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PROKOPIS SYMEONIDES v. KARABET KALAYDJIAN.

[STRONGE, C.J., AND THOMAS, J.]

PROKOPIS SYMEONIDES & OTHERS, *Plaintiff-Respondents,*

v.

KARABET KALAYDJIAN, *Defendant-Appellant.*

(*Appeal No.* 3567.)

Contract Law, 1930, *section* 27 (1) — *Whether applicable to contracts in partial restraint of trade — Trade Union Law*, 1932, *section* 4.

Where manufacturers of ice in the town of Nicosia and manufacturers thereof in the town of Limassol contracted that the former would not send ice to Nicosia and that the latter would not do so to Limassol.

Held: the contract was void under section 27 of the Contract Law, 1930, as being in restraint of trade and was not prevented from being so by a contemporaneous oral agreement between the same parties that certain customers in Nicosia of the Limassol manufacturers hitherto supplied by them with ice should in future be supplied on their behalf by the Nicosia manufacturers.

Held further that section 4 of the Trade Union Law, 1932, did not operate to validate such a contract.

Appeal from judgment of the Nicosia District Court in action 262/35.

The respondents were manufacturers of ice in Nicosia and the appellant was an ice manufacturer in Limassol. By agreement in writing dated 20th July, 1935, between the respondents, appellant and another, it was agreed that up to the end of November, 1935, the respondents would not supply or send any ice to Limassol and that appellant would not do so to Nicosia. Clause 3 of the contract fixed the damages for breach of the contract at £100. By an oral agreement of the same date between the same parties it was agreed that certain customers of the appellants in Nicosia hitherto supplied by appellant with ice from Limassol should be supplied by the respondents with ice on appellant's behalf. In the action the respondents claimed £100 damages for breach of the contract by appellant and another in supplying ice to the said customers in Nicosia.

The District Court (Stavrinides, D.J.) gave judgment against appellant for the amount claimed and from this judgment the appellant appealed.

G. Chrysafinis for appellant:

I submit the agreement is void as being in restraint of trade. English Common Law in regard to contracts in restraint of trade is wider than section 27 (1) of the Contract Law, 1930. *Nordenfelt* v. *Maxim Nordenfelt &c. Co.*, 1894, Appeal Cases at p. 541. That section 27 applies to and covers partial restraints appears from the use of the word "absolutely" in section 28. Pollock and Mullah Indian Contract Acts, 6th Ed., pp. 210-211.

P. N. Paschalis for respondent:

Appellant was not wholly restrained from exercising his trade because under an oral agreement between himself and respondents of even date with the contract whereby respondents were to supply to him in Nicosia ice for his three Nicosia customers appellant was in effect still continuing to supply them. There was therefore only the partial restraint from supplying other persons in Nicosia, and section 27 of the Contract Law, 1930, does not apply to cases of partial restraint. Furthermore, appellant in fact benefited by the restraint in that he would get the ice at a lower price and would in addition be saved the transport expenses of bringing his ice from Limassol to Nicosia.

The contract is validated in any event by section 4 of Law 1/1932 as this was a combination between masters and masters imposing restrictive conditions upon their trade.

The following written judgments were delivered:

STRONGE, C.J.: Plaintiffs who are ice manufacturers in Nicosia, and defendants who carry on the same business in Limassol entered into a written agreement dated 20th July, 1935, (Exhibit 1) by para. 1 of which the plaintiffs bound themselves not to send ice from Nicosia to Limassol and the defendants bound themselves not to send ice from Limassol to Nicosia. By para. 3 of this agreement damages for breach of it were fixed at £100.

By an oral agreement made the same day as the written contract, but whether before or after its execution does not appear, the plaintiffs, as is clear from their letter (Exhibit 4) bearing the same date as the written contract, undertook to supply to three Nicosia customers of defendant 1, about 60 blocks of ice daily in Nicosia, defendant 1 being under contract with his 3 customers to supply that quantity. Between the 20th July, 1935, and the 5th September of the same year defendant 1, who was a partner with defendant 2 in the manufacture of ice, sent on an average 44 blocks of ice daily from Limassol to Nicosia to these three customers. Plaintiffs brought this action against both defendants claiming £100 damages for breach of the contract of 20th July, 1935, restraining the defendants from sending ice from Limassol to Nicosia. The main defence relied upon by the defendants was that the contract was void under section 27 of the Contract Law of 1930 as being a contract in restraint of trade. The learned judge of the District Court overruled this contention and gave judgment against defendant 1 for £100 and costs and judgment in favour of defendant 2 without costs on the ground apparently that defendant 2 had nothing whatever to do with the breach complained of which was solely and entirely the act of defendant 1.

Against that judgment defendant 1 now appeals. The argument of the appellant that the contract is void under

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section 27 of the Contract Law, 1930, is opposed by two different arguments on behalf of the respondents. They say in the first place that section 27, enacting that every agreement by which a person is restrained from carrying on a trade or business is to that extent void, is essentially a reproduction of the English Common Law relating to contracts in restraint of trade and does not void any agreement which like the present imposes a partial and not a total restraint. Their argument is based upon section 2 (1) of the Contract Law, 1930, and is in substance this:—

"At English Common Law only contracts by which a person is wholly restrained are void. Consequently the expression 'restrained' in section 27 of the Contract Law must by virtue of section 2 (1) of the same Law be presumed to be used with the meaning which that expression bears in English law and therefore must mean 'wholly or absolutely restrained'".

