

50, 1948

In the Privy Council.

No. 32 of 1947.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE
SITTING AS A COURT OF APPEAL

UNIVERSITY OF LONDON
-9 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

44487

BETWEEN

- (1) BRACHA BEN-YA'ACOV
- (2) (A) NISSIM MIRAKOV COHEN
(B) MALKIEL MIRAKOV COHEN
- (3) (A) DOV GUTERMAN
(B) DVORA GUTERMAN
- (4) (A) BLUMA VORTMAN
(B) YA'ACOV VORTMAN
in their personal capacity as heirs and as legal represen-
tatives of the estate of the late SIMHA VORTMAN
- (5) BENJAMIN MANN
- (6) ESTHER MAMANOV
- (7) REUVEN LEV
- (8) MEIR WIND
- (9) (A) GERSHON MABOVITZ
(B) SHIFRA GERSHONOVITZ ... (*Defendants*) APPELLANTS

AND

JOSEPH FORER (*Plaintiff*) RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an Appeal from a Judgment dated the 26th September, 1945, of the Supreme Court of Palestine sitting as a Court of Appeal, affirming a Judgment of the Land Court, Tel-Aviv, given the 21st December, 1944, in favour of the Respondent in nine Consolidated Actions brought by him against the above-named Appellants.

p. 40

p. 31

2.—The Respondent at all material times was the owner of a parcel of land (No. 457 in Block 6904, Tel-Aviv), on which he erected a block of flats known as No. 24 Hasoftim Street. At various dates between

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CASE FOR THE RESPONDENT.

RECORD

Exs. 1-9,
pp. 55-71

pp. 31, 41

October, 1937, and May, 1939, during and after the erection of the building, he entered into nine separate agreements with the respective Appellants or their predecessors in title. The true meaning and effect of these agreements is in issue, and their terms are not altogether the same, but they are largely similar and the substantial purport of each, it is submitted, is an agreement to sell a specific flat in the above block. The sale of a flat is prohibited by the law of Palestine. It was indeed common ground between the parties in this litigation that it is legally impossible to transfer a flat in the Palestine Land Registry, and that such a disposition is illegal if made outside the land registry, and both the Courts below have held that each of these agreements was an agreement for the sale of a flat, and was therefore void as an agreement to do that which could not lawfully be carried out. 10

3.—The two Judgments of the Courts below are not the only Judgments of Palestine Courts in which it has been held that these same documents were void agreements. All the various Courts by whom these agreements have been considered have held them to be void, and, it is, submitted, these Judgments are relevant not merely because they explain why the present actions were brought by the Respondent, and not merely because they were of persuasive authority with the Courts below, but because between the Respondent and some, if not all, of the Appellants, the present issue (it is submitted) is *res judicata*. 20

4.—(i) In respect of one of the said flats the Respondent had originally entered into a similar agreement with persons of the name of Eliahu Grinstein and David Cohen. In 1938 they brought an action (5471/38) against the present Respondent in the Magistrate's Court, Tel-Aviv, claiming the return of the price paid, and, by a Counterclaim in that action, the Respondent claimed against them damages for breach of that agreement. This Counterclaim was dismissed on the ground that the sale of a flat in Palestine cannot lawfully be carried out, and therefore the agreement was null and void. 30

(ii) The Respondent appealed from that decision to the District Court, Tel-Aviv, which dismissed his appeal on the same ground (Edwards J. and Dr. Mani J., 83/39).

(iii) In May, 1940, the Respondent brought two actions (4931/40 and 4932/40) against the present Appellants Ben-Ya'acov and Dov and Dvora Guterman claiming possession on the ground of breach by those Appellants of their two agreements. The Court held that the agreements were wholly void, but that the Appellants had an equitable lien on the flat to secure the return of the money paid by them on account of the price. 40

(iv) Meanwhile in July, 1940, the Respondent had brought an action (7126/40) in the Magistrate's Court, Tel-Aviv, against the Appellant Lev claiming damages for breach of his agreement. Lev set up by way of Defence that the agreement was void on the above grounds, and relied on

the above-mentioned Judgment of the District Court (83/39), and the Court upheld his contention and dismissed the action.

