

1982 October 22

[HADJIANASTASSIOU, A. LOIZOU AND MALACHTOS, JJ.]

NICOS POURIKKOU,

Appellant-Defendant.

v.

PAMBOS SOTERIOU AND ANOTHER,

Respondents-Plaintiffs.

(Civil Appeal No. 5899).

Contract—Auction—Agreement for a “knock-out” between intending bidders—Not illegal.

The sole issue in this appeal was whether an agreement between two bidders not to compete at an auction was illegal.

5 *Held*, that an agreement for a “knock-out” (i.e. a combination between intending bidders to refrain from bidding against each other) was not illegal.

Appeal dismissed.

Cases referred to:

10 *Rawlings v. General Trading Company* [1921] 1 K.B. 635 at pp. 640, 641;

Harrop v. Thompson and Another [1975] 2 All E.R. 94 at p. 97.

Appeal.

15 Appeal by defendant against the judgment of the District Court of Limassol (Fr. Nicolaidis, D.J.) dated the 1st November, 1978, (Action No. 201/77) whereby he was adjudged to pay to each one of the plaintiffs the sum of £333.333 mils as damages for breach of an agreement.

P. Soteriou, for the appellant.

20 *N. Nicolaou*, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU, J. read the following judgment of the Court. On 21st June, 1978, Pambos Soteriou in giving evi-

dence in Court, said that on the 21st October, 1976, he was informed that the factory of the Oil Seed Company at Zyyi was offered for sale by public auction on 24th October, 1976. He referred the matter to plaintiff No. 2 Demetris (Mitsios) Stylianou, and both decided to find another person for bidding together. On 22nd October, 1976, they met the defendant in the latter's office, and the three of them agreed for bidding in that sale and to share the profits and/or the losses at one third each. On the same day, together with plaintiff No. 2, they visited the factory, as well as the mukhtar of Zyyi. As they were not able to agree as to the price of the factory, they went together in the afternoon with Nicos Vashiotis, an expert, in order to estimate the value of the building materials of the factory. They further decided to appoint the defendant Nicos Pourikkou as their representative for bidding at the auction. They also had agreed that if during the bidding at the auction there were other people bidding, either to offer them a certain amount in order to abandon the bidding, or to accept themselves a certain sum in order to withdraw from the bidding. This procedure, he added, is usual in biddings. In addition, they agreed that any payments or collections of money made would have been divided by one third each.

On 22nd October, 1976, they visited the place in question by car and present were himself, the defendant and Nicos Vashiotis. Whilst in the car Vashiotis was informed by him as to the facts of the case. Indeed, he added, they estimated the value of the materials of the factory which was built on the said building site at £17,500 and the land was assessed between £8,000 and £10,000. During the journey towards Zyyi, they repeated the provisions of their agreement in the presence of Vashiotis.

On 24th October, 1976, he went to Zyyi for the purpose of bidding, accompanied by Mr. Andreas Kyprianou and a lawyer Andreas Konnaris. The defendant was also present, as well as Mr. Pattichis, the representative of the Archbishopric, the representative of Hellenic Mining Company and Andreas Constantinides who arrived there when the bidding had started. The defendant continued bidding regularly, and at a certain point he intervened and exchanged certain views for settlement, viz., whether Mr. Pattichis would take the land in question and the defendant the materials or vice versa. Finally, it was agreed

that the defendant would withdraw from bidding on condition that he would be paid the sum of £1,000, which amount was paid to the defendant by a certain Andreas Constantinides by cheques of £1,200, from which amount £200 would have been paid to Mr. A. Kyprianou who was interested in buying another piece of land and he withdrew from the bidding.

The plaintiff further complained that the defendant, in breach of their agreement kept the whole amount of £1,000 and did not pay any amount to him or to plaintiff 2 in accordance with the relevant agreement made between them. However, on the following day, the defendant offered to him the sum of £100 only which he rejected. In addition, plaintiff 2 Demetris Stylianou supported the statement of the plaintiff 1 and repeated that he, plaintiff 1 and the defendant would bid in the public auction and would share the profits and/or damages by one third each. He further said that they agreed that the plaintiff 1 would represent them and take part in the bidding. Finally, this witness said that although the defendant was expected at his office, he did not arrive there and later on the 25th October, 1976, he went in the shop of Mr. Akapniti who offered to him the sum of £100.-, but he rejected it.

There was further evidence by Mr. Andreas Constantinides, P.W. 4, who supported the statement of the two witnesses and said that the defendant together with plaintiff 1 and Mr. Kyprianou approached him in order to agree and to withdraw from the bidding. Indeed, he added, there were certain negotiations and an agreement was reached with Mr. Pattichis to pay to Mr. Kyprianou £200, and to the plaintiff 1 and defendant £1,000 in order to withdraw from the bidding.

The defendant, in giving evidence, agreed that he visited the property in question together with plaintiff No. 1 and on the following day they visited the place again in the afternoon taking Mr. Nicos Vashiotis with them. Furthermore, he said that having heard the evidence of Mr. Nicos Vashiotis, he denied that such an agreement as alleged did take place. Indeed, he said that he told the plaintiffs that if and when he would buy the site they would collect 3 per cent. On Sunday he added, he went to Zyyi and took part in the bidding together with Mr. Pattichis. He further denied that there was an agreement

between the plaintiff and himself to share between them the amount of £1,000. He further stated that when the value of the land was fetching £17,500, Mr. Kyprianou called him and told him to give him £1,000 to withdraw from the bidding. He accepted, he said, and Mr. Constantinides gave him a cheque for £1,000. He further added that he does not deny to pay 3 per cent. Finally, he said he refused to give one third share to the others. 5

