evidence Act (1 of 1872), s. 91—Documents in relation to equitable mortgage—Documents merely recording transaction already completed—Whether such document requires registration—Suit for enforcement of contract—Agreement to stifle prosecution or compound felony pleaded in defence—Whether pre-existing debt and threat of criminal prosecution enough to constitute agreement void and unenforceable.

In the case of documents which have been executed in relation to an equitable mortgage by deposit of title deeds, if the document which is executed is the sole repository and appropriate evidence of the transaction, it would require registration and would be inadmissible in evidence for want of registration. If, however, the document merely records a transaction of equitable mortgage already completed, it does not create the equitable mortgage but is a record of equitable mortgage already completed, and would not require registration.

Hari Shankar Paul v. *Kedar Nath Saha*,[1] *Obla Sundaracharia*r v. *Narayana Ayyar*,[2] *Kedarnath Dutt* v. *Shamlal Khettry*,[3] *Pranjivandas Mehta v. Chan Ma Phee*,[4] and *Subramonian* v. *Lutchman*,[5] referred to.

In a suit for enforcement of a contract, when it is pleaded in defence that the contract is void inasmuch as there was an agreement to stifle prosecution or compound a felony, it is not enough for the defence to establish that there was a pre-existing debt, and that also there was a threat of criminal prosecution. There should be in addition to these circumstances an agreement on the part of the plaintiff not to prosecute—a contract whereby he agrees as a part of the consideration either not to bring or to discontinue criminal proceedings for some alleged offence, and unless and until the defendant is in a position to establish any such contract, a mere threat of criminal proceedings or pressure or undue influence or intimidation would not afford a valid defence to the suit.

Sudhindra Kumar v. *Ganesh Chandra*,[6] *Sayamma* v. *Punamchand*,[7] and *Kessowji Tulsidas* v. *Harjivan Mulji*,[8] *Williams* v. *Bayley*,[9] and *Bhowanipur Banking Corporation Ltd.* v. *Durgesh Nandini Dasi*,[10] referred to.

First Appeal against the decision of V. B. Potdar, Civil Judge, S. D., at Kolhapur.

Suit to enforce an equitable mortgage.

One Krishnaji (defendant No. 1) was an employee of the Bank of Kolhapur (plaintiff), and in the course of his work

[1] (1939) L. R. 66 I. A. 184, s. c. 41 Bom. L. R. 1144.
[2] (1931) L. R. 58 I. A. 68 s. c. 33 Bom. L. R. 878.
[3] (1873) 11 Beng. L. R. 405.
[4] (1916) 18 Bom. L. R. 664.
[5] (1922) L. R. 50 I. A. 77, s. c. 25 Bom. L. R. 582.
[6] [1938] A. I. R. Cal. 840.
[7] (1933) 35 Bom. L. R. 850.
[8] (1887) 11 Bom. 566.
[9] (1866) 1 H. L. 200.
[10] (1941) 44 Bom. L. R. I, s. c. L. R. 68 I. A. 144.

as such employee he committed various defalcations. He unauthorisedly operated on three accounts of the Bank's customers and by forging several cheques in these accounts and also making false entries therein, misappropriated sums aggregating Rs. 30,700. These defalcations were noticed by about October 25, 1944 and defendant No. 1 was questioned by Padalkar, the accountant of the plaintiff-Bank. Defendant No. 1 confessed to having committed these defalcations and Padalkar accompanied defendant No. 1 to the house where he was living with his maternal aunt Laxmibai, who was the widow of one Laxman Golwalkar and who had a widow's estate in the suit-house. Shankarrao (defendant No. 2) was also a distant relation of hers and had been staying in the house. He was looked upon by defendant No. 1 as well as Laxmibai for guidance. He was at that time out of Kolhapur and Padalkar was asked to wait. Defendant No. 2 came to Kolhapur the next day and he also told Laxmibai that if the moneys were not made good defendant No. 1 would be criminally prosecuted. On October 27, 1944 a promissory note was executed by defendant No. 1, defendant No. 2 and Laxmibai for the sum of Rs. 30,700 in favour of the plaintiff Bank. On October 28, 1944 the manager of the Bank made a report to the Chairman about the execution of the promissory note and stated that defendants Nos. 1 and 2 and Laxmibai had promised to pay the amount by October 30, 1944. The parties evidently wanted to arrange for cash by selling certain shares and securities. They were, however, not successful and on November 6, 1944 a further report was made by the manager to the Chairman intimating that the parties were doing their utmost to raise the amount on the security of their immovables. These attempts to raise moneys on the mortgage of the immovable properties did not meet with success. The Committee meeting of the Bank passed a resolution on November 22, 1944 as follows:—

"As Shree Lakshmibai Golwalkar is not fully authorised to take a loan against (the security of) her house, she has decided to take in adoption the eldest son of Shreeyut Inamdar, and as the said (adoption) ceremony is to take place on November 27, 1944, this may be awaited till that time."

This adoption took place on November 27, 1944 and on December 16, 1944 all the three parties viz. defendant No. 1, defendant No. 2 and defendant No. 3, the adopted son of Laxmibai, made an application to the Bank for a loan of

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Rs. 30,700. Along with the application they furnished a statement of the immovable property to which each was entitled. The property belonging to defendant No. 3 was described as property No. 696 situated at Shahupuri of the value of about Rs. 40,000 and fetching a rent of Rs. 25 per month, except in regard to the portion thereof where defendant No. 3 himself resided. Simultaneously with this application for loan and the statements, all the defendants signed a letter of lien which was in the printed form of the Bank. All these documents were executed on December 16, 1944. An endorsement in red ink at the top of the application ran as under:—

"Sanctioned loan of Rs. 30,700 against J. P. (joint promissory note) and T. D. (title deeds) at 4 per cent. Amount to be advanced before completion of T. D. papers if necessary".

On December 28, 1944 a receipt was passed in connection with the sum of Rs. 30,700 by all the three defendants and they executed in favour of the Bank a promissory note for the amount of the loan. This promissory note recited that the defendants had borrowed from the plaintiff Bank, that day, i.e. December 28, 1944, Rs. 30,700 in cash, that they had agreed to pay interest on the said sum of money reckoning it six monthly at the rate of 4 per cent per annum and that they agreed to repay the said sum with interest on demand. They made themselves jointly and severally responsible for the repayment of the whole amount. When the application for loan was made on December 16, 1944, defendant No. 3 had handed over to the plaintiff Bank the documents of title to the said property viz. Ghar-than Sanad dated April 3, 1940 and Pot Sanads of the Ghar-than, three in number, one of them dated March 14, 1942 and two of them dated November 4, 1941. An equitable mortgage on the suit property was thus created when the agreement to advance the loan was arrived at between the parties in pursuance of the application made in that behalf on December 16, 1944. On March 6, 1945 defendant No. 3 executed in favour of the plaintiff Bank a letter confirming the equitable mortgage. In that letter he referred to the promissory note which he had executed in favour of the plaintiff Bank on December 28, 1944 in regard to the loan of Rs. 30,700 which had been advanced by the plaintiff Bank to him. He stated that as an additional security for the said loan he had on December 16, 1944 deposited the

documents and title-deeds of his immovable property mentioned above and that he would take away the title deeds and documents which had thus been deposited on repayment of the whole amount with interest borrowed from the plaintiff Bank on the loan account. He further stated that he had given that letter to the plaintiff Bank for confirmation of the equitable mortgage created by him on December 16, 1944. This loan was not repaid by the defendants and the plaintiff Bank instituted the present suit on July 25, 1946 for realisation of the equitable mortgage.