(v) In April, 1941, the Respondent brought a second action against the Appellant Lev (3060/41) claiming money due to him upon certain promissory notes given by Lev for instalments due under the agreement. The Appellant Lev set up that the agreement was void and relied upon the last-mentioned Judgment, and the Court on the 20th June, 1941, decided in his favour on those grounds.

(vi) Under all but two of the agreements, instalments of the price
10 of the flats were payable over a period of 20 years, and in the above circumstances, alarmed by the above decisions, the Respondent commenced actions for possession of the premises. In December, 1942, he brought actions against each of the present nine Appellants in the Magistrate's Court, Tel-Aviv (Civil Cases 6938-46/42) claiming possession of the respective flats and offering to return to the purchasers the money paid by them. The actions were consolidated. The Appellants alleged (inter alia) that the learned Magistrate (Dr. Cheshin) had no jurisdiction to hear the actions as they involved a decision of the ownership of immovable property, and the value of such property was outside the limits of his jurisdiction
20 under Section 4 of the Magistrates' Courts Ordinance, 1939. On the 2nd November, 1943, the learned Magistrate gave Judgment in favour of the Respondent in eight of these cases on the ground that, for the above reasons, the agreements were null and void, and the actions were within his jurisdiction. He had previously required the Respondent to deposit in Court for repayment to these Appellants the moneys paid by them under the agreements, and the Respondent paid those moneys into Court.

(vii) Five of these eight Appellants then appealed to the District Court, Tel-Aviv (Civil Appeal No. 198/43) which gave Judgment dismissing the appeals on the same grounds.

30 (viii) Those Appellants then appealed to the Supreme Court, which allowed their appeal on the ground that the actions involved a decision of the ownership of immovable property and were outside the jurisdiction of the Magistrates' Court.

(ix) Nevertheless in the case of *Lipshitz v. Valero*, No. 24 of 1945 (unreported) the Privy Council recently (on the 31st July, 1947) decided that the Supreme Court has no jurisdiction to hear appeals from decisions of the District Court sitting as a Court of Appeal, and accordingly, it is submitted, the last-mentioned decision of the Supreme Court was without jurisdiction; the decisions of the Magistrates' Court and of the District
40 Court remain, and the invalidity of the said agreements is *res judicata*.

(x) In pursuance however of this decision of the Supreme Court, the Respondent, desirous of saving the expense of an appeal to the Privy Council, commenced the present actions against the Appellants in the Land Court. In the meantime some of the money so paid into Court had

been withdrawn, but the balance remained in Court, and the Appellants are indebted to the Respondent under another Judgment (the subject matter of a separate appeal to His Majesty in Council) for a sum exceeding anything that the Respondent has received under the agreements. Both the Land Court, and on appeal the Supreme Court, decided that the said agreements were void for the reasons already stated, and gave Judgment in favour of the Respondent for a declaration that he is the owner of the premises in question and for ancillary relief. It is from this decision of the Supreme Court that the Appellants have brought this appeal.

5.—The material provisions of the Palestine Law are contained in the Land Transfer Ordinance (Drayton, Laws of Palestine, 1934 Ed., Vol. II, Chap. 81, pp. 881–884), and the Land Law (Amendment) Ordinance, No. 34 of 1937 (Supplement No. 1 to the Palestine Gazette, No. 740 of 25th November, 1937). 10

The material provisions of the Land Transfer Ordinance are as follows :—

“ Section 2—‘ Disposition ’ means any disposition of immovable property except a devise by will or a lease for a term not exceeding 3 years.

“ ‘ Land ’—includes houses, buildings and things permanently fixed in the land. 20

“ Section 3—This Ordinance shall apply to . . . every . . . form of immovable property.

“ Section 4—(1) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with.

“ (2) Any person wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section.

“ (3) In order to obtain the consent referred to in sub-section (2), a petition shall be presented through the land registry office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition. 30

“ (4) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition.

“ (5) The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved. 40

“ Section 5—(1) If the application for registration is made by an agent or nominee on behalf of a principal, the agent or nominee

“ shall make full disclosure in his petition of the principal for whom he
 “ is acting, and the immovable property disposed of shall be registered
 “ in the name of the principal.

