1965
May 7,
June 18
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COSTAS MAVRO-MOUSTAKI
v.
IACOVOS N. YEROUDES, AS EXECUTOR OF THE WILL OF THE DECEASED SPYROS MICHAELIDES

[ZEKIA, P., VASSILIADES, JOSEPHIDES, JJ.]

COSTAS MAVROMOUSTAKI,

Appellant-Defendant,

v.

IACOVOS N. YEROUDES, AS EXECUTOR OF THE WILL OF THE DECEASED SPYROS MICHAELIDES,

Respondent-Plaintiff,

(*Civil Appeal No.* 4518)

Practice—Striking out pleading—Appeal against order of District Court refusing defendant's application to dismiss the action on the ground that the statement of claim discloses an illegal contract which is void and unenforceable—Application based on the Civil Procedure Rules Order 27, *rules* 1, 2 and 3 (*which correspond to the English Rules of the Supreme Court (before the* 1962 *Revision) Order* 25, *rules* 2, 3 *and* 4), *and the inherent jurisdiction of the Court.*

Contract—Illegality—Contract Law, Cap. 149, *section* 23 (*a*) (*b*) *and* (*e*)*—False declaration of sale price at the District Lands Office.*

Immovable Property—Formalities for transfer—False declaration of sale price at the District Lands Office—Land Transfer Amendment Law, Cap. 228, *sections* 2, 3, 3 (*d*), 4 *and* 5 *and the Department of Lands and Surveys* (*Fees and Charges*) *Law, Cap.* 219, *section* 3 *and Schedule to the Law* (*para.* 2 (*b*) (iv)).

This is an appeal from the order of the District Court of Limassol refusing the defendant's application to dismiss the action on the ground that " the statement of claim discloses no cause of action against the defendant and/or that the action as shown by the statement of claim is not maintainable and/or it cannot succeed and/or that the plaintiff by his statement of claim is not entitled to the remedies sought ". These points of law were raised by the statement of defence and the defendant's application was based on Order 27, rules 1, 2 and 3 of the Civil Procedure Rules, and the inherent jurisdiction of the Court. The application was made after the close of the pleadings and the points of law were set down for hearing before the trial of the action.

Our Rules correspond to the provisions of the English Rules of the Supreme Court (before the 1962 Revision) Order 25, rules 2, 3 and 4. These rules empower the Court by summary

process, that is, without a trial in the normal way, to stay or dismiss an action where the pleading discloses no reasonable cause of action, etc.

According to the notes to the English R.S.C. Order 25, rule 4, in the Annual Practice, it has been held in many cases.

The Court of Appeal in dismissing the appeal—

Held, (1) the defendant's submission is that the statement of claim discloses an illegal contract which is void and should not be enforced by a Court of law. At this early stage and without a full hearing which will reveal the full facts, we are not prepared to agree that the claim is based on an illegal contract. This does not necessarily mean that we express any concluded view that the statement of claim discloses a legal and enforceable contract. We simply express the view that there is a point capable or worthy of being argued ; and that this is not a plain and obvious case clear beyond doubt that recourse should be had to the summary process under the Rules.

(2) There is a point capable or worthy of being argued in this case and that, consequently, we are not satisfied that the cause of action disclosed in the statement of claim is obviously and almost incontestably bad. Whether, after the evidence is heard at the hearing the plaintiff will succeed in proving that the contract sued upon is a legal and enforceable contract is another matter and we should not be taken to be expressing any view in the matter.

(3) For these reasons we are of the view that the District Court rightly dismissed the defendant's application to strike out the claim and the appeal is accordingly dismissed with costs.

Appeal dismissed.

Cases referred to :

Napier v. *National Business Agency* (1951) 2 All E.R. 264, at p. 266 A ;

Snell v. *Unity Finance Ltd.* (1963) 3 All E.R. 50, at pp. 54C and 55E ;

Archbolds (*Freightage*) *Ltd.* v. *Spanglett* (1961) 1 All E.R. 417, 422 and 424 ;

Boissevain v. *Weil* (1950) 1 All E.R. 728, 732 A.B. ;

Michael Gavrilidi v. *Savva Georghi and another* (1895) 3 C.L.R. 140 ;

Lawrence v. *Norreys* (Lord) (1890) 15 App. Cas. 210 ;

Dyson v. *Attorney-General* (1911) 1 K.B. 410 at p. 418 ;

Law v. *Dearnley* (1950) 1 All E.R. 124 at p. 127 ;

St. John Shipping Corporation v. *Joseph Rank Ltd.* (1957) 1 Q.B. 267, 283, 286 and 289 ;

Wetherell v. *Jones* (1832) 3 B. & Ad. 221 ;

Vita Food Products Inc. v. *Unus Shipping Co.* (1939) A.C. 277.

