C.A. 311/57

ATTORNEY-GENERAL

v.

M. DIZENGOFF & CO. (NAVIGATION) LTD.

In the Supreme Court sitting as a Court of Civil Appeal

Goitein J., Landau J. and Berinson J.

Administrative Law—Retroactivity of subordinate legislation—Regulations imposing lighterage charges and contributions to the Ministry of Finance—Analogy with local authority bye-laws and other delegated legislation—Criteria of reasonableness and legislative intention—Invalidity on grounds of ultra vires, lack of good faith, extraneous considerations and abuse of power—Ports Ordinance—Ports (Lighterage Charges) Order, 1953*—Interpretation Ordinance.*

Three different rates of exchange were introduced as a result of the variation of the official rate of exchange of Israeli currency in 1952. The rate applicable to shipping matters necessitated an increase in the charges for port services, including those for Israel shipping, in order to avoid the charge of discrimination in favour of such shipping. The excess earnings made by the port service companies in respect of Israel shipping was, at first by agreement and later by Order, made transferable to the Ministry of Finance. The respondent resisted this arrangement in respect of its own Israel ships and refused to pay the transferable amount. The Order embodying the arrangement was given retrospective effect but as a result of doubts as to the adequacy of the Order the authorities published a Defence Regulations Order. The respondent persisted in its refusal to pay the Ministry's portion of the port charges due from it. Instead the lighterage company involved assigned the debt of the respondent to the Government which unsuccessfully sued the respondent, the District Court rejecting the Government's claim on the grounds that the retrospective effect of the Defence Regulations Order and the new scales payable thereunder was not binding.

Held: The Ports' Ordinance under which the Ports' Order was made contains no express prohibition upon giving retroactive force to any Order made thereunder. References to retroactivity in the Ordinance did not touch the subject matter of the Ports' Order. Notwithstanding the views sometimes expressed in English case law, there was no reason in principle for distinguishing between delegated legislation of the type of the Ports' Order and local authority bye-laws, when it came to testing the validity thereof. The question of reasonableness is one aspect of excess of authority and, therefore, there can and ought to be a close parallel in the manner of judicial scrutiny of all types of delegated legislation. All the various tests employed—unreasonableness, lack of good faith, having regard to improper considerations, extraneous objects—are merely different forms of testing

excess of authority or abuse of power. In the instant case, the retroactive force given to the obligation to pay the increased charges was not in the circumstances unreasonable by itself. It did not constitute an invasion of the contractual relations between the parties, since any rate that was imposed depended upon the law and not upon the bargaining powers of the parties. The period of one and a half years of retroactivity was, however, unreasonable since it involved reopening transactions wholly completed. Likewise, the contributions to the Ministry of Finance were unreasonable since they constituted an indirect and camouflaged collection of an impost which had nothing in common with the purpose of the legislature when it authorised the fixing of port charges.

Palestinian cases referred to:

(1) *Cr. A.* 69/38—*Attorney-General v. Rousseau, Ticket Cashier of the Tel-Aviv Service, Jerusalem* (1938) 2 *S.C.J.* 43; (1938) 4 *C.L.R.* 233.

(2) *Misdemeanour Appeal* 18/28—*Attorney-General v. Abraham Altshuler* (1920-1933) 1 *P.L.R.* 283; (1919-1933) 4 *C.O.J.* 1314.

(3) *Cr. A.* 5/46 *Tel-Aviv—Hassia Trachtenberg v. Attorney-General* (1946) *S.C.D.C.* 447.

(4) *Cr. Leave Application* 26/47 *Haifa—Sami Abdalla Bahaj v. Attorney General* (1947) *S.C.D.C.* 225.

Israel cases referred to :

(5) *H.C.* 21/51—*N. Binenbaum and others v. Tel-Aviv Municipality* (1952) 6 *P.D.* 375.