The defence contended, *inter alia,* that the pronotes were obtained by assuring the defendants that if they signed the pronotes, the plaintiff would not take any action against defendant No. 1 in a criminal Court. It was merely to avoid criminal prosecution being launched against defendant No. 1 that these defendants passed the said pronotes, and the consideration therefor being unlawful, they were against public policy, and were illegal and void under s. 23 of the Indian Contract Act. Defendant No. 3 further contended that the deposit of the documents and the letter of lien and confirmation did not create a valid equitable mortgage.

The trial Court decreed the plaintiff's suit. The defendants preferred an appeal to the High Court.

S. B. Jathar with *V. N. Lokur, K. R. Bengeri* and *P. V. Vaze* for the appellants.

A. G. Desai with *R. G. Samant* for respondent No. 1.

BHAGWATI J. [After stating the facts the judgment proceeded]. Mr. Jathar who appeared before us for both has very ably and exhaustively argued the appeal and has urged before us all the points which could possibly be urged in favour of the appellants. The first contention which he urged before us was that the letter of lien dated December 16, 1944, was the sole repository and appropriate evidence of the transaction of equitable mortgage, that it was not registered and that therefore no equitable mortgage could be proved by the plaintiff Bank for want of registration of that document. The position in law with regard to the registration of memoranda of equitable mortgages is thus summarised in Mulla's Registration Act, 5th edn., at p. 44:

"A mortgage by deposit of title-deeds does not require any writing, but it is usual for the mortgage to be accompanied by a memorandum in writing. In such cases the question often arises whether the writing

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requires registration. If the writing *itself* constitutes the bargain or contract between the parties and creates a mortgage on the property, it must be registered under the Registration Act. But if the mortgage was completed by the deposit of title-deeds and the advance of money on such deposit, and the writing is merely a record of an already completed transaction, the writing does not require registration. The question in each case is, did the document constitute a bargain between the parties or was it merely the record of an already completed transaction?"

Our attention was drawn to several cases which lay down the true position in law with regard to registration of such documents, and our attention was first drawn to a decision of their Lordships of the Privy Council reported in *Hari Shankar Paul* v. *Kedar Nath Shah.*[1] Their Lordships of the Privy Council held in that case that where the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement in writing which evidences the deposit and contains all the essentials of the transaction, expressly conferring a power of sale on the mortgagee and in fact purports to be an instrument not merely evidencing the transaction already completed but by itself effective to create an interest in the property in favour of the mortgagee, such a document requires to be compulsorily registered. They quoted with approval the observations of Lord Carson in *Subramonian* v. *Lutchman*[2] where Lord Carson had approved of the position in law as laid down in *Kedarnath Dutt* v. *Shamloll Khettry*[3] and *Pranjivandas Mehta* v. *Chan Ma Phee,*[4] and stated the criterion to be (p. 192):

"Did the document.....constitute the bargain between the parties or was it merely the record of an already completed transaction?"

This passage from the judgment of Lord Carson had been commented upon by Lord Tomlin in *Obla Sundaracharia*r v. *Narayanna Ayyar*[5] and Lord Tomlin had observed (p. 74):

"While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within s. 17 of the Indian Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and

(1) (1939) L. R. 66 I. A. 184, s. c. 41 Bom. L. R. 1144.
(2) (1922) L. R. 50 I. A. 77, 82, s. c. 25 Bom. L. R. 582.
(3) (1873) 11 Beng. L. R. 405.
(4) (1916) L. R. 43 I. A. 122, 125. s. c. 18 Bom. L. R. 664.
(5) (1931) L. R. 58 I. A. 68, s. c. 33 Bom. L. R. 878.

place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties."

This ratio was adopted by their Lordships of the Privy Council in *Hari Shankar* v. *Kedar Nath* and they finally came to the conclusion that where contemporaneous with the creation of the mortgage by deposit of title deeds an agreement in writing was executed by and between the parties which agreement was made an integral part of the transaction and was itself an operative instrument, and not merely evidential, such a document must be registered. In *Kedarnath Dutt* v. *Shamloll Khettry*[1] the deposit was made in the morning and the memorandum was executed in the evening of the same day, and Couch C. J. in the course of his judgment observed (p. 414):

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within s. 17 of the Registration Act."

The following observations from the judgment of their Lordships of the Privy Council in *Pranjivandas Mehta* v. *Chan Ma Phee*[2] may also be appropriately referred to at this stage (p. 125):

"The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. In the words of Lord Cairns in the leading case of *Shaw* v. *Foster*,[3] 'Although it is a well-established rule of Equity that a deposit of a document of title, without more, without writing, or without word of mouth will create in Equity a charge upon the property referred to. I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.'"

[1] (1873) 11 Beng. L. R. 405.

[2] (1916) L. R. 43 I. A. 122, s. c. 18 Bom. L. R. 664.

[3] (1872) L. R. 5 H. L. 321, 341.

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It may be noted that these observations of Lord Cairns in *Shaw* v. *Foster* had been quoted with approval by their Lordships of the Privy Council in the case reported in *Pranjivandas v. Chan Mah Phee*[1] and they were taken by their Lordships of the Privy Council in *Subramonian* v. *Lutchman*[2] and *Sundarchariar* v. *Narayana Ayyar*[3] as laying down the correct position in law.

The position, therefore, in the case of documents which have been executed in relation to the creation of an equitable mortgage by deposit of title deeds is that if the document which is executed is the sole repository and appropriate evidence of the transaction, it would require registration and would be inadmissible in evidence for want of registration, for it is well known that by virtue of the provisions of s. 91 of the Indian Evidence Act where the terms of a contract, grant or disposition of property are reduced to writing, no evidence can be given in proof of the terms thereof except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Act. If, however, the document merely records a transaction of equitable mortgage already completed, it does not create the equitable mortgage but is a record of an equitable mortgage already completed, and would not require registration.

[His Lordship, after dealing with points not material to the report, proceeded.]

A more formidable argument was, however, advanced by Mr. Jathar in connection with this transaction and it was that the consideration was unlawful and therefore the contract was void under s. 23 of the Indian Contract Act. Section 23 of the Indian Contract Act lays down that:

"The consideration or object 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."

He urged that the consideration for the agreement here was the stifling of a prosecution, or to put it in other words, the compounding of a felony, and therefore the consideration was

(1) (1918) 18 Bom. L. R. 664 s. c. L. R. 43 I. A. 122.

(2) (1922) L. R. 50 I. A. 77, s. c. 25 Bom. L. R. 582.

(3) (1931) 33 Bom. L. R. 878 s. c. L. R. 58 I. A. 68.

unlawful and the contract was void. Defendant No. 1 had committed offences of forgery and falsification of accounts amongst others, and these were certainly non-compoundable offences. It was the duty of the plaintiff bank as true citizens to give the information of the commission of these offences to the authorities, and in so far as they under threat of criminal proceedings agreed not to prosecute defendant No. 1 if defendants Nos. 2 and 3 executed the promissory note in their favour and deposited the documents of title of the suit house as and by way of equitable mortgage, they made a trade out of that felony, they compounded a non-compoundable offence, and the consideration was, therefore, unlawful and the contract void.