Appeal.

Appeal against the judgment of the District Court of Limassol (Loizou, P.D.C. and Malachtos, D.J.) dated the 27.3.65 (Action No. 2209/64) whereby it was ordered that the action of plaintiff was maintenable and that it should take its normal course.

Sir P. Cacoyannis, for the appellant.

E. Komodromos with *Geo. X. Ioannides*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :

JOSEPHIDES, J. : This is an appeal from the order of the District Court of Limassol refusing the defendant's application to dismiss the action on the ground that " the statement of claim discloses no cause of action against the defendant and/or that the action as shown by the statement of claim is not maintainable and/or it cannot succeed and/or that the plaintiff by his statement of claim is not entitled to the remedies sought ". These points of law were raised by the statement of defence and the defendant's application was based on Order 27, rules 1, 2 and 3 of the Civil Procedure Rules, and the inherent jurisdiction of the Court. The application was made after the close of the pleadings and the points of law were set down for hearing before the trial of the action.

The facts as stated in paragraphs 5 and 6 of the statement of claim are that in the beginning of October, 1964, the plaintiff verbally agreed to sell and the defendant agreed to buy two shops in Limassol for the agreed sale price of £6,000. The said sum was to be paid within a reasonable time when the transfer of the two shops would be effected in the name of the defendant-purchaser. The question of time was agreed at the request of the defendant who stated that he proposed bringing money from England for that purpose. In paragraph 7 of the statement of claim it is

further averred that on the 22nd October, 1964, at the defendant's request, the plaintiff visited him in his clinic and there "defendant in a very convincing, friendly and intimate manner requested plaintiff to accept that the amount of £4,000 be declared as sale price in the declaration of sale instead of the agreed amount of £6,000 and that he would pay the balance of £2,000 in advance and plaintiff being innocent and unsuspecting submitted to the convincing requests of defendant and accepted and received the amount which would not be included in the declaration of sale, less £10 discount ". It was further arranged that the defendant would pay the balance of £4,000 to the plaintiff by a cheque which was to be issued by a third party.

The transfer could not be effected on the 22nd of October, 1964, and, accordingly, as stated in paragraph 10 of the statement of claim, on the following day, the 23rd October, 1964, plaintiff went to the defendant's clinic who paid to him again the sum of £1,990 in cash (which sum had, in the previous day, been returned by the plaintiff to the defendant) and the parties then went to the District Lands Office in Limassol to effect the transfer of the aforesaid two shops when the cheque of £4,000 would be handed by the defendant to the plaintiff. The transfer of the shops was effected at the District Lands Office and the defendant endorsed and delivered to the plaintiff a cheque, dated 22nd October, 1964, issued by Georghios S. Galatariotis & Sons Ltd., on Barclay's Bank, in payment of the balance of the sale price of £4,000 and the parties then left. Subsequently, the defendant stopped payment of the cheque and the plaintiff instituted the present action.

In paragraph 18 of the statement of claim the plaintiff alleges that he was induced to sign the declaration form at the District Lands Office by the fraud of the defendant "in order that he may have money benefits in his favour without plaintiff realising the trap which the defendant fraudulently prepared for him". One of the particulars of the fraud pleaded is that the defendant represented to the plaintiff that "there existed most important reasons for him which forced him to demand from plaintiff not to refuse to declare the false price of £4,000 instead of the agreed price of £6,000."

The plaintiff accordingly claimed—

(*a*) the sum of £4,000 as damages representing the balance of the value of the two shops which were transferred to the plaintiff ; and

(*b*) alternatively, the same amount by virtue of a cheque endorsed to him which was stopped by the defendant.