(6) *C.A.* 10/55—*"El-Al" Israel Air Lines Ltd. v. Mayor of Tel-Aviv-Jaffa and others* (1956) 10 *P.D.* 1586.

(7) *C.A.* 43/53—*Kfar Ata Local Council v. "Ata" Textile Company Ltd* (1955) 9 *P.D.* 869.

(8) *H.C.* 98/54; 105/54—*Eugen Lazarovitz and Saada George Saad v. Food Controller (Avinoam Halevi) Jerusalem* (1956) 10 *P.D.* 40.

(9) *H.C.* 72/55, 117/55—*Siegfried Freidy and Shmuel Mendelson and others v. Tel-Aviv Municipality and others* (1956) 10 *P.D.* 734.

(10) *H.C.* 129/57—*Michel Ben Kosta v. Minister of Interior and others* (1958) 12 *P.D.* 209 *(infra p.* 10).

(11) *Cr. A.* 247/55—*Sharlo Ben-Bassat v. Attorney-General* (1956) 10 *P.D.* 716.

(12) *C.A.* 222/56—*Mayor, Councillors and Townsmen of Holon Municipality v. Zelig Shwartz* (1957) 11 *P.D.* 214.

(13) *Cr. C.* 91/55 *Jerusalem—Attorney-General v. Sharlo Ben-Bassat* (1955) 11 *P.M.* 46.

(14) *C.A.* 55/51 *Haifa—Yoqneam Local Council v. Dr. Manfred Meir Lehman* (1952-53) 8 *P.M.* 34.

(15) *C.C.* 1143/57 *Tel-Aviv—Citrus Marketing Partnership (Shoham Agency) v. Tel-Aviv-Jaffa Municipality and others* (1958) 15 *P.M.* 39.

(16) *C.C.* 48/53 *Jerusalem—Jerusalem Municipality and others v. Yihye ben Yihye Kahah* (1955) 10 *P.M.* 58.
(17) *C.C.* 121/53 *Jerusalem—Jerusalem Municipality v. Rahamim A. Israelin and others* (1955) 10 *P.M.* 98.
(18) *C.A.* 261/55—*Tel-Aviv-Holon Municipality v. Zelig Shwartz. Real Estate Agent, Holon* (1956) 12 *P.M.* 240.

English cases referred to:

(19) *Harrison v. Stickney and others* (1858) 9 *E.R.* 1033.
(20) *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1948] 1 *K.B.* 223; [1947] 2 *All E.R.* 680.
(21) *Attorney-General for Alberta v. Attorney-General for Canada and others* [1939] *A.C.* 117.
(22) *Berney v. Attorney-General* (1947) 176 *L.T.* 377.
(23) *Kruse v. Johnson* [1898] 2 *Q.B.D.* 91.
(24) *Sparks v. Edward Ash, Ltd.* [1943] 1 *K.B.* 223; 1 *All E.R.* 1.
(25) *Taylor v. Brighton Borough Council* [1947] 1 *K.B.* 736.
(26) *Short v. Poole Corporation* [1926] *Ch.* 66.

Australian case referred to:

(27) *Arthur Yates and Co. Pty. Ltd. v. The Vegetable Seeds Committee* (1945) 72 *C.L.R.* 37, cited in Keir and Lawson, Cases in Constitutional Law, 4th Edition, Oxford, 1954, pp. 299-312.

Gillon, State Attorney, and *Weiss,* Deputy State Attorney, for the appellant.
Firon and *Bar-Navon* for the respondent.

BERINSON J. The only question which arises in this appeal is the retroactive effect of the Ports' (Lighterage Charges) Order, 1953, which fixed higher tariffs for lighterage in the ports of the country for a period antedating the publication of the Order. The Order was published on May 14, 1953 and it contains higher tariffs for two earlier periods: one from July 1, 1951 to February 13, 1952, and the other for the period commencing February 14, 1952. Of the latter period, the interval of time between February 14, 1952 and May 14, 1953 is of interest to us.