The learned Judge having listened to the addresses of both counsel reserved his judgment and on 1st November, 1978, had this to say delivering his judgment: 10

“From the material before me it is clear that the present case would be based mainly on the credibility of the witnesses because the plaintiffs were alleging in the statement of claim that there was an agreement between the parties in both taking part in the bidding and that the defendant collected the sum of £1,000 for the account of all the parties, but the defendant in his statement of defence besides taking part in the bidding he denies all the allegations of the plaintiffs. Besides that and much to my surprise the defendant during the proceedings alleged that he collected the sum of £1,000 for his own account and that, in any event, that agreement was null and void.” 15 20

Then the learned Judge had this to say:

“I had the occasion to follow the evidence of the plaintiffs and their witnesses, as well as, the defendant in giving evidence before the Court. I had followed them with great attention and having studied the totality of the evidence and the way they gave their evidence I have no doubt at all to accept the evidence of the plaintiffs.” 25 30

On the contrary, the evidence given by the defendant in most points goes outside the pleadings and he has not given me the impression of being a witness of truth.”

Finally the Court accepted the evidence of the plaintiffs and that the plaintiffs and the defendant had agreed in a joint-venture for bidding in the public auction and said: 35

“In the light of all which has been said I am of the view that

the plaintiffs have succeeded to prove their statement of claim, and for all these I issue judgment in favour of the plaintiffs and against the defendant for the sum of £333,333 mils in favour of each of the plaintiffs with costs."

5 On appeal counsel for the appellant-respondent argued that the decision of the learned trial Judge that the agreement between the respondents and his client was not illegal is wrong in law and that the said decision between the parties is an agreement between the parties and/or partners is contrary to the
10 evidence adduced and is wrong in law.

The learned Judge quoted a passage from Chalmers on Sale of Goods 17th Edition from p. 269 which reads:-

15 "After much doubt it was settled that an agreement for a 'knock-out, (i.e. a combination between intending bidders to refrain from bidding against each other) was not illegal. The seller could protect himself by fixing a reserve price."

See also the case of *Rawlings v. General Trading Company*, [1921] 1 K.B. 635 at pp. 640, 641, where Bankes L.J. had this to say:-

20 "This is an appeal from a judgment of Shearman J., who held that an agreement for what is popularly known as a 'knock-out' at an auction was against public policy and unenforceable.

25 It appears to me that this case is covered in principle by the decision in *Galton v. Emuss* 1 Coll. 243, decided in 1844. No one in that case desired to contest the legality of the contract, and Knight Bruce V.C. held the contract to be legal and founded on valuable consideration. In the later case of *Heffer v. Martyn*, 36 L.J. (Ch.) 372, 373,
30 decided in 1867, the facts were somewhat different, but the Master of the Rolls, in commenting on *Galton v. Emuss* 1 Coll. 243 and a previous decision of his own in *In re Carew's Estate* 26 Beav. 187, says this: 'The question is
35 whether this circumstance invalidates the sale. I had to consider this in the matter of *In re Carew's Estate* 26 Beav. 187, and I came to the conclusion that such an arrangement is not illegal; that the intending buyers may arrange between themselves which lots they will bid for and which

not, and agree not to compete with each other; and if they may do so in that case I think also they may take money for abstaining to compete as well as arrange to take one lot against another. This also was considered to be legal by Sir J. Knight Bruce V.C. in *Galton v. Emuss*, 1 Coll. 243. I am of the opinion that I must follow these cases.' So far as I am aware these decisions have never been questioned. A dictum by Gurney B. in *Levi v. Levi*, 6 C. & P. 239 at nisi prius to the effect that an agreement several not to bid at an auction was an indictable offence was expressly disapproved of by Parke B. when delivering judgment in *Doolubdass v. Ramloll*, 5 Moo. Ind. App. 133. Having regard to the state of the authorities in the Chancery Courts for over 70 years, I do not think that it was open to the learned judge to take the view he did, nor do I think that this Court should after the lapse of time overrule those authorities, even if this Court considered that they were wrong, which I am far from suggesting that they were." 5 10 15

In *Harrop v. Thompson and another* [1975] 2 All E.R. 94, Templeman J. in raising the question whether an agreement not to bid invalidated an auction contracted, and having reviewed the authorities had this to say at p. 97: 20

"Counsel for the first defendant submits that in the light of the observations of Shearman J. and Scrutton L.J. and the hint in the observations of Atkin L.J., it is open to a judge of first instance to hold that an agreement not to bid is against public policy, being in restraint of trade and that a vendor who complains of such an agreement is not bound by his contract with the purchaser. I do not consider that there is anything in the *Rawlings* case [1921] 1 K.B. 635 which overrules the earlier authorities or enables me to ignore them. Counsel relies on observations in the *Rawlings* case as pointing in the direction in which he submits the law should develop. Whether he is right or wrong, I am not at liberty to twist the wheel in the direction he wishes. 25 30 35

In *Cohen v. Roche* [1927] 1 K.B. 169 at 173 it was accepted by McCardie J. that it seemed reasonably clear in law that the existence of an agreement not to bid does not of itself 40

afford any answer to an action. In *Pallant v. Morgan* [1952] 2 All E.R. 951, there was a formidable array of distinguished counsel and it did not occur to them or to Harman J., who decided the case, that there was anything
5 wrong with an agreement between two bidders not to compete at an auction.”

In the light of the authorities quoted we have reached the conclusion that an agreement for a “knock out” between the intending bidders to refrain from bidding against each other
10 is not illegal and we are not prepared to upset or overrule the judgment of the trial Judge both as to the facts in issue, as well as, with regard to the legal aspect of the case. For this reason we would, therefore, dismiss the appeal.

Appeal dismissed with costs in favour of the respondents.

15 *Appeal dismissed with costs.*