To this contention there are two, as I think, fatal objections, the one that in English law the term "restrained" has not the limited or restricted meaning—alleged by Mr. Paschalis. A person only partially restrained in the exercise of his trade or business is in the eye of the English law a person "restrained" in the exercise of his trade. So, too, is a person whose agreement wholly restrains him from exercising it. The law, it is true, says that the latter agreement is void while the former may not be, but this distinction between the two does not imply that under the former agreement the person is not restrained while under the latter he is. The second objection against assigning to the term "restrained" in section 27 the meaning for which Mr. Paschalis contends is, that even assuming "restrained" in English law to have the meaning asserted by Mr. Paschalis, to give it that meaning in section 27 would be giving it a meaning inconsistent with the context and by section 2 expressions occurring in the Contract Law are only to be given the meaning they bear in English law if that would be consistent with the context. If the term "restrained" in section 27 (1) had been intended by the draftsman to mean "wholly restrained" as Mr. Paschalis says it means in English law then sub-section 2 (i), saving from the operation of the preceding sub-section certain kinds of agreements partially restrictive, would have been unnecessary and, so too, would the addition of the word "absolutely" in section 28 before the term "restricted".

The respondents' second answer to the contention that the agreement is void as being in restraint of trade appears at first sight to be more weighty. It is this:—The written contract and the oral agreement must, they say, be read together as constituting one complete transaction or agreement. So read, the proper construction, they

maintain, is that while defendant 1 was by the written contract restrained from sending any ice from Limassol to Nicosia he was nevertheless, in effect as the result of the oral part of the contract, at liberty to supply his customers vicariously with ice of the plaintiffs' manufacture and the ice to be so supplied must be looked upon or regarded as being ice of defendant 1's manufacture. It follows, according to the argument of respondents, that he was not in effect restrained by the contract from delivering ice to his three Nicosia customers, and, consequently, they maintain that the contract is not one by which he is restrained in the exercise of his trade. This reasoning appears to me to land the respondents in a dilemma. If defendant 1 is not restrained from delivering ice to his three customers in Nicosia, then the present action for damages in respect of his delivering ice to them cannot lie, for he has not committed any breach of contract by such delivery. If, on the other hand, the effect of the contract is that he is restrained from delivering any ice at all in Nicosia or from delivering more than a limited quantity of ice to his three customers there, then it seems to me clear that the contract *does* restrain him from exercising his trade in Nicosia and being consequently a contract which is made void by section 27 of the Contract Law of 1930 this action is not maintainable.

The fact that as from the date of the contract the three customers of defendant 1 in Nicosia were to pay defendant 1 for the Nicosia ice which was to be manufactured and delivered to them by the plaintiffs in lieu of defendant 1's ice from Limassol which they had hitherto been getting cannot, in my opinion, change or convert this Nicosia ice into defendants' Limassol ice.

Can it be supposed—assuming the contract had been carried out in its entirety—that any one of defendant 1's three Nicosia customers if asked in August, 1935, what ice he was using would have replied: "Limassol ice". Clearly under the contract not a single pound of ice actually manufactured by defendant 1 in Limassol was to reach Nicosia even in the case of his three customers there. And even if I were to assent—which I do not—to the fiction which so ingeniously converts into Limassol ice the blocks of Nicosia ice deliverable daily to these three customers in Nicosia, there would nevertheless remain the incontrovertible fact that even as regards these three customers defendant 1 was restrained by the contract in the exercise of his trade because if they or any one of them over and above the daily quantity of ice with which he was to be supplied by plaintiff on defendant 1's behalf wanted an additional quantity of ice manufactured by defendant 1 in Limassol it is clear that defendant 1 by

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the terms of the contract would be precluded from supplying it. That the arrangement effected by the contract was, by reason of the saving of transport expenses and the higher price which defendant 1 was enabled to charge his three customers, more advantageous to defendant 1 than the state of affairs before the contract was entered into is, I think, in the circumstances of this case *nihil ad rem*, and does not prevent this contract from being rendered void by section 27. It does not seem to me that, in the case of *Madhub Chunder* v. *Rajcoomar Doss*, referred to in Pollock & Mulla (6th Ed.) at p. 211 the contract by which the plaintiff was to cease carrying on his business of brazier in a particular quarter of the city of Calcutta would have been held not to be a contract in restraint of trade had the amount he was to receive under the contract been 900 times the 900 rupees for which he sued.

There remains the argument that the later Law relating to Trade Unions (Law 1, 1932) applies to validate the agreement on the ground that as this was a combination of manufacturers of ice to regulate relations between themselves or to impose restrictive conditions on the conduct of their business it was a trade union and therefore the agreement which is the subject of this action is validated by section 4 of that Law.