It is necessary to clear the ground by referring to a few of the authorities which were cited at the bar in regard to this aspect of the question. The first case which was relied upon was the case reported in *Sudhindra Kumar* v. *Ganesh Chandra.*[1] In that case a prosecution had been launched against one Kalidas. Negotiations were started between the parties for settlement of the liability of Kalidas to the plaintiff bank. Kalidas in the course of the negotiations offered a settlement of his liability but also wrote to the plaintiff bank that the criminal proceedings against him should be withdrawn. The bank could not agree to any such proposition and the negotiations progressed further. The criminal proceedings were adjourned from time to time. In the meanwhile the wife of Kalidas executed a mortgage of her private property to the plaintiff bank and used part of the mortgage money to pay off her husband's debt. The plaintiff bank thereafter put in a petition before the criminal Court stating that Kalidas and his son had made up their differences with the bank and had voluntarily made arrangements for the payment of the moneys due from them, and upon that the Court discharged the accused under s. 253 of the Criminal Procedure Code. In a suit filed to realise this security it was contended that the consideration was unlawful and the plaintiff bank were not entitled to a mortgage decree. In the course of the judgment the learned Judges of the Calcutta High Court observed that:

"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

[1] [1938] A. I. R. Cal. 840.

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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."

Derbyshire C. J. commented upon the circumstances of the case and observed (p. 846):

"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 sacrifices could only have been made to relieve Kalidas of the prosecution that was hanging over his head."

Under the circumstances of the case the learned Judges came to the conclusion that the non-prosecution by the plaintiff bank of the criminal proceedings which they had launched against Kalidas was an express or implied term of the bargain and that therefore the consideration for the mortgage was vitiated. Mr. Justice B. K. Mukherjea had the following observations to make in the course of his judgment (p. 851):

".....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. *Mt. Hemanta*).[1] 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 learned Judge then quoted the observations of Cotton L.J. in *Flower* v. *Sadler*[2] (p. 576):

".....A threat to prosecute is not of itself illegal; and the doctrine contended for does not apply, where 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, possibly a 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, which he justly owes to his creditor."

A distinction was, however, pointed out between getting a security for a debt from a debtor and getting it from a third person who is under no obligation to the creditor and the learned Judge observed (p. 851):

"When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of

(1) [1931] A. I. R. Cal. 416. (2) (1882) L. R. 10 Q. B. D. 572.

the criminal case, and as such the security is not entertainable in law: (vide *Kessowji Tulsidas* v. *Hurjivan Mulji and Shamkuvarvahu*[1] and *Sayamma* v. *Punamchand Raichand*).[2] 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 be enforced in law."

The principle, therefore, which was laid down in this decision was that if a pre-existing liability of the debtor is the sole consideration for the security, the consideration would not be vitiated even though the security was given under threat of criminal proceedings. But if the non-prosecution of the offender was also a matter of bargain between the parties, and was a part of the consideration, the consideration would be unlawful and the security could not be enforced.

It does not make any difference to the position whether a prosecution had been already launched or there was a mere threat of criminal proceedings. As has been observed by Mr. Justice Baker in *Sayamma* v. *Punamchand*[2] (p. 854):

".....A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution, obtain a guarantee from third parties. Of course it makes no difference whether the criminal proceedings have been actually instituted, as in the present case, or whether there is still only a threat of them, provided the consideration is the stopping of the criminal proceedings, whether actual or contemplated."

Reliance was placed on the two cases of *Kessowji Tulsidas* v. *Hurjivan Mulji and Shamkumarvahu*[1] and *Sayamma* v. *Punamchand Raichand*[2] by the learned Judges of the Calcutta High Court above. In *Kessowji Tulsidas* v. *Hurjivan Mulji and Shamkumarvahu*[1] defendant No. 2 gave to the creditors of her near relative, defendant No. 1, a guarantee for the payment of the debts due to them by defendant No. 1. As a consideration for this guarantee the creditors were to forbear for a period of 15 days taking such proceedings and by implication were to abstain from doing such a thing if the said debts were paid within that time. It was held that such

[1] (1887) 11 Bom. 566.

[2] (1933) 57 Bom. 678, s. c. 35 Bom. L. R. 850.

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a guarantee could not be enforced by the creditors. Mr. Justice Farran who decided the case came to the conclusion that there was a threat of criminal prosecution given by the creditors to defendant No. 2 and the guarantee which was given by defendant No. 2 was given by her in consideration of her obtaining immunity for 15 days for defendant No. 1 from criminal prosecution and implied total immunity if the guarantee was then fulfilled. It is significant to note here that in return for her executing the letter of guarantee she obtained immunity for defendant No. 1 from criminal prosecution for a particular period. The immunity could only be obtained if the creditors agreed not to take any proceedings against defendant No. 1 during that period and that was the consideration which moved from the creditors and which was the consideration for the execution of the letter of guarantee by defendant No. 2 in their favour. In the course of his judgment Mr. Justice Farran relied on the observations of Lord Westbury at page 220 in *Williams* v. *Bayley.*[1] These observations lay down an equitable principle which cannot be demurred against (p. 220):

"Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'misprison of felony'. That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, further, converted it into a source of emolument to himself."

Mr. Justice Farran referred to two other English cases *Flower* v. *Sadler*[2] and *Ward* v. *Lloyd*[3] which, according to him, did not conflict with that view, and he observed that (p. 512):

"A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence,

(1) (1866) 1 H. L. 200.
(2) (1882) 10 Q. B. D. 572.
(3) (1843) 7 Scott N. Rep. 499.

and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute, and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties."

On the facts before him the learned Judge, therefore, came to the conclusion that there was in fact an agreement not to prosecute which was the consideration for the execution of the guarantee by defendant No. 2 in favour of the creditors of defendant No. 1 and the suit against defendant No. 2 was dismissed.

In *Sayamma* v. *Punamchand Raichand*[1] defendant No. 1 and his relatives defendants Nos. 2 and 3 had passed a promissory note to the plaintiff for a certain amount for compounding a non-compoundable offence and withdrawal of the complaint filed by the plaintiff against defendant No. 1. The plaintiff withdrew the criminal proceedings a day before the promissory note was passed. In a suit to recover the amount of the promissory note, defendant No. 3 contended that the promissory note having been passed for stifling a prosecution for a non-compoundable offence was void under s. 23 of the Indian Contract Act, and it was held that the consideration for the promissory note having been the compounding of a non-compoundable criminal charge, the agreement was void altogether and defendants Nos. 2 and 3 were not liable to be sued. Mr. Justice Baker discussed the various authorities which had been cited at the Bar, and Mr. Justice Shingne laid down the principle deducible from decided cases in the terms following (p. 687):

"Firstly, where the consideration for an agreement is a promise not to prosecute for an offence which is non-compoundable, the agreement is not enforceable at law.

Secondly, this limitation on the freedom of contracts will only be enforced when it is *quite clear* that the consideration for the agreement was such an illegal promise as stated above.

Thirdly, a man to whom a debt is due may take securities for that debt from his debtor, even though the debt arises out of a non-compoundable offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties."

These observations were taken from decided cases, some of which we have already referred to, and it is clear from the

[1] (1933) 57 Bom. 678, s. c. 35 Bom. L. R. 850.