The principal facts are these. On February 14, 1952, a change occurred in the official rate of exchange of the Israel Lira. Up to then there had been one rate of exchange of 2.8 U.S. dollars to the Lira. On that date, three rates of exchange were introduced, namely, Rate A—2.8 U.S. dollars to the Lira, Rate B—1.4 U.S. dollars to the Lira, and Rate C—1 dollar to the Lira. Rate C was fixed for shipping. As a

consequence of this variation in the rate of exchange, Treasury officials found it necessary to introduce changes in the existing scale of lighterage charges in the ports of the country, and this mainly in order to ensure that the amounts theretofore paid by foreign companies in foreign currency should continue to be paid notwithstanding the new exchange rate. But in order, on the one hand, to avoid a charge of discrimination in favour of Israel ships by foreign shipping companies and, on the other hand, to absorb the increased profits which would accrue without justification to a division of Savar Co. Ltd., which provided lighterage services in the port of Haifa, it was decided to introduce a new uniform tariff 2.8 times higher than the preceding one, in respect of all ships, foreign as well as Israel. Along with this it was agreed that the difference in income between the previous and new tariffs, after deducting a definite amount which was approved as the increase for Savar Co. Ltd., should be transferred by the latter to the Treasury. The different shipping companies and their agents in Haifa accepted this agreement and acted accordingly, except that the respondents resisted it to some extent. As agents for foreign ships they paid the increased lighterage charges in full, but as owners of Israel ships they agreed to pay and paid only the increase which had been approved for Savar Co. Ltd. but refused to pay the remaining sums intended for the Treasury on the ground that the demand of these sums was illegal.

This arrangement was put into operation without any legal formality. Only on May 14, 1953 was this omission supplied by the publication of the Ports' Order which purported, as I have indicated, to fix increased lighterage charges retrospectively. The respondents were not deterred and continued to be refractory. When doubts apparently arose in the minds of the competent government authorities whether the Ports' Order was adequate for achieving its avowed purpose, a Defence Order was also issued pursuant to Regulation 46 (b) of the Defence Regulations, 1939, directed to the Savar Co., Ltd. ordering it to accept for its lighterage services the amounts fixed by the Ports' Order in force retrospectively from February 14, 1952, and to remit thereout to the Treasury certain designated sums. The respondents did not retreat from their position even after the issue of the Defence Order, with the result that they continued to owe Savar Co. Ltd. substantial sums. That company was not interested in litigating with the respondents about the money earmarked for the Treasury and accordingly assigned its rights to the Government of Israel, notice to this effect being sent to the respondents. Since these sums have not been paid, the present action was commenced.

Counsel for the defendant respondent endeavoured to upset the claim by a number of different arguments, but all of them were rejected except for two which were decided in its favour. It was held that the retroactive force given to the said Defence Order and to the new scale of lighterage charges in the Ports Order was not binding and the action failed for this twofold reason. The learned State Attorney agreed before us that the Defence Order directed by a competent authority to the Savar Co. Ltd. could impose no obligations upon other persons and for this reason could not serve as grounds for an action against the respondent, and he concentrated his criticism upon that part of the decision which related to the lack of retroactive force of the lighterage charges fixed by the Ports Order.

The question of the retroactive force of secondary legislation is not new to us. It has been dealt with a number of times in our courts in connection with local council bye-laws which purported to impose taxes, fees or other payments retrospectively. These decisions have established the principle that generally such secondary legislation with retrospective application is not proscribed but is to be tested by the accepted criterion with reference to bye-laws, i.e., by the test of reasonableness. In the leading case of *Binenbaum v. Municipality of Tel Aviv* (5), Agranat J. says (at pp. 385-6):

> "We have found no legal authority which declares that in no event is it permissible for a local authority to give retroactive force to a bye-law enacted by it, and it is our opinion that in law this matter also, like that of the effect of bye-laws generally, is always to be tested by the standard whether the retrospective provision is unreasonable or unacceptable."