10 “ (2) If at any time it appears to a court or a registrar that
 “ immovable property has been registered under this Ordinance
 “ otherwise than in accordance with sub-section (1) the court or
 “ registrar shall enquire into the case and make a report to the High
 “ Commissioner, who may impose upon any of the parties concerned
 “ penalties by way of fine or forfeiture not exceeding one fourth of the
 “ value of the property.

“ Section 7.—After the title has been examined and the consent
 “ required by Section 4 has been obtained, a deed shall be executed
 “ in the form prescribed and shall be registered in the land registry.

“ Section 11—(1) Every disposition to which the consent required
 “ by Section 4 has not been obtained shall be null and void.

“ Provided that any person who has paid money in respect of
 “ a disposition which is null and void may recover such money by
 “ action in the courts.

20 “ Section 12—If any person is a party to a disposition of
 “ immovable property which has not received the consent required
 “ by Section 4 and either enters into possession, or permits the other
 “ party to enter into possession, of the immovable property whether
 “ by himself or any person on his behalf, he is guilty of an offence and
 “ is liable to a fine of one-fourth of the immovable property.”

The Land Law (Amendment) Ordinance, 1937 (which is an Ordinance
 to amend the Land Law (Amendment) Ordinance 1933) provides as
 follows :—

“ Section 2—The principal ordinance shall be amended by the
 “ addition of the following section thereto as Section 10—

30 “ 10. As from the commencement of the Land Law (Amend-
 “ ment) Ordinance 1937, no registration shall be made or document
 “ of title issued in respect of :—

“ (a) the ownership of trees, or

“ (b) the ownership of buildings, or

“ (c) any right to build, or to add to buildings already erected
 upon land :

40 “ Provided that the provisions of this section shall not apply to
 “ any tree, building or right already registered in the Land Registry
 “ at the commencement of the Land Law (Amendment) Ordinance,
 “ 1937, or which forms the subject matter of a judgment of
 “ a competent court or a decision of a Land Settlement Officer given
 “ prior to that date.”

RECORD

6.—The effect of the above provisions is that every sale of land is null and void unless the written consent to it of the Director of Lands has first been obtained (Sections 11, 4 (2) and (3)), and, after such consent has been obtained, the sale is registered in the land registry in the form prescribed (Section 4 (1)); and as registration of the ownership of buildings, apart from the land on which they stand, is prohibited, any sale of a building, or part of a building, is null and void, for the consent to it of the Director cannot be given and it cannot be registered. And if the word “ sale ” in the Land Transfer Ordinance does not include an agreement to sell, nevertheless an agreement to sell a flat in a building is an agreement to do that which cannot legally be performed and is null and void. All this was common ground in the Courts below. 10

p. 31, l. 40
p. 41, l. 39

7.—Each of the nine agreements in question commences with a recital, namely, that the Respondent is building (or has built, according to the date of the agreement) a house of common ownership No. 24 Hashoftim Street, and has agreed to sell to the particular Appellant a flat in that house—specifying the flat by its position—and that the Appellant had agreed to purchase the flat, and that therefore the parties have agreed as follows in the document. Nothing, therefore, is referred to in the recital except an agreement for the sale of a specific flat in the building. The only 20 qualification to be made to the above is that the agreement with Vortman contains in the recital some further words which it is submitted have no meaning.

p. 57,
ll. 9, 10

8.—In the operative part of each of the nine agreements it is provided that the particular Appellant agrees to pay such and such a sum as the price of the said flat, to be payable by the instalments referred to below. In all the agreements the purchase price is referred to as the price of the flat and nothing else.