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observations of Mr. Justice Shingne quoted above that it is only the consideration which amounts to the plaintiff agreeing not to prosecute the offender that would vitiate the giving of a guarantee by the sureties.

The last case which we need refer to in this behalf is the case reported in *Bhowanipur Banking Corporation, Limited* v. *Durgesh Nandini Dasi.*[1] In that case the plaintiff, a banking corporation, had instituted a suit for the recovery of the principal and interest due on a mortgage bond executed by the defendant, Shreemati Durgesh Nandini Dasi, the widow of one Kalidas Rai Chowdhury. The mortgage bond set out that Kalidas was indebted to the bank for the sum of Rs. 1,78,965-4-7, that it was impossible for him to pay off that debt in full from his own resources, and that the mortgagor had determined to reduce her husband's debt as far as possible by borrowing money by mortgaging her own properties. By that document the defendant borrowed Rs. 30,000 repayable with interest at 9 per cent per annum. The defence taken up was that the bank had brought a false criminal case against her husband and her eldest son, that during the pendency of that case the bank undertook to withdraw it if she executed the mortgage bond for Rs. 30,000, and that under the apprehension of her husband and son being sentenced to imprisonment, and not having had an opportunity of getting advice from a disinterested person, she executed the document in suit. She further pleaded that the mortgage bond, having been executed with the object and consideration of procuring withdrawal of the criminal case, was illegal, inoperative and void in law. Their Lordships on the facts before them came to the conclusion that it was difficult to see what more cogent proof there could be of an agreement to stifle a prosecution. The case was one in which the prosecution had plainly stated that they had compounded a noncompoundable offence, and it could not be disputed that part of the terms of composition was the mortgage given by the defendant. In the course of their judgment their Lordships observed that:

"In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would, however, be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon

[1] (1941) 44 Bom. L. R. 1, s.c. L. R. 68 I. A. 144.

criminal proceedings is a serious abuse of the right of private prosecution."

Their Lordships, however, laid down that

"In a suit for enforcement of a contract, in order to constitute an agreement to stifle prosecution as a defence the defendant should establish, a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence."

In regard, however, to the sufficiency of the evidence which would be reasonable for substantiating such a defence, their Lordships observed that:

"Agreements to stifle prosecution are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances."

This decision of their Lordships of the Privy Council is the last word on the subject of agreements for stifling prosecution or compounding a felony. It is not enough to establish that there was a pre-existing debt nor is it enough to establish that besides the pre-existing debt there was also a threat of criminal prosecution. These circumstances by themselves would not be enough. There should be in addition to those circumstances an agreement on the part of the plaintiff not to prosecute, a contract whereby he agrees as a part of the consideration either not to bring or to discontinue criminal proceedings for some alleged offence, and unless and until the defendant is in a position to establish any such contract, a mere threat of criminal proceedings or pressure or undue influence or intimidation would not afford a valid defence to the suit.

[The rest of the judgment is not material to the report.]

VYAS J. I agree with my learned brother. Amongst the points which were argued before us were:

(1) Whether the equitable mortgage in this case was created by the deposit of title deeds of the suit house by defendant No. 3 on December 16, 1944, or by the letter, exhibit 89, dated the same date December 16, 1944, written by defendants Nos. 1, 2 and 3 to the manager of the plaintiff bank and signed by defendants Nos. 1, 2 and 3;

(2) Whether there was consideration for the promissory note dated December 28, 1944; and

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(3) If there was consideration for it, whether it was opposed to public policy and therefore unlawful within the meaning of s. 23 of the Indian Contract Act.

Now, the first point has arisen in this manner: Mr. Jathar for the appellants, original defendants Nos. 3 and 2A, has contended that in this case the security for the amount mentioned in the promissory note dated December 28, 1944, was not created by the deposit of title deeds but was created by the writing of the letter, exhibit 89, by defendants Nos. 1, 2 and 3 to the bank, and that as the said document which was compulsorily registrable (vide s. 17 of the Indian Registration Act) was not registered, the plaintiff's case based on equitable mortgage must fail; and in this connection Mr. Jathar has relied on *National Bank of India* v. *R. C. Nazir & Co.*[1] It was a case in which on May 30, 1919, defendant No. 4 had deposited the title deeds of his property with the plaintiff bank, and had addressed to the bank a letter the same day saying:

"I beg to state the fact that the title deeds of my immoveable property.....were lodged by me with your bank on May 30, 1919, as guarantor for any possible indebtedness of defendants Nos. 1 to 3."

There was no evidence of any preceding agreement. In a suit by the bank it was held:

"(1) That the evidence showed that the letter was the document in the form of which the terms of the contract between the parties had been reduced;

(2) that it was inadmissible in evidence for want of registration; and

(3) that consequently there was no evidence that an equitable mortgage had been created by defendant No. 1 depositing his title deeds with the bank."

In the course of his judgment, Mr. Justice Tayabji referred to the case of *Subramonian* v. *Lutchman*[2] in which Lord Carson delivering the judgment of the Privy Council observed (p. 82):

"(1) Where titles (of property) are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title.

(2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule.

(3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security."

Having made these observations, Lord Carson formulated the ultimate question as follows: Did the memorandum constitute the bargain between the parties? Therefore, in the case before

[1] (1931) 34 Bom. L. R. 748.

[2] (1922) L. R. 50 I. A. 77, s. c. 25 Bom. L. R. 582.

us, also, on the above mentioned authority, the question is: did the letter, exhibit 89, create the equitable mortgage or did it constitute the bargain between the parties? If yes, the want of its registration would be fatal to the suit. If not, and if the equitable mortgage was created by the deposit of title deeds, the fact that the letter, exhibit 89, was not registered would be a circumstance of no consequence.

In *Obla Sundarachariar* v. *Narayanna Ayyar*[1] the same principle was enunciated by Lord Tomlin who said (p. 74):

".....no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties."

Referring to the above mentioned cases of *Subramonian* v. *Lutchman and Obla Sundarachariar* v. *Narayanna Ayyar* in his judgment in *National Bank of India* v. *R. C. Nazir & Co.*[2] Mr. Justice Tayabji said (p. 753).

"Summing up the results reached, the cases relating to equitable mortgages by deposit of title deeds come under one of the following three possibilities:—

(1) The title-deeds may be handed over with nothing said except that they were to be security:.....

(2) The delivery of title-deeds may be accompanied with a bargain, which is not a written bargain. Though the terms of the deposit may at some time be embodied in a written document, that document may be a mere memorandum and may not constitute the contract.....

(3) There may be a written bargain—the contract between the parties being reduced to the form of a writing—a document which purports or operates to create the mortgage; or a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement. The memorandum may be the bargain between the parties, it may itself bring about a definite change in the legal relation to the property by an expression of will embodied in a document.....so that without its production in evidence the plaintiff cannot establish his claim."

The question, therefore, arises: Does the letter, exhibit 89, constitute a bargain or contract of equitable mortgage between the parties or is it a memorandum which could be looked upon as the sole repository and appropriate evidence of the equitable mortgage? Did it bring about a change in the legal relationship of the owner of the property with reference to

[1] (1931) L. R. 58 I. A. 68, s. c. 33 Bom. L. R. 878.

[2] (1931) 34 Bom. L. R. 748.