> "There is no rule which prohibits a retrospective rate. That depends upon the intention of the legislature and the question is whether the Law under which each rate is made does so expressly or impliedly."

This rule, which was laid down by Baron Parke in the case of *Harrison v. Stickney* (19), was cited with approval by Agranat J. in the *Binenbaum* case.

> "What requires to be made out is not the permission but the prohibition to levy a retrospective tax (by a local authority)" :

El Al v. Municipality of Tel-Aviv-Jaffa (6); and see also *Local Council*

of Kfar Ata v. Ata Ltd. (7) in which no irregularity was found in the imposition retrospectively of a fee for a service rendered by a local authority, in the absence of any prohibition in the Order pursuant to which the fee was imposed.

These rules were established in cases with reference to bye-laws enacted by local authorities for the collection of taxes, fees or other local payments, but I see no reason, and none was brought to our attention, why they should not be equally applicable with reference to any other kind of delegated legislation prescribing government or other compulsory payments.

The next question is whether anything can be learned from the provisions of the Ports Ordinance, under sec. 10(1) of which the Ports Order was made, about the existence of a prohibition on the retroactivity of the Order. There is no express prohibition, but is it to be implied. Notwithstanding Mr. Firon's interesting arguments, I have come to the conclusion that no such prohibition can be spelled out from the provision of the Ordinance.

In the first place, Mr. Firon argued, the fact that sub-secs. 3(b), 3(c) and 3(d) expressly mention the question of retroactivity shows that the legislator was not oblivious to this problem and even if he passed it over in silence in sec. 10, he did not wish lighterage charges to be fixed with retrospective effect. I am not persuaded by this argument. These subsections were added to the original Ordinance of 1926 by Ordinance No. 44 of 1946, after the Government of the time had recognized the independent existence and separate administration of the Port of Tel-Aviv by Jewish public bodies and it became necessary to place certain acts of the Government Port Authority with regard to this port on a legal basis, as appears from the official explanatory notes which accompanied the draft of the Ordinance of 1946. The fact that for this purpose the legislator directed his attention to the matter of retroactivity in so far as it was necessary to achieve this special purpose, does not prove that he intended at the same time to deny the possibility of making retroactive use of other provisions of the Ordinance which were originally part of it. From a positive regarding the new provisions you may not infer a negative regarding the early provisions.

Mr. Firon argued secondly that sub-secs. 10(2) and 10(3) of the Ordinance, when read together with sub-secs. 15(1) (a) and 15(1) (g), patently demonstrated the intention to establish rates for lighterage services which were to be rendered in the future and not for those which had already been rendered. Sub-sec. 10(2) requires anyone

in charge of a vessel which renders a service in port for which a rate has been fixed to keep a copy of the rates available and to produce it upon demand to anyone who receives the service or to the customs officials or police. The question then arises—when a rate is later fixed retrospectively, how can these duties be carried out literally with regard to a period of time which has already passed? We must not forget that under sub-sec. 15(1) (g) non-compliance with any provision in the Ordinance constitutes a criminal offence. The same applies to the collection of the charge for the service. If after a while a rate is fixed different from the one which has existed for some time, how is it possible lawfully to carry out in respect of that time, the provision found in sub-sec. 10(3) that no charge is to be collected other than the one authorised by the rate then actually in force? Here also the collection of a payment higher than the one fixed by the rate in force at the time constitutes an offence under sub-sec. 15(1) (a).