9.—In the three earliest of the nine agreements there is throughout no sale of anything but a flat. This applies to the agreements with the 30 Appellants Lev, Vortman and Mann. In the later six agreements, however, in order to avoid the effect of the law as to sales of buildings, the sale is expressed as also including (though no price is payable in respect of it) “ part of the plot registered in the Land Registry Office, Tel-Aviv, in “ volume No. 53 folio 148 (situated in Tel-Aviv, 24, Hashoftim Street), “ consisting of an area to be in proportion to the number of rooms to be “ owned together with the other flat owners.” In the Courts below it was argued on behalf of all the Appellants that the effect of the agreements was to transfer a musha’ (i.e. undivided) share of the plot of land on which the building stood, and of everything upon it and that although the remainder of the agreement was null and void the Appellants were entitled 40 to accept a lesser performance, namely, transfer of an undivided share. But it is submitted on behalf of the Respondent, and the Courts below were

Ex. 7, p. 55
Ex. 4, p. 57
Ex. 5, p. 58
pp. 60-71

E.g. p. 60,
ll. 11-16

p. 28, l. 7

p. 28, l. 11

- of opinion, as follows : Firstly as regards the earlier three agreements no such provision anywhere appears in them. Secondly, in the agreements where it appears, that provision is wholly inconsistent with the remainder, namely, a sale of a specific flat. Any person who acquired an undivided share of the land thereby acquired the like undivided share in every part of the building, including every part of each flat, and therefore no person could acquire the sole ownership of a flat. Alternatively, if the share acquired in the land was a divided share, its position was undefined, but it carried with it, wherever it was, the whole of that part of the building which was superimposed upon it, through all its floors. Thirdly, the provision was void for uncertainty both on the ground just mentioned and on further grounds. When, for example the fourth agreement, in order of date, was made with Mamanov, the three earlier agreements had been entered into for sale of flats to Lev, Vortman and Mann, but no part of the plot had been included. The words quoted above from the fourth agreement leave it wholly uncertain what share was to be given to Mamanov, for example whether it was a share in the proportion that Mamanov's rooms bore to the number of rooms in that building, or in the proportion that Mamanov's flat bore to the number of flats in the building; but if, as both the Courts below held, the share was to be in the proportion that the number of Mamanov's rooms bore to the total number of rooms in the block, three shares would remain unsold and be the property of the Respondent who would own three corresponding shares in the building. The result would be much the same if Mamanov's share was to be in proportion to the number of flats. Moreover the Respondent was always at liberty to add to the number of flats in the building, and this he did. A 10th flat was begun on the 15th August, 1939—after the nine flats had been sold—and if this provision in the agreements has any meaning Mamanov's share in the plot of land would then be reduced. Fifthly, it is submitted, and the Courts below so held, that undivided shares can only be created by one agreement, and not by separate agreements between the Respondent and a number of persons, between whom no agreement was made.
- 10 p. 33,
ll. 27-48
p. 48, l. 4
p. 32,
ll. 10-15
- 20 Ex. 6. p. 60.
- 30 p. 19, l. 14
p. 32, l. 28
p. 47, l. 35

- 10.—But in answer to the Respondent's submission that the agreement to sell undivided shares in the plot and building could not be enforced as being void for uncertainty and inconsistent with the substantial purpose of the agreements, namely, the sale of specific flats, the Appellants relied on a provision, contained in the six later agreements which provided (as they submitted) that the Respondent would transfer the whole plot and building into certain names to hold on behalf of the purchasers of the flats. These provisions are, however, as follows : Firstly, they do not occur in the three earliest agreements, which only speak of a sale of a specific flat. These three agreements do also contain provisions which (in the Respondent's submission) are void for ambiguity, but which make some reference to a contemplated transfer of the building into the names of the
- 40 pp. 60-71
pp. 55 59

p. 56
p. 57
p. 59
p. 56
pp. 57-59

“ buyers ” (Exhibit 7, Art. 12), or “ the committee which the partners will elect ” (Exhibit 4, Art. 5) or the “ partners ” (Exhibit 5, Art. 7) or “ a committee which will be elected by all the members ” (an addition at the end of the same Exhibit 5). In Exhibit 7 the Respondent does not agree to make any such transfer. In Exhibit 4 and Exhibit 5 he so agrees on terms. Nevertheless as these provisions only relate to a transfer of the building and not the land, they do not assist the Appellants.

