

*Privy Council Appeals Nos. 32 and 30 of 1947*

Bracha Ben Ya'acov and others - - - - - *Appellants*  
v.  
Joseph Forer - - - - - *Respondent*  
and  
Esther Mamanoff and others - - - - - *Appellants*  
v.  
Joseph Forer - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 11TH MAY 1948

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*Present at the Hearing:*

LORD UTHWATT  
LORD MACDERMOTT  
SIR JOHN BEAUMONT

[*Delivered by* LORD UTHWATT]

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The first of these cases is an appeal by special leave from the judgment dated the 26th September, 1945, given in nine consolidated actions, of the Supreme Court of Palestine, sitting as a Court of Appeal, dismissing the appellants' appeal from the judgment of the Land Court, Tel-Aviv, dated the 21st December, 1944.

The substance of the question at issue in this appeal is whether contracts for sale of certain flats were valid in law. In the courts below the contracts were held to be invalid and an order was made declaring the respondent to be the sole owner of the building and the sole person having any rights therein, and each appellant was ordered not to interfere with the respondent's rights. In the case of two at least of the appellants the order made has been followed up by execution proceedings directed to delivery of possession.

The facts lie within a narrow compass. At all material times the respondent has been the registered owner of a plot of land at Tel-Aviv. On this land he erected a building consisting of nine flats. Between October 1937 and May 1939 during and after the erection of this building, the respondent entered into nine separate agreements—each for the sale of one flat—with the appellants or their predecessors in title. The difficulty with which the parties were faced was that by virtue of section 2 of the Land Law (Amendment) Ordinance 1937 no registration could be made under the Land Transfer Ordinance of the separate ownership of a flat and this circumstance dictated the form taken by the sale agreements. It is unnecessary to state the terms of these agreements in detail. A summary of their effect is sufficient for the purpose in hand.

In each agreement:—

(a) the preamble recites that the respondent has built or is building a house in common ownership.

(b) the sale agreed upon is a sale of a specific flat.

(c) the purchase price is payable in part on or shortly after the execution of the agreement and as to the rest—save in two cases—by instalments over a period of years.

(d) the purchaser is to be entitled to take possession.

In some respects the sale agreements differ. In the case of the sales to Lev, Vortman and Mann (the three earliest agreements) nothing is agreed to be sold except a flat. In the other agreements the sale is expressed to include "part of the plot consisting of an area to be in proportion to the number of rooms to be owned together with the other flat-owners".

In all the agreements there is a provision directed to subsequent transfer. Lev undertakes to give his "share for the transfer of the building in the names of the buyers in the Land Registry". In the agreements with Mann and Vortman the respondent agrees to transfer all the building into the name of the committee to be elected by the purchasers, provided a certain mortgage is given. In the other agreements the provision is for transfer to a committee or a co-operative society or into the names of two or three of the purchasers to be held in favour of all the purchasers. In some of the agreements there is a provision that in the event of the committee or co-operative society not being formed by a specified date the respondent will transfer to the purchaser of the flat his share in the plot and in the building masha.

The essential features are:

(1) that despite the language used in some of the agreements the sale contemplated and agreed was in all cases a sale only of the flat;

(2) that the purchasers between them were at a later date in some fashion to get a transfer of the ownership of the land and the buildings; and

(3) that transfer of a flat as such was not in contemplation.

The remaining relevant facts are that possession of the flats was taken by the purchasers: that no co-operative society or committee has ever been formed: that no attempt has been made to effect a formal transfer and indeed that no steps of any kind have been taken under the Land Transfer Ordinance.

As a result of events which it is not necessary to detail the respondent brought the actions giving rise to the first appeal. These actions were aimed at obtaining possession of the flats and were based on the contention that the agreements were void.

The main question is whether the agreements for sale are invalid. The contention of the respondent is that each of the sale agreements is a disposition within the meaning of the Land Transfer Ordinance. If that be so it is clear that as the consent to a disposition required by that Ordinance has not been obtained, the sale agreements are null and void.

The general object of the Ordinance is clear. It is that the Land Registry office should contain a complete and accurate record of changes in proprietary interest which result from transactions affecting immovables and that no such changes shall take place without the prior consent of the Director of that office. The scheme of the Ordinance is that no "disposition" of immovable property shall be valid unless the provisions of the Act have been complied with (sect. 4) and that consent to the disposition shall be obtained by petition. The petition is to set out the terms of the disposition to be made and it is to be accompanied by proof of the transferor's title and is to contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition. After the title has been examined and the consent has been obtained, a deed in the prescribed form is to be executed and is to be registered in the Land Registry. A disposition to which the required consent has not been given is null and void. (sect. 11) A party to a disposition of immovable property which has not received consent who either enters into possession or permits the other party to enter into possession, is guilty of an offence punishable by a fine. (sect. 12).