It seems to me that it is possible to answer the questions which Mr. Firon has put to us. The new rate comes into being and takes effect upon the publication of the Order prescribing it. Only then do the various duties arise with regard to having available and producing the new rate and the collection of the charges for the services prescribed therein for any past period and until then non-compliance with these duties is not to be regarded as an offence. In other words, as long as the new rate has not been published, although it relates to a period already past, the duty to keep and produce a copy of it and to act in accordance therewith, does not arise, and a person carries out his duties in the matter by fulfilling them in respect of the past period from the date of publication of the new rates and thereafter. In this respect, the Ports Order is phrased in a special form. It provides that fees shall be paid for lighterage services in accordance with those set out in the Schedule, and the Schedule specifies the higher payments payable for the past periods. The order does not provide that the new rates should be regarded as if they had also been in force in the past. It merely creates an obligation for the future in respect of the past. Mr. Firon's questions do not, therefore, in fact arise.

The conclusion, then, is that the Ports Ordinance does not preclude the fixing of retrospective rates and in this regard there is nothing objectionable in the Ports (Lighterage Charges) Order, 1953.

But is not the retroactivity of the Order ultra vires or otherwise invalid? Is not this a case of lack of good faith, or an exercise of authority in an unreasonable manner or for an extraneous purpose? Generally,

any one of these is sufficient to invalidate an act of an administrative body. I have said "any one of these", but we must not lose sight of the fact that the truth of the matter is that the lines of demarcation are far from clear and well-defined, and they overlap considerably, as Lord Greene M.R. explained at length in *Associated Provincial Picture House Ltd. v. Wednesbury Corp.* (20). I shall have occasion to revert to this case when I deal in detail with the test of reasonableness.

Before that, there is another preliminary question to be answered. Is it generally a matter for the court to examine the legislation of an administrative body from these aspects, and has it the power to in-invalidate this legislation should such a flaw be found? As far as extraneous purpose is concerned, a clear answer was given in *Lazarovitz* v. *Food Controller* (8), where it was said at p. 47 that—

> "This court may certainly interfere upon the application of an injured person and also invalidate legislative provisions of the authorities promulgated under statutory power, not only for reasons of formally exceeding the strict letter of the Law conferring the power, but also for other reasons, such as improper motive, or use of the power for a purpose unrelated to the matter."

Thus, a bye-law of the Municipality of Tel-Aviv was later invalidated by this court for the reason that "a body having the power to enact secondary legislation of a local character must not be enabled to settle religious problems under the guise of regulating the sale of meat in a particular place": *Freidy v. Municipality of Tel-Aviv-Jaffa* (9).

The very same has been done by the Privy Council in England in deciding more than once to invalidate Laws of the provincial parliaments in Canada, which although dealing with subjects and matters within their formal jurisdiction were exploited for attaining an unrelated purpose: *A.G. for Alberta v. A.G. for Canada* (21), where it was said (at p. 130):

> "It is not competent either for the Dominion or a Province under the guise or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers, and a trespass on the exclusive powers of the other."

At this point I think it is proper to quote the words of Lord Goddard L.C.J. (spoken, it is true, obiter) in the case of *Berney v. A.G.* (22) (at pp. 381-382), which point out that a change or distortion of purpose

by a government body in delegated legislation made by it, is simply excess of authority:

> "It may be, though it is not necessary to decide it, that if the competent authority, in this case a government department, uses the powers given by an order made under a Defence Regulation for some purposes wholly unconnected with the regulation or under the order, they could not justify their action under the regulation or under the order, as the answer would be that they were not acting under it."

In Canada, South Africa, India and Australia, the courts act according to this principle, as was explained, with numerous precedents from these countries, in the Australian decision of *Yates v. Vegetable Seed Committee* (27), passages of which are quoted in Keir and Lawson, Cases in Constitutional Law (4th ed.) pp. 299-312. In the *Lazarovitz* case above, the question whether administrative legislation is to be subjected to the test of reasonableness did not arise. But in the course of a general and comprehensive analysis of the topic of judicial interference with the action of public officials and bodies, the following was said in passing on this question (at p. 51):

> "We have already seen that the degree of necessity of a certain act by an authorised body, the decision as to which is committed to its discretion, is no concern of the court, which will uphold the act if done in good faith. It would seem that the court will not, in like manner, inquire into the degree of efficacy or reasonableness of such an act, with the exception of the test of reasonableness of bye-laws: *Kruse v. Johnson* (23)."