The mere fact that 5 or 6 persons who are engaged in the same kind of manufacture enter into a mutually restrictive agreement as regards the commodity they manufacture does not, in my opinion, make the combination a trade union within the Law of 1932. It seems clear from section 2 of that Law that there must be an association or society having a constitution of some kind setting forth the purposes for which the association or society is formed and no such society or constitution existed here.

As I am clearly of opinion that the contract *per se*, and even if read together with the oral agreement, was an agreement by which defendant 1 was restrained from exercising his trade and therefore void under section 27 of the Contract Law, I do not think it necessary to consider the other grounds of appeal argued by Mr. Chrysafinis. I think this appeal should be allowed with costs, that the judgment of the Court below should be set aside, and judgment entered for the appellant.

THOMAS, J.: This appeal raises the important question of what agreements in restraint of trade are void in accordance with the law in force in Cyprus. The appellant carries on the business of manufacturing ice in Limassol, and each of the respondents has a factory in Nicosia for making ice. To keep up the price of ice and to avoid competition the parties entered into a contract on 20th July, 1935, under which the appellant undertook not to

supply or send any ice from Limassol to Nicosia, and the respondents undertook not to send any to Limassol from the date of the contract until the end of November. The appellant having sold ice in Nicosia after the date of the contract was sued by the respondents for £100, the amount fixed in the contract as damages payable upon breach of the agreement. The main defence raised by the appellant was that, the agreement being in restraint of trade, was void. The learned judge in the Court below said that "taking into consideration all the circumstances of the present case I am of opinion that the agreement sued upon is not in restraint of trade and therefore valid and enforceable." Judgment was given against the appellant for £100, the amount of damages provided in the contract. The only serious question raised for decision in this appeal is whether the agreement sued upon is void under Cyprus law as a restraint of trade. At the date of the contract the appellant was under agreement to supply daily three buyers in Nicosia. By an agreement supplementary to and of the same date as the main contract the respondents undertook to supply the three customers of the appellant in Nicosia. In these circumstances is the undertaking of each party not to send ice to the town of the other a restraint of trade ?

Under section 27 of the Contract Law, 1930, agreements in restraint of trade are void. Section 2 of the same Law says the Law shall be interpreted in accordance with the principles of legal interpretation obtaining in England. The Court below read this section as if it stated that the principles of English law shall apply in interpreting a contract alleged to be in restraint of trade, and accordingly decided the case according to English law. In my view the judge was in error in so doing, first because the Law is to be interpreted not in accordance with the principles of English law, but in accordance with the principles of legal interpretation, which is a very different thing. Secondly because the expressions used in the Law are to have the meanings attached to them in English law only if those meanings are consistent with their context, and not contrary to any express provision contained in the Law itself. From the terms of section 27 read together with section 28 it is quite clear that the word "restrain" has a meaning different from that which it bears in English law, and to give it such latter meaning would be inconsistent with its context. "Restrain" must be taken in its ordinary accepted meaning which is to hold back, hinder, or prevent a person from some course of action. The words of section 27 are quite general, and are not subject to any limitation other than the three exceptions set out in sub-section 2. "To escape the prohibition, it is

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not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly brought within one of the exceptions." (Pollock and Mulla's Indian Contract Act, 6th Ed., p. 211.) After a full examination of all the decisions of the Indian Courts Sir Frederick Pollock expresses the opinion that the section must be construed according to its literal terms, and when so construed " it only strikes at agreements which operate as a total bar to the exercise of a lawful business, for however short a period or however limited the area, and does not avoid agreements which merely restrain freedom of action in detail in the actual exercise of a lawful business " (Pollock and Mulla, p. 218). The agreement not to supply any ice to Nicosia for four months was manifestly a limitation or restriction of appellant's right to sell ice wherever he chose, and therefore clearly a restraint upon the exercise of his lawful trade. Under English law an agreement in restraint of trade is valid if it is reasonable between the parties, and not injurious to the public. The law in Cyprus knows no such distinction, and renders void any agreement in restraint of trade except in three cases set out in sub-section 2 of section 27. Our law is thus a substantial departure from the English Common Law. Section 27 of our Contract Law comes from the draft Civil Code of New York. " This code," says Sir Frederick Pollock, " is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced." An examination of our Statute Book shows during the last ten years that it is the definite policy of the Legislature to put into force here English law, as is shewn in the enactment of the Criminal Code, the Partnership Law, and the Bankruptcy Law. It would be more in conformity with this policy if section 27, which comes from a draft New York code never enacted, were repealed, and replaced by a section making the law regarding agreements in restraint of trade the same as it is in England.

A submission was made by Mr. Paschalis for the respondents that the agreement between the parties was a combination among masters and masters imposing restrictive conditions on the conduct of their trade, and as such is rendered valid by section 4 of the Trade Union Law, 1932. In regard to this argument it is only necessary to say that section 4 speaks of " the purposes of any trade union," and that the parties do not come within the definition of " trade union " in section 2 of the Law.

For the reasons I have given I am of opinion that this appeal should be allowed, and judgment entered in favour of the appellant, with costs here and below.

Appeal allowed.