The defendant's-appellant's case is that the first agreement alleged in paragraph 5 of the statement of claim to have been entered into in the beginning of October, 1964, was not complete as no provision as to the date of transfer or the mode of payment was made ; and that the final agreement was concluded on the 22nd October, 1964, and that it provided for the sale price, transfer, registration and mode of payment, as well as the understanding between the parties to defraud the Revenue by making a false declaration at the Land Registry Office. It was further alleged on behalf of the defendant that on the 23rd October, 1964, the same agreement was repeated and thereupon the transfer was effected at the District Lands Office.

Defendant's counsel submitted that, assuming that all the facts alleged in the statement of claim were proved, the plaintiff could not succeed on the ground of illegality, that is to say, that the consideration or object of the agreement was unlawful being forbidden by law, or of such a nature that if permitted it would defeat the provisions of a law, or as being opposed to public policy, contrary to the provisions of section 23 (*a*), (*b*) and (*e*) of the Contract Law, Cap. 149.

Under the provisions of the Land Transfer Amendment Law, Cap. 228 (section 2), no sale of any immovable property in pursuance of any contract shall be registered at the District Lands Office until the proceedings and formalities specified in sections 3, 4 and 5 have been complied with. One of the formalities to be complied with is a declaration to be made by the parties under the provisions of sections 3 (*d*), 4 and 5, stating that the seller is the registered owner of the property, the nature and extent of the property and its boundaries (if any), that the seller has agreed to sell it for a " specified consideration " and requesting that the property may be registered in the name of the intending purchaser. On his part the purchaser has to declare that he has agreed to purchase the property for the " specified consideration " and requesting that the property may be registered in his name. Section 8 of the Law provides that any person who knowingly and with fraudulent intent makes or causes to be made a false statement in any declaration made under section 5 of the Law shall be guilty of an offence and shall be punishable " in the same way as though he had given false evidence in any judicial proceeding ".

It will be seen that in the aforesaid Law there is no reference at all either to any fees payable to the Public Revenue or anything to show that the object of that Law is the charging of any fee or the collection of any revenue.

However, section 3 of the Department of Lands and Surveys (Fees and Charges) Law, Cap. 219, and the Schedule to that Law (paragraph 2 (*b*) (iv)), provide that for the " registration of title (*payable by the person to be registered*)" a fee of 4 per cent is chargeable on the " sale price ".

It will thus be seen that by the alleged false statement in the declaration made before the District Lands Office, *i.e.* the understatement of the sale price by £2,000, the purchaser-defendant, stood to benefit the sum of £80 which was payable by him as a fee to the District Lands Office upon the registration of the title in his name. The seller-plaintiff stood to benefit nothing out of the alleged false statement of the sale price.

Sir Panayioti Cacoyianni submitted that as the plaintiff was an accomplice in the false declaration before the District Lands Office, under the provisions of the Land Transfer Law, Cap. 228, and as this was made deliberately in order to defraud the Revenue of the fees payable under Cap. 219, the claim was based on an illegal contract which was void and unenforceable, although the plaintiff stood nothing to benefit out of the alleged false declaration. In support of his submission counsel referred to the following cases :

Napier v. *National Business Agency* (1951) 2 All E.R. 264, at p. 266A ; *Snell* v. *Unity Finance Ltd.* (1963) 3 All E.R. 50, at pp. 54C and 55E ; *Archbolds (Freightage) Ltd.* v. *Spanglett* (1961) 1 All E.R. 417, 422 and 424 ; and *Boissevain* v. *Weil* (1950) 1 All E.R. 728, 732 A.B.

Relying on these authorities counsel submitted that the statement of claim disclosed no cause of action against the defendant and that the action was not maintainable and should be dismissed at this stage without proceeding to trial.

Counsel for the plaintiff submitted that the agreement between the parties as alleged in paragraphs 5 and 6 of the statement of claim was concluded fully in the beginning of October, 1964, long before the 22nd of October, 1964, when the alleged false declaration is stated to have been agreed upon, and that the contract so concluded in the beginning of October, 1964, was lawful and enforceable as both the consi-

deration and object of it were lawful. He based his argument on the provisions of section 2 of the Land Transfer Amendment Law, Cap. 228, which reads as follows :

> " No sale or mortgage of any immovable property in pursuance of any contract shall be registered at the District Lands Office until the proceedings and formalities specified in sections 3, 4 and 5 have been complied with."