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the property—in other words, did it transfer any interest in the property? Would the plaintiff bank fail in their action if this document were not produced in Court as evidence? All these questions must be answered in the negative. If we turn to the document itself (exhibit 89), we find that it speaks of securities already produced or deposited in the shape of fixed deposit receipts, share certificates, Government promissory notes, cash certificates, etc. The securities already deposited are referred to as securities for the sums of money that had been advanced to the defendants by the bank from time to time on various accounts and also for the sums of money that might be advanced to them in future. They are referred to as securities for "all types of balances that may be found due by us individually or jointly under the loan account, current account, cash credit account, Hundi account and over-draft account, etc. in your Bank." The document then goes on to speak of securities to be deposited in future.

"in case such a circumstance arises as when we fail to pay up in time according to your demand, the balance fund due by us to you, or when the market value of the properties mentioned in the title deeds deposited by us with you, does not in your view exceed by 50 per cent of the balance due to you."

It is to be noted in particular that the document does not by its own terms create any security. On the contrary it says:

"We give you in writing that for proper security of the balance due to you by us if you require any deeds and documents to be executed by us in respect of the said properties, then we shall execute the same in proper time according to your demand, at our cost, and you may get them executed by us."

In these circumstances, looking to the terms of exhibit 89, we are of the opinion that it is not by any means a sole repository of the equitable mortgage. Only one instance of its terms will suffice to show how utterly shrouded in vagueness it is, and that instance is furnished by the words:

"as security for all types of balances that may be found due by us individually or jointly under the loan account, current account, cash credit account, hundi account and over-draft account, etc., in your Bank."

In other words, not only did this document not create any security by its own terms, but it did not even specify the amount of the debt to be secured. Such a document cannot be looked upon as one creating an equitable mortgage, and in our opinion equitable mortgage was not created by it.

Mr. Jathar has also relied on *Hari Shankar Paul* v. *Kedar Nath Shah*.[1] There the plaintiffs' case was that the mortgage was effected by the delivery to them of the documents of title of certain immovable property in Calcutta with intent to create a security thereon; and it was held by their Lordships that where the parties professing to create a mortgage by deposit of title deeds contemporaneously entered into a contractual agreement in writing, which evidences the deposit and contains all the essentials of the transaction, expressly conferring a power of sale on the mortgagee and in fact purports to be an instrument not merely evidencing the transaction already completed but by itself effective to create an interest in the property in favour of the mortgagee, such a document requires to be compulsorily registered. The ratio of the decision is that where the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement in writing which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered. We are unable to agree with Mr. Jathar that exhibit 89 which, on the face of it, is a very vague document amounts to a contractual agreement, which is an integral part of the mortgage, or is itself an operative instrument of the mortgage. By itself, it does not effectively create an interest in the property in favour of the mortgagee bank. It does not speak of the amount of the debt nor the rate of interest nor the date, month, or even the year of repayment, nor give even a clear or certain description of the securities stated to have been already deposited or to be deposited in future.

In *Kedarnath Dutt* v. *Shamloll Khettry*[2] Couch C. J. observed (p. 414):

> "The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within s. 17 of the Registration Act."

In the case before us it is impossible to hold that the parties (plaintiff bank and defendants Nos. 1, 2 and 3) looked upon

[1] [1939] L. R. 66 I. A. 184. [2] (1873) 11 Beng. L. R. 405.

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this document as the only repository and appropriate evidence of the mortgage. No title deeds were deposited by this document, and even those which were referred to as already deposited were not specified with proper particulars. The sole repository of a mortgage is a document, upon a perusal of which alone, we should be in a position to know what the security was, what its value was, what the terms of the mortgage were, etc., etc. It is impossible to gather these vital details from this document, exhibit 89.

For the appellants our attention was next drawn to *Pranjivandas* v. *Chan Mah Phee*[1] in which it was held:

"Where documents of title-deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the documents, but where the documents of title are handed over accompanied by a bargain, the bargain must rule the scope of the security, and when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security."

The decision in *Shaw* v. *Foster*[2] was followed in which it was observed by their Lordships:

"Although it is a well established rule of Equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in Equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Now, it is not possible to hold in this case that this document, exhibit 89 was an actual written charge accompanying the deposit of title deeds. No charge at all was in fact created by it as would be clear from the words:

"We give you in writing that for proper security of the balance due to you by us if you require any deeds and documents to be executed by us in respect of the said properties, then we shall execute the same in proper time according to your demand, at our cost, and you may get them executed by us."

—the words which spoke of the execution of "proper security" at the "proper time." Clearly, therefore, no written charge was created by this letter, exhibit 89.

In this context a considerable light is thrown by what was called the "confirmation letter" exhibit 88, dated March 6

(1) (1916) 18 Bom. L. R. 684, P. C. (2) (1872) L. R. 5 H. L. 321, 339.

1945, written by defendant No. 3 to the manager of the plaintiff bank. Therein defendant No. 3 spoke of two securities for the loan account: (1) The promissory note dated December 28, 1944, and (2) The deposit of title deeds of immovable properties made on December 16, 1944. He did not make any mention therein of any security having been created by the letter, exhibit 89, dated December 16, 1944. Contextually, the creation of the equitable mortgage mentioned in the last paragraph of this "confirmation letter", exhibit 88, must mean the creation of equitable mortgage by deposit of title deeds.

In our opinion the true construction of the writing exhibit 89 is that it was tantamount to goods bailed to the bankers to be retained by the bankers as a security for the general balance of the amount, which the bankers are entitled to call for and retain in accordance with the proivsions of s. 171 of the Indian Contract Act. The expression "as security for all types of balances that may be found due by us individually or jointly under the loan account, current account, cash credit account, Hundi account and over-draft account, etc. in your Bank" does suggest, we think, that this letter of lien, as it is designated by defendants Nos. 1, 2 and 3 themselves, was intended to operate as a lien of bankers within the meaning of s. 171 of the Indian Contract Act. It was not intended to transfer to the bank any interest in the title deeds themselves. We further feel that what was created by the letter, exhibit 89, was the relationship of pawnor and pawnee between defendants Nos. 1, 2 and 3 and the plaintiff bank (see s. 176 of the Indian Contract Act). Section 176 says:

"If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale."

It is thus clear that the pawnee may sell the thing pledged and that was what was provided for by the following words in exhibit 89:

"In case we fail to do so then you may sell the title deeds or securities—properties that have been already deposited with you and thus recover the balance due to you."

The point to be noted is that defendants Nos. 1, 2 and 3 did not transfer any interest in the title deeds to the Bank, but merely said that the bank was to have a lien on the title deeds

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and hold them as collateral security and was to sell them to recover its dues. In case of such a sale, the purchaser would get a lien on the title deeds, but the interest in them would still continue to vest in defendants Nos. 1, 2 and 3. The point in brief is that the title deeds were merely pledged by this document, exhibit 89, to the bank and the documents constituted a lien of the bankers to be retained by them as a security for the balance of amount. No mortgage was created by it, and therefore, it needed no registration.

The equitable mortgage in this case was created by the deposit of title deeds. The said title deeds must only have been given to the bank by way of security for the debt and for no other purpose. Indeed that was what was explicitly stated by defendant No. 3 himself in exhibit 88 to which we have already referred. This is what he stated:

"As an additional security for the said loan account, I have on the date December 16, 1944, deposited the following documents and title deeds of our immoveable properties."