The Ordinance contains the following definition of "disposition":—

"Disposition" means a sale mortgage gift dedication of wakf of every description and any other disposition of immovable property except a devise by will or a lease for a term not exceeding three years and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years.

The short question is therefore the ambit of the word "disposition".

In their Lordships' view the term "disposition" as used in the Ordinance does not include a contract for sale. The outstanding fact is that the word "disposition" in ordinary legal parlance—whether it is used as describing a transaction or the document giving effect to the transaction—connotes a transfer of proprietary interest and that no proprietary interest passes by virtue of a contract of sale alone. Again "sale" is expressly mentioned in the definition of "disposition" and certainly includes a transfer on sale. It would be inept to use the word "sale," when including a transfer on sale, as also including a contract for sale, for those two transactions are entirely different in character and legal effect. Further the words "mortgage," "gift" "dedication"—the company in which the word "sale" is found in the definition of "disposition"—are words which refer to transfers of proprietary interest and not to agreements to make such transfers. Moreover, the procedure directed to be followed by the Ordinance is directed to securing an effective transfer and apparently is machinery for that end only. Lastly, when the particular provisions of the Ordinance are taken into review, intelligible effect can be given to them all without including contracts for sale within the meaning of "disposition."

Their Lordships are fortified in their conclusion that contracts for sale are not so included by the reflection that were the contrary the case the ordinary course of business would be much hampered. No firm bargain for sale could be reached either by public auction or private bargain, and an intending purchaser would be at the mercy of a vendor who might not choose to take the steps necessary to obtain consent. To this it may be added that the decisions of the Courts of Palestine, that orders for specific performance can be made in respect of a contract which has not received the Director's sanction, accord with the view that appeals to their Lordships.

The remaining matters that emerge for consideration may be shortly disposed of. First, from the statement of the effect of the contracts it is apparent that none of them contemplates a transfer made otherwise than in accordance with law and the circumstances that appropriate provisions for transfer have not been included in the contracts and that a transfer satisfactory to all concerned may not in the course of events in fact be made cannot affect the legality of the contracts. The contracts are therefore in all respects lawful. Second, it is not necessary to consider whether any of the appellants is in a position to get an order for specific performance of his contract. Their Lordships will assume that they are not. It is sufficient that in the case of all except Lev it is clear that they had at all material times wished to abide by their contract. As regards Lev there was some evidence on which a case for repudiation by him of his contract might have been made, but there was no evidence that the respondent had accepted any such repudiation and in their Lordships' view, on the evidence adduced in the case, he stands as respects non-repudiation in the same position as the other appellants. The result is that the appellants are in possession of the respondent's flats as licensees of the respondent under the sale contracts. It is clear that the contracts contemplated permanent possession on the part of the licensees who performed their contractual obligations. It is true that in some respects the appellants have not performed the obligations to which they were subject under the contracts, but this non-performance took place in somewhat curious circumstances. Their Lordships do not find it necessary to set out those circumstances. They merely record their conclusion that it was not proved in the proceedings that at the date when they were instituted an event had happened which according to the general equitable principles of the Law of England would justify