Relying on the case of *Michael Gavrilidi* v. *Savva Georghi and another* (1895) 3 C.L.R. 140, he submitted that Cap. 228 clearly implied a contract of sale pre-existing, before the parties attend at the Land Registry Office to carry out the formalities envisaged in sections 3, 4 and 5 of the Law. As the Supreme Court said in that case (at p. 141) :

> " These statements (in the declaration) so to be made before the Land Registry Office Officials, are matters quite separate and apart from the contracts which the parties have previously entered into, and we do not know of any principle on which a party to an agreement, who breaks his agreement and declines to go before the Land Registry Office Official and make the written declaration, should not be liable in damages to the other party to the agreement. The agreement itself is clearly not illegal : in the first place such an agreement must of necessity be entered into before the parties could make the declaration required by the law, and, further, the legislature has distinctly recognised it as legal, inasmuch as by the Sale of Lands Law, 1885, it may be specifically enforced as against the vendor or his heirs provided that it has been made in writing, though as against the vendee it is declared that he cannot be forced to take the property, but the remedy of the vendor is declared to be in damages only. If such an agreement be recognised as legal when put into writing, we see no reason why it should be illegal if entered into verbally. In the latter case it cannot be made the subject of an action for specific performance, but it does not appear to us on that account to be illegal."

Plaintiff's counsel further submitted that there was an alternative claim based on the unpaid cheque, dated the 22nd October, 1964, which was issued and handed to the plaintiff prior to the transaction and declaration before the District Lands Office. He also submitted that the plaintiff alleged fraud in his statement of claim, that is to say, that he was tricked by the defendant and that,

consequently, he was not in *pari delicto* with him; that the object of the agreement was not forbidden by the law, the object being the sale of the shops; and, finally, that where the object of the legislature in imposing a penalty in a statute is merely the protection of revenue, the statute will not be construed as prohibiting the act in respect of which the penalty is imposed, and he cited in support of that proposition Halsbury's Laws, third edition, volume 8, page 141, paragraph 245.

As already stated, the defendant based his application on the provisions of the Civil Procedure Rules, Order 27, rules 1, 2 and 3 and the inherent jurisdiction of the Court. Our Rules correspond to the provisions of the English Rules of the Supreme Court (before the 1962 Revision) Order 25, Rules 2, 3 and 4. These Rules constitute a wide and general provision, both useful and necessary, to enforce the rules of pleading. They empower the Court by summary process, that is, without a trial in the normal way, to stay or dismiss an action where the pleading discloses no reasonable cause of action, etc.

Speaking of this jurisdiction to dismiss actions *in limine*, Lord Herschell in *Lawrance* v. *Norreys* (Lord) (1890) 15 App. Cas. 210, said (at page 219): "It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases".

In *Dyson* v. *Attorney-General* (1911) 1 K.B. 410 at page 418, Fletcher Moulton, L.J. said: " To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad".

That is, undoubtedly, the test to be applied and the language used there is strong language. If there is a point capable or worthy of being argued it was clearly impossible to strike out an action *in limine* (per Tucker, L.J. in *Law* v. *Dearley* (1950) 1 All E.R. 124, at page 127).

According to the notes to the English R.S.C. Order 25, rule 4, in the Annual Practice, it has been held in many cases that it is only in plain and obvious cases that recourse should be had to the summary process under this Rule, and that this procedure can only be adopted when it can be clearly seen that a claim is, on the face of it, obviously unsustainable, or that the case is clear beyond doubt.

So long as the statement of claim discloses some cause of action, or raises some question fit to be decided by a court, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out.

With these principles in mind we now come to consider counsel's submissions. Can it be said that there is no point capable or worthy of being argued in this case? Or that the cause of action is obviously and almost incontestably bad? or that the claim is obviously unsustainable?