In his evidence in the Court he endeavoured to evade the consequences of his admission in exhibit 88 by saying:

"It is not true that these papers were deposited as a security for the pro-note debt."

But in the next breath he had to confess:

"The signature on Exh. 88 is mine. It does mention that these papers were deposited as an additional security for the pro-note debt."

Such prevarication does no credit to him (defendant No. 3), shows disregard for truth and only evinces an attitude of mind which must stand self-condemned.

The next point which is made by Mr. Jathar is that there was no consideration for the promissory note as far as defendants Nos. 2 and 3 were concerned. It is argued that the bank's debtor was defendant No. 1 alone and that defendants Nos. 2 and 3, had nothing to do with the embezzlements which were made by defendant No. 1. The misappropriations made by defendant No. 1 alone having been detected, it was in order to make good those moneys that the pro-note was taken by the bank from defendants Nos. 1, 2 and 3. In these circumstances, says Mr. Jathar, there was failure of consideration so far as defendants Nos. 2 and 3 were concerned. The contention must fail. Consideration need not necessarily be in cash. In this case the giving of time till October 30, 1944,

to make good the amount misappropriated was the consideration which moved from the bank to defendants Nos. 1, 2 and 3 and that, in our opinion, was good and valid consideration. The bank would not have given time if the pro-note were to be executed by defendant No. 1 alone. The bank would give time till October 30, 1944, only if defendants Nos. 2 and 3 also jointly executed the pro-note along with defendant No. 1. Defendant No. 2 and Laxmibai, who was the adoptive mother of defendant No. 3, were very anxious that defendant No. 1 should be given time to make good the moneys, and the bank was prepared to do so only if defendants Nos. 2 and 3 joined defendant No. 1 in executing the pro-note. It was in those circumstances that the pro-note came to be executed jointly by defendants Nos. 1, 2 and 3. We have thus no doubt that the consideration which flowed from the plaintiff bank to defendants Nos. 1, 2 and 3 was that the time was given to defendant No. 1 to pay off his debt to the bank by October 30, 1944, in which giving of time all the defendants were intensely interested. It was a good and valid consideration.

But the most interesting part of Mr. Jathar's argument is that even if there was consideration for the promissory note, it was unlawful, being opposed to public policy (vide s. 23 of the Indian Contract Act). Mr. Jathar has very strenuously contended that if we look to the circumstances of the case and take a careful and considered stock of them, we must be driven to the conclusion that the consideration for the promissory note which moved from the bank to defendants Nos. 1, 2 and 3 was the compounding of a non-compoundable offence, which compounding amounted to trading in felony. No doubt an offence of criminal misappropriation is an offence compoundable with the leave of the Court. But the alleged forgeries committed by defendant No. 1 in the course of his embezzlements were non-compoundable offences, and the compounding thereof amounted to trading in felony, says Mr. Jathar. It is contended that such a consideration, being opposed to public policy, was unlawful, and therefore the pro-note was unenforceable. In support of this contention Mr. Jathar has taken us through evidence. He says that on evidence there were threats and intimidation to defendant No. 2 and Laxmibai, that the said threats were threats of criminal prosecution of defendant No. 1, that pursuant to those threats the title deeds of defendant No. 3 were deposited with the bank and defendants Nos. 2 and 3 had joined in the execution of the

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promissory note and that therefore we must, as a matter of glaring natural probabilities hold that the bank must have given the defendants to understand that if the promissory note was jointly executed by them all, the bank would not prosecute defendant No. 1. It is submitted for the appellants that such an understanding generated by the bank in the minds of defendants Nos. 1, 2 and 3 and resulting in the execution of the promissory note by all the three of them would be trading in felony and would vitiate the promissory note.

Now, Mr. Jathar has fortified himself by certain authorities, and the first case to which he has drawn our attention is the case of *Sudhindra Kumar* v. *Ganesh Chandra.*[1] The question for decision there was whether a certain mortgage bond was invalid and unenforceable by reason of an alleged agreement to compromise a non-compoundable criminal charge. It was a case in which one Kalidas Roy Chawdhury and his son Jitendra had executed a mortgage bond in favour of the bank whose debtors they were. Kalidas died leaving surviving behind him his sons Jitendra, Sayendra and Suhindra and those sons contended in a suit which was brought by the bank against them and others that the bank had launced a non-compoundable criminal proceeding against Kalidas and Jitendra and that the said proceeding was compromised or withdrawn on condition of Kalidas and Jitendra submitting to arbitration and executing a mortgage bond, and that the bond was, in those circumstances, void and unenforceable. The Subordinate Judge who tried the suit found that the debt in satisfaction of which the bond in suit was executed was a genuine one and had existed previous to the criminal case and that therefore the bond was valid and enforceable in law. He accordingly made an order for sale. On the matter going to the High Court in appeal Derbyshire C. J. observed in the course of his judgment (p. 847):

"....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

[1] [1938] A. I. R, Cal. 840.

the mortgage. The consideration for the submission by Kalidas and Jitendra to arbitration was, in my view, the promise to drop the criminal proceedings. 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."

The learned Chief Justice held that the mortgage was invalid and the appeal of the sons of Kalidas was allowed. Mr. Jathar for the appellants relies on this case and submits that as in that case the wife of Kalidas had mortgaged her private property to the bank for relieving Kalidas of the prosecution which was hanging over his head, so in this case also the title deeds of the immovable property of defendant No. 3 must have been deposited with the plaintiff bank by defendant No. 3, the adopted son of Laxmibai, for saving defendant No. 1 from prosecution. Mr. Jathar has gone further and argued that in the circumstances of the present case we should infer that the bank must have given a promise to defendants Nos. 1, 2 and 3 that if they executed a promissory note jointly, defendant No. 1 would not be prosecuted by them.

In our opinion the Calcutta decision would not apply to the facts of this case. There the learned Chief Justice had found that the director of the bank had made a promise to Kalidas, on various dates in April, May and June 1925 that if he executed a mortgage bond the criminal charge against him would be dropped. The evidence of such promise or agreement between the bank and the defendants is absolutely lacking in this case. It may be noted that in the above mentioned Calcutta case Mr. Justice Mukherjea who delivered a concurring judgment followed the decisions in *Kamini Kumar* v. *Birendra Nath*[1] and *Gopal Chandra* v. *Lakshmi Kanta*[2] and observed (p. 850):

"The question now is, whether on the facts mentioned above, the mortgage bond is void and unenforceable, under s. 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

[1] [1930] A. I. R. P. C. 100. [2] [1933] A. I. R. Cal. 817.

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the parties, that a non-compoundable criminal case should not be proceeded with.....If the *quid pro quo* or consideration for a bond is the withdrawal of a criminal prosecution, obviously it is hit by s. 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.*"

The point, therefore, is that simply because in our present case defendant No. 1 was not prosecuted by the bank, it would not necessarily follow that the consideration for the promissory note was a promise on the part of the bank that it would not prosecute defendant No. 1. In the words of Mr. Justice Mukherjea in the Calcutta case, it would not be enough even if the motive which drove the defendants to pass the pro-note were that a criminal proceeding should not be launched against defendant No. 1. It is quite probable, of course, that the motive with which defendants Nos. 2 and 3 joined defendant No. 1 in executing the pro-note might have been that defendant No. 1 should not be tried on a criminal charge arising out of the embezzlements and forgeries. But that would only mean that defendants Nos. 2 and 3 might have thought to themselves that if they joined defendant No. 1 in executing the pro-note, the prosecution of defendant No. 1 would be avoided. This would, in our opinion, be far from sufficient justification to presume that the consideration or object of the pro-note was the avoidance of prosecution. The test is "Was there a bargain between the bank and defendants Nos. 1, 2 and 3 that if the suit pro-note was jointly passed by defendants Nos. 1, 2 and 3 to the bank, the bank would not prosecute defendant No. 1?" The evidence on the point of bargain in this case is nil.