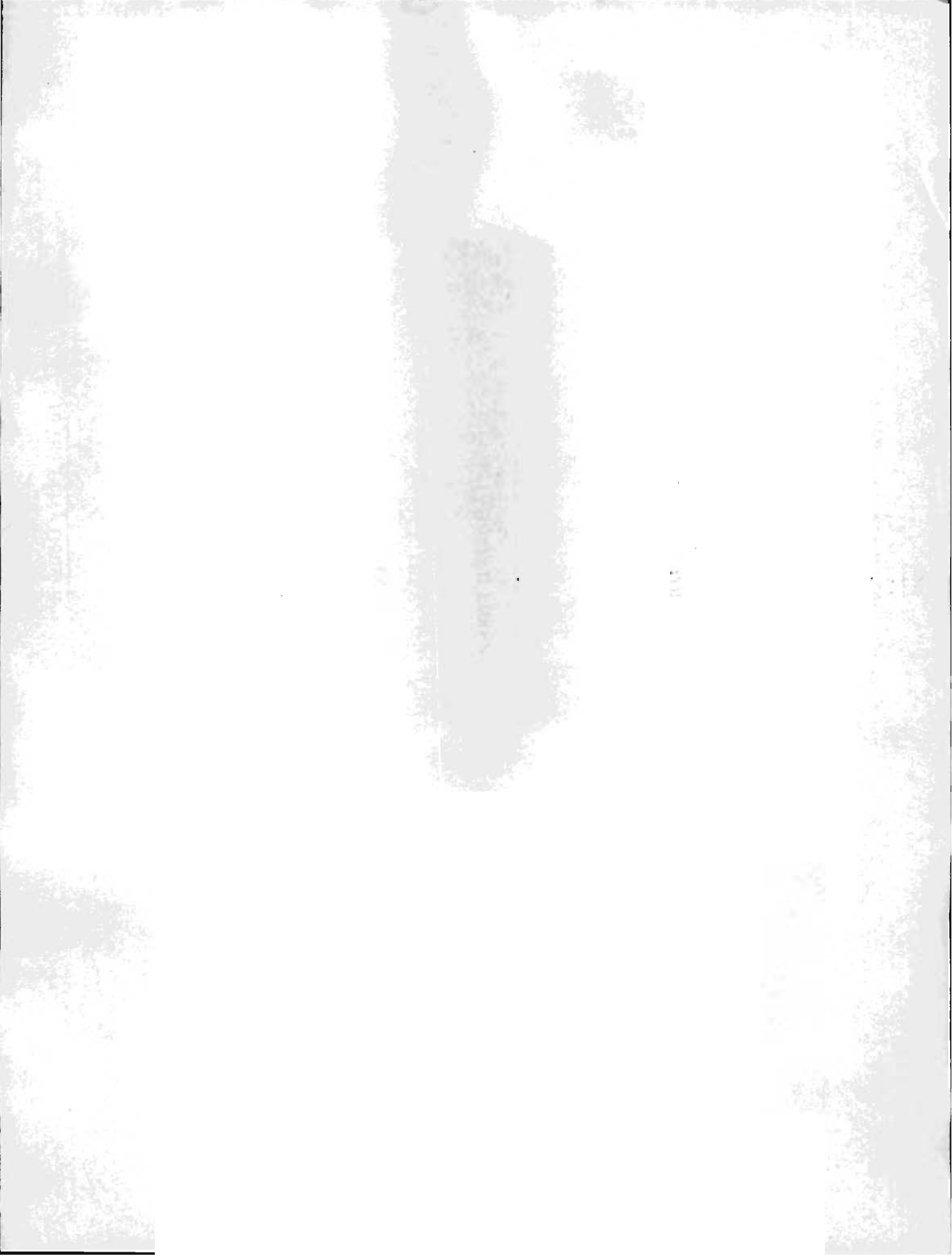
a revocation of the licences to be in possession arising under the sale contracts (Cf *Winter Garden Theatre (London) Ltd., v. Millenium Productions Ltd.* [1948] A.C. 173. The propriety of taking such principles into account is established by *Sheikh Suleiman Taji Faruqi v. Michel Habib Aijub* (Privy Council Appeal No. 1 of 1935) where with reference to Article 46 of the Palestine Order in Council, 1922, Lord Atkin, delivering the judgment of this Board, said " Their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity. . . ." ) Accordingly no order should have been made which would justify an application for possession by the Respondent.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed and each of the actions be dismissed but without prejudice to any proceedings the respondent or his successors in title may be advised to take based on failure by any purchaser to comply with the terms of the contract for the sale of a flat to him, and that the respondent pay the costs of the actions and of the appeal to the Supreme Court. The respondent will pay the costs of the appeal to their Lordships.

The second case is an appeal from the judgment dated the 13th April, 1945 of the Supreme Court sitting as a Court of Appeal dismissing an appeal from the judgment dated the 11th September, 1944 of the District Court, Tel-Aviv in nine other consolidated actions between the same parties and relating to the same flats. The point at issue in this appeal is whether the purchasers of the flats were bound to pay " equivalent " or " estimated " rent by reason of their occupation of the same flats. The Courts below, on the basis that the contracts for sale were invalid, held that such " equivalent " or " estimated " rent was payable.

It was conceded, and in their Lordships' opinion rightly conceded, that if the contracts were not invalid, rent was not payable.

Their Lordships being of opinion that the contracts were not invalid will humbly advise His Majesty that the appeal be allowed and that the respondent pay the costs of the appellants in the District Court and the Supreme Court. The respondent will pay the costs of the appeal to their Lordships.



In the Privy Council

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BRACHA BEN YA'ACOV AND OTHERS

v.

JOSEPH FORER

AND

ESTHER MAMANOFF AND OTHERS

v.

JOSEPH FORER

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DELIVERED BY LORD UTHWATT