The defendant's submission is that the statement of claim discloses an illegal contract which is void and should not be enforced by a Court of law. At this early stage and without a full hearing which will reveal the full facts, we are not prepared to agree that the claim is based on an illegal contract. This does not necessarily mean that we express any concluded view that the statement of claim discloses a legal and enforceable contract. We simply express the view that there is a point capable or worthy of being argued; and that this is not a plain and obvious case clear beyond doubt that recourse should be had to the summary process under the Rules. We give below the reasons for our conclusion.

As already stated, counsel for the defendant bases his submission on the provisions of paragraphs (*a*), (*b*) and (*e*) of section 23 of our Contract Law, Cap. 149, which reads as follows:

> "23. The consideration or object of an agreement is lawful, unless—
>
> (*a*) it is forbidden by law; or
>
> (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law; or
>
> .
>
> (*e*) 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"

We think that this section is a codification of the common law on the subject of illegal contracts, and in considering it we shall refer to English cases on the point (see also section 2 (1) of our Contract Law).

Devlin J. (as he then was) in *St. John Shipping Corporation* v. *Joseph Rank Ltd.* (1957) 1 Q. B. 267, *inter alia*, held that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit ; and that, on a true construction of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiffs' infringement of sections 44 and 57 (which made it an offence to load a ship so that her loadline was submerged) did not prevent them from suing on the contract. This case was applied by the Court of Appeal in England in the Archbolds' case (1961) (*supra*), referred to by the defendant's counsel in support of his case. We are greatly indebted to Lord Devlin for his lucid and illuminating judgment in the *St. John Shipping Corporation* case, and we propose referring to it extensively in the course of our judgment.

In *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221, the plaintiff sued for the price of spirits sold and delivered. A statute of George IV provided that no spirits should be sent out of stock without a permit. The Court held that the permit obtained by the plaintiff was irregular because of his own fault and that he was therefore guilty of a violation of the law, but that the statute did not prohibit the contract. Tenterden C. J. stated the law as follows (at page 225) :

> " Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect : and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part."

As Devlin J. said in the *St. John Shipping Corporation* case (at page 286) the last sentence in this judgment is a clear and decisive statement of the law.

In *Vita Food Products Inc.* v. *Unus Shipping Co.* (1939) A. C. 277, Lord Wright said (at page 293) : " Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds ".

As stated by Devlin, J. in the *St. John Shipping Corporation* case (at page 283) :

> " There are two general principles. The *first* is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made to break the law ; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The *second* principle is that the Court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is : if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits ; it does not matter whether or not it prohibits a contract ; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits ; but you are not concerned at all with the intent of the parties ; if the parties enter into a prohibited contract, that contract is unenforceable."

The test is just the same whether it is the terms of the contract or the performance of it that is called in question : that is, " is the contract, as made or as performed, a contract that is prohibited by the statute? " (page 284). It is plain that the authorities, when fully considered, do not proceed upon the basis that in the course of performing a legal contract an illegality was committed ; but

on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute (page 284). According to Devlin J., two questions are involved—(*a*) does the statute mean to prohibit contracts at all? If yes, (*b*) does this contract belong to the class which the statute intends to prohibit? (pages 285 and 287).

> " In the statutes to which the principle has been applied, what was prohibited was a contract which had at its centre—indeed often filling the whole space within its circumference—the prohibited act ; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statute specifically said there must be accompanying documents ; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense. It is going a long way further to say that contracts which depend for their performance upon the use of an instrument which has been treated in a forbidden way should also be forbidden. In the only case I have seen where the contention appeared to go as far as that the claim failed" (Per Devlin, J. in the *St. John Shipping* case, at page 289).

In each case a conclusion must be reached on the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion (per lord Wright in the *Vita Food* case, *supra*, at page 295).

It will thus be seen that the decision in the present case may turn on the agreement itself, or on the terms of the statute, or on both.

We have referred to the above authorities simply for the purpose of showing that there is a point capable or worthy of being argued in this case and that, consequently, we are not satisfied that the cause of action disclosed in the statement of claim is obviously and almost incontestably bad. Whether, after the evidence is heard at the hearing, the plaintiff will succeed in proving that the contract sued upon is a legal and enforceable contract is another matter and we should not be taken to be expressing any view in the matter.

For these reasons we are of the view that the District Court rightly dismissed the defendant's application to strike out the claim and the appeal is accordingly dismissed with costs.

Appeal dismissed with costs.