11.—In the later six agreements the provision runs : “ The First Party, ” i.e., the Respondent “ undertakes to transfer at the Land Registry the “ aforesaid plot and the whole of the building erected thereon to a committee 10
“ or to a co-operative society of the house in common ownership which
“ shall be formed by all the flat owners at any time that he will be required
“ to do so by any of the flat owners free from any charge (except the charge
“ of the flat owners in accordance with the contracts) and the First Party
“ undertakes as well to sign on all the necessary documents and to appear
“ in the Land Registry Office.” (Exhibit 6, Art. 5, p. 61 ; Exhibit 3,
Art. 4, p. 63 ; Exhibit 2, Art. 5, p. 65 ; Exhibit 9, Art. 4, p. 67 ; Exhibit 8,
Art. 4, p. 68. In Exhibit 1, Art. 6, p. 70, the words “ 2 or 3 of the
“ purchasers of the flats ” are substituted for “ a committee or a co-operative 20
society ”). At the end of that clause there is also added in two agreements (Exhibit 6, Art. 5, p. 61 and Exhibit 2, Art. 5, p. 65) “ In the event that
“ such a committee or co-operative society shall not be formed within
“ 1 year from the day of signing this Deed, the First Party shall transfer
“ to the Second Party his share in the plot and in the building as aforesaid
“ Musha’a.”

12.—It is submitted (and it was held by the Courts below) firstly that these agreements are void, illegal and unenforceable by virtue of Section 5 of the Land Transfer Ordinance which prohibits the registration of land in the name of any person who is an agent or nominee for some other person ; secondly it is submitted that these provisions are void for 30
uncertainty and unenforceable. It was further submitted on behalf of the Appellants that the committee or co-operative society might be regarded as trustees for the flat owners, but the Supreme Court held, and the Respondent submits, that the English doctrine of private trusts is not part of the law of Palestine, and whether it is or not, Section 5 of the Land Transfer Ordinance would nevertheless prohibit the transfer. It was found as a fact by both Courts that no committee was ever formed with the consent of all the flat owners and no co-operative society was ever formed.

p. 32, l. 30
p. 48, l. 18
p. 48, l. 15
p. 32, l. 49
p. 48,
ll. 9, 27

13.—The Appellants also submitted that they were entitled to an equitable lien on the premises to secure the repayment of the purchase 40
money already paid, but it is submitted, and both Courts held that no equitable lien can arise under an unenforceable contract, and that the Appellants’ claim for such money is by way of an action for money had and

p. 34, l. 4,
p. 48, l. 41

received, subject to the Respondent's set off for money due to him under the Judgment for "equivalent rent," the subject matter of the Appeal No. 30 of 1947 to His Majesty in Council. p. 34, l. 10

14.—Lastly the Appellants submitted that the Appellants, who have been let into possession under these agreements, were tenants protected by the Rent Restrictions (Dwelling Houses) Ordinance, 1940, but it is submitted, and both Courts below have held, that there was no evidence of any tenancy. p. 34, l. 12 ff
p. 48, l. 28 ff

15.—The Respondent humbly submits that this Appeal should be dismissed with costs for the following among other

REASONS.

- (1) Because the matters in issue are *res judicata*.
- (2) Because the agreements sued upon are void and unenforceable, by reason of the provisions of the Land Transfer Ordinance and the Land Law (Amendment) Ordinance, 1937, as agreements for the sale of flats in a building.
- (3) Because the agreements are void for uncertainty.
- (4) Because as regards the six later agreements, the provision therein for the transfer of shares in the building and the land to a number of persons is void for uncertainty.
- (5) Because that provision is repugnant to and inconsistent with the rest of the terms of those agreements.
- (6) Because that provision is void and unenforceable by reason of Section 5 of the Land Transfer Ordinance.
- (7) Because the Appellants have no lien upon the premises.
- (8) Because there was no evidence of any tenancy by any of the Appellants.
- (9) Because the Judgments of the Land Court and of the Supreme Court were right for the reasons given therein and ought to be affirmed.

A. S. DIAMOND.

In the Privy Council.

No. 32 of 1947.

ON APPEAL FROM THE SUPREME COURT OF
PALESTINE SITTING AS A COURT OF APPEAL.

BETWEEN

BRACHA BEN YA'ACOV AND OTHERS
(Defendants) APPELLANTS

AND

JOSEPH FORER *(Plaintiff)* RESPONDENT.

CASE FOR THE RESPONDENT

BARTLETT & GLUCKSTEIN,
199 Piccadilly, W.1.
Respondent's Solicitors.