It is true that defendant No. 3 and Laxmibai have deposed that Mr. Padalkar, the bank accountant, had threatened, the prosecution of defendant No. 1 and had intimidated them that unless a joint promissory note was passed by defendants Nos. 1, 2 and 3 there would be no saving of defendant No. 1 from the prosecution. But in this connection the following observations of Cotton L. J. in *Flower* v. *Sadler*[1] are very pertinent (p. 576):

"A threat to prosecute is not of itself illegal; and the doctrine contended for does not apply, where a just and *bona fide* debt actually

[1] (1882) 10 Q. B. P.

exists, when there is a good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as, possibly, a 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, which he justly owes to his creditors."

It would not, therefore, be appropriate to hold from the alleged threat of criminal prosecution (assuming that the story of threat is a true one) that the subsequent transaction of a pro-note, which was passed for the debt which was justly owed by defendant No. 1 to the bank, was vitiated. But if the pro-note were the result of a bargain between the parties that defendant No. 1 was not to be prosecuted in the event of its execution, the law would not enforce it.

The next case we are referred to for the appellants is the case of *Kessowji Tulsidas* v. *Hurjivan Mulji and Shamkumar vahu.*[1] S gave to the creditors of H a guarantee for the payment of the debts due to them by H. As a consideration for this guarantee the creditors were to abstain from taking criminal proceedings against H for fifteen days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time, and it was held that such a guarantee could not be enforced by the creditors. In particular, Mr. Jathar has relied on the following observations of Mr. Justice Farran in his judgment in that case (p. 570):

"I do, however, feel a great difficulty in believing that the steps which the plaintiffs then threatened against Hurjivan were not criminal proceedings. *Prima facie*, the man had been guilty of criminal breach of trust as a servant, and to a large extent, and that was the aspect in which the plaintiffs viewed and still view his conduct. That they were pressing very hard is certain. I cannot doubt but that they were angry. They were clearly in haste. They sent for the lady at night and for their solicitor's clerk also at a late hour. They did not wait to procure a stamp.....but had the document then and there executed. It is hardly in accordance with human nature to think that the plaintiffs did not suggest criminal proceedings. It is certainly not in accordance with the custom of native merchants in Bombay."

Mr. Jathar argues that in consonance with the working of human nature the plaintiff bank, whose moneys were embezzled by defendant No. 1, must have threatened defendant No. 1 and his relatives defendant No. 2 and Laxmibai, the adoptive mother of defendant No. 3, with prosecution of defendant No. 1 and that the suit pro-note must have been the result of those threats. It is to be remembered, however, that in

[1] (1887) 11 Bom. 566.

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Kessowji Tulsidas v. *Hurjivan Mulji* there was a document executed by defendant No. 2 in favour of the plaintiffs and it stated (p. 568):

"From Bhai Hurjivan Mulji, whom I have protected as a son, there appears to be due to you, as the balance of an account, Rs. 3,700. You want to take steps to recover the said amount immediately. But at my request you have at present ceased to take such steps, on condition that if Bhai Hurjivan Mulji should not pay you your money with interest within fifteen days I am to pay such balance as may appear to be due to you by Bhai Hurjivan Mulji. I, therefore, give this guarantee-paper in writing, as follows: If within fifteen days Bhai Hurjivan Mulji should not pay such balance as may appear to be due to you in the account, I myself am duly to pay you the amount of such balance as may appear in the account."

In other words, the consideration for the document passed by defendant No. 2 in favour of the plaintiffs was an agreement between them that the criminal prosecution of Hurjivan Mulji was to be stayed for fifteen days, and it was in those circumstances that the guarantee given by defendant No. 2 was held not binding on her. The point is that the case was decided on the basis that there was a promise on the part of the plaintiffs to stay the prosecution for fifteen days. There was a bargain to that effect between the plaintiffs and defendant No. 2. The question whether in the absence of such a bargain the guarantee would have been held unenforceable from the circumstances of the case did not arise for decision in that case, and that being so, Mr. Desai for the respondents has contended, and quite rightly, that the above-quoted observations of Mr. Justice Farran should be looked upon as *obiter*. Certainly they did not receive support from the division bench of this Court in *Sayamma* v. *Punamchand*[1] in which Mr. Justice Baker said (p. 854):

".....A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not, however, by stifling a prosecution, obtain a guarantee from third parties. Of course, it makes no difference whether the criminal proceedings have been actually instituted, as in the present case, or whether there is still only a threat of them, provided the consideration is the stopping of the criminal proceedings, whether actual or contemplated."

Mr. Justice Baker approvingly referred to the decision in *Sukhdeo Das* v. *Mangal Chand*[2] in which it was held:

"Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not

[1] (1933) 35 Bom. L. R. 850. [2] (1917) 2 P. L. J. 630.

enforceable by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise."

The ratio of the decisions in *Sayamma* v. *Punamchand* and *Sukhdeo Das* v. *Mangal Chand* is that even though the debt may arise out of a criminal offence, as in the present case, and even though the debtor may be threatened by his creditors with prosecution, the agreement between the debtor and his creditors would be enforceable at law, provided of course that the consideration for the agreement is not a promise not to prosecute the debtor.

Mr. Jathar has next referred us to *Shripad* v. *Sanikatta Co-operative Society*[1] in which it was held by Mr. Justice Lokur as follows:

"An agreement which is the outcome of an understanding that the complainant should not object to the withdrawal of a prosecution against a person, in respect of a non-compoundable offence which has been taken cognizance of, is against public policy under s. 23 of the Indian Contract Act, 1872, and is therefore void and unenforceable."

There, again, the same principle to which we have referred above was accepted, viz., that if there is a bargain between the parties that if a certain agreement is passed by the debtor in favour of the creditor, the creditor would not prosecute the debtor, the agreement would be void and unenforceable.

For the appellants we are next referred to *Henry Williams* v. *Bayley*.[2] It was a case in which a son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. Those endorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (father's) name on it, was lying at the bankers dishonoured. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him. It was held that the agreement was invalid. It was obseryed that:

[1] (1944) 46 Bom. L. R. 745. [2] (1886) L. R. 1 H. L. 200.

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"A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity."

On the authority of these observations Mr. Jathar has contended that in the present case also defendants Nos. 2 and 3 were not free and voluntary agents in executing the pro-note jointly with defendant No. 1. They executed it as they were threatened that if they did not do so, defendant No. 1 would be prosecuted. In these circumstances, says Mr. Jathar, the pro-note would not be enforceable.

Mr. Desai for the respondents has referred to *Bhowanipur Banking Corporation, Limited* v. *Durgesh Nandini Dasi*[1] in which it was observed by their Lordships of the Privy Council (p. 3):

"The learned Judge is in fact doing nothing more than considering the elements that go to the making of a simple contract, for it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence."

Mr. Desai says that in the present case there is no evidence whatever of any contract or agreement or bargain between the parties (plaintiff bank and defendants Nos. 1, 2 and 3) that if the promissory note were jointly executed by defendants Nos. 1, 2 and 3, defendant No. 1 would not be prosecuted. It could not, therefore, be said that the consideration for the pro-note was an illegal agreement.

It is now necessary to go into the evidence and see whether there was any bargain between the parties that the plaintiff bank would desist from prosecuting defendant No. 1 if a joint pro-note were passed by defendants Nos. 1, 2 and 3. If we turn to the evidence of defendant No. 3, he says that Padalkar, the bank accountant, had gone to Laxmibai and told her that defendant No. 1 would be prosecuted for the defalcations committed by him and would be imprisoned, that defendant No. 2 would also lose his service and that the whole family of Laxmibai would be put to shame. Laxmibai deposes that on that particular night defendant No. 1 returned home at 2 o' clock, began to weep and said that he had misappropriated

[1] (1941) 44 Bom. L. R. 1, P. C.

the bank moneys and the authorities of the bank were asking him to pay up the amount the next morning. Next morning the bank accountant visited her house and told her that defendant No. 1 had misappropriated the moneys which must be paid off on that very day or else he would have to be imprisoned. On the other hand, Padalkar on behalf of the bank has denied the allegations of threat and intimidation. It is true that defendant No. 3 and Laxmibai are interested in saying that there were threats and intimidation from the bank accountant since the liability under the promissory note is now sought to be evaded. It is equally true that Padalkar also is interested in denying the story of threat since he might think that such a story would be prejudicial to the case of the bank. Quite irrespective, however, of the credibility or otherwise of the evidence of these witnesses, we are not satisfied that in this case there really arose any question of an agreement or bargain between the parties regarding non-prosecution of defendant No. 1. Primarily, the bank would be concerned with the recovery of its moneys which were embezzled by defendant No. 1, and that must have been the uppermost thought in the minds of its officials as soon as the defalcations were discovered. The bank officials must have asked defendant No. 1 to pay up the moneys and in the natural course defendant No. 1 must have spoken about it to Laxmibai and the promissory note must have been immediately thought of as the only possible way for satisfying the bank debt. We do not think the matter went to the stage of any talk between Padalkar and defendant No. 3 or Laxmibai regarding what would happen if the moneys were not paid off by defendant No. 1. Defendant No. 3 and Laxmibai might of course have thought in their own minds that if the pro-note were not passed, defendant No. 1 might be prosecuted, and that might indeed have been the motive for the passing of the promissory note. But that is entirely different from there being any bargain between the parties that defendant No. 1 would *not* be prosecuted if the promissory note were passed by defendants Nos. 1, 2 and 3. The evidence, in our opinion, is quite insufficient to satisfy us as to the existence of any such bargain in this case.

For the appellants it is submitted before us that we should presume from the circumstances of this case—threats, intimidation and bank not launching a criminal proceeding—that there must have been a bargain between the parties that if

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the promissory note was jointly passed by defendants Nos. 1, 2 and 3, there would be no initiation of prosecution by the bank. We are unable to agree. In *Williams* v. *Bayley,* there was an overt act, namely, the handing back of the notes with the forged indorsements by the bankers to the father from which a bargain not to prosecute the son could be legitimately presumed. In *Bhowanipur Banking Corporation, Limited* v. *Shreemati Durgesh Nandini Dasi* there was an overt act of the actual withdrawal of the prosecution. There is no such overt act of these types in this case. If for instance, the forged cheques which were evidence of the guilt of defendant No. 1 had been returned to the defendants, we would have been entitled to infer a bargain between the parties of the kind suggested by the appellants. Simply because defendant No. 1 was not prosecuted, we are afraid we cannot deduce any promise on the part of the bank, as the result of which there was non-prosecution. Even the idea of prosecution might not have arisen if the first thought of the bank was to recover the moneys, as it must have been, and if the defendants agreed at once to arrange to pay back.

In the circumstances, we are of the opinion that the consideration for the suit promissory note is not proved to have been opposed to public policy and therefore not proved to have been vitiated by s. 23 of the Indian Contract Act. Regarding the other points including the point whether a *sanad* is a document of title, I agree with the conclusions of my learned brother.

In the result the appeal fails and is dismissed.

PER CURIAM. We have heard Mr. Jathar in regard to the costs of the appeal. There are no special circumstances which would enable us to take this case out of the general rule that costs must follow the event. The appeal will, therefore, stand dismissed with costs.

Mr. Jathar has further told us that in the decree which has been passed by the Court below six months time to redeem was given from the date of the judgment, viz., from February 27, 1950, under O. XXXIV, R. 4, of the Civil Procedure Code, and though the decree has been drawn up, in view of the pendency of the appeal, nothing further appears to have been done by way of finalising the decree. We think it but fair that the appellants should have six months' time for redemption from today, and with that variation in the date of

redemption, we confirm the decree which has been passed by the Court below. The appellants will accordingly have six months' time to redeem calculated from today.

Appeal dismissed.

K. B. S.

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APPELLATE CRIMINAL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

ABBA GANI AND CO. (ORIGINAL PLAINTIFFS), APPELLANTS *v.* THE TRUSTEES OF THE PORT OF BOMBAY (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Indian Contract Act (IX of 1872), s. 74—Contract for supply of goods—Payment of deposit for due performance of contract—Forfeiture of deposit for breach of contract—Relief against forfeiture—Applicability of section—Equitable jurisdiction of Court to grant relief—Unreasonableness of deposit whether a ground for granting relief—Whether express provision in contract necessary to allow exercise of right of forfeiture.

Section 74 of the Indian Contract Act, 1872, does not contemplate the case of a deposit made for the due performance of a contract. Such deposit cannot be considered as amount to be paid in case of a breach, nor can it be considered to be "any other stipulation by way of penalty." Hence a party committing a breach of the contract is not entitled to the benefit conferred by the section in a suit filed by him for the refund of the deposit.

Dinanath v. *Malvi & Co.*,[1] followed.

Pallonjee Eduljee & Sons v. *Lonavala Municipality*,[2] dissented from.

Natesa Aiyar v. *Appavu Padavachi*,[3] *Bhalchandra* v. *Mahadeo*,[4] *W. J. Younie* v. *Tulsiram Jankiram*,[5] and *Jamai Majri Coal Co. Ltd.* v. *S. N. Lokras*,[6] approved.

Bishan Chand v. *Radha Kishan Das*,[7] and *Sankalchand Shah & Co.* v *J. Prakash & Co.*,[8] referred to.

The equitable jurisdiction of the Court to give relief against forfeiture and to relieve a party against penalty is conditioned by the fact that ordinarily the Court will not help a wrong-doer or a party in default in obtaining a deposit which he had made for the due performance

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* First Appeal No. 23 of 1951.

(1) (1929) 32 Bom. L. R. 272.
(2) (1936) 39 Bom. L. R. 835.
(3) (1913) 38 Mad. 178.
(4) [1947] A. I. R. Nag. 193.
(5) [1942] A. I. R. Cal. 382.
(6) [1950] Nag. 625.
(7) (1897) 19 All. 489.
(8) (1945) 48 Bom. L. R. 633.