In two cases, *Sparks v. Edward Ash Ltd.* (24) and *Taylor v. Brighton Borough Council* (25), the court expressed its opinion that it was not within its jurisdiction at all to examine the question of the reasonableness of legislative acts of a competent authority, although in both cases the court dealt with the question on the merits and reached the general view that the legislative act concerned was not unreasonable.

In the *Sparks* case it was argued that certain regulations issued by the Minister of Transport for regulating traffic at pedestrian crossings were so burdensome and absurd as to be unreasonable and invalid. Scott L.J. who dealt with this question at length considered first the meaning of the concept of unreasonableness which may invalidate delegated legislation, in view of the norms laid down in the well known case of *Kruse* v. *Johnson* (23) and then he added (at pp. 229-30):

"If it is the duty of the courts to recognize and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses...and can be annulled in the usual way.

For the above reasons, this court has, in my opinion, no power to declare these two regulations invalid for unreasonableness, certainly not on any ground submitted in argument before us."

The last phrase "certainly not on any ground submitted in argument before us" does, nonetheless, contain an intimation that possibly other grounds for establishing unreasonableness could have been advanced to invalidate the regulations.

Similarly, in the *Taylor* case (25) referred to in the *Lazarovitz* case (8), the court considered a proposed provision which the Brighton Borough Council intended to insert in its town planning scheme, under which the erection of a fun fair within the planning area without the consent of the council would be forbidden. A landowner who was about to put up such a fun fair upon his land argued inter alia that it was not within the power of the council so to provide, since it had to exercise the discretion which had been given to it in this matter in a reasonable manner. Lord Greene M.R., answered this argument (at pp. 748-9) as follows:

"It was said that some restriction ought to be read into the language of the Act prohibiting this particular provision on some principle of what is called reasonableness and that a delegated power such as this must be used reasonably rather on the same principle as the power to make a by-law. In my judgment, the analogy of the by-law, even if it could carry the appellant as far as suggested, is quite out of place in the present circumstances. We are dealing with a totally different class of subject-matter and one in which the ultimate arbiter is the Minister himself. In my judgment, not only does the argument of unreasonableness break down on the facts, but the attempt made is to introduce it into a subject-matter for which it was never designed."

On the other hand, Wrottesley L.J., who merely added one short paragraph, did not reject the test of reasonableness as such but construed it in the accepted manner in the following words:

> "As to the last matter, if what is sought to be introduced under the heading of reasonableness is that the use of the power must be reasonable in the opinion of judges of the High Court, I think that argument is not well founded."

It is, therefore, possible to sum up the situation by saying that the attempts which have been made in English courts to prove that certain administrative actions of a legislative character are unreasonable and for that reason invalid, have not succeeded and the opinion has been expressed not once in the course of dealing with the problem that such legislative action, as distinguished from bye-laws which may be declared invalid for unreasonableness, is not subject to the test of reasonableness.

As far as I know, no case has yet occurred in this country in which the court has been asked to put an act of administrative legislation, not a bye-law of a local authority, to the test of reasonableness, except one extraordinary instance in this court in the period of the Mandate, *Attorney-General* v. *Rousseau* (1), and another case in the Haifa District Court, which was cited by way of dissent by Judge Lamm in *Citrus Marketing Partnership v. The Municipality of Tel-Aviv-Jaffa* (15).

As for municipal bye-laws, I summarized my views about a year ago in *Kosta v. Minister of the Interior* (10). I still believe in the correctness of what I said there, and I take the liberty of stating here the substance of my views:

> "The many decisions given by the courts in this country since the establishment of the State, as well as during the period of the Mandate, which have dealt with this question, have almost always and consistently proceeded upon the assumption that the test of reasonableness of municipal bye-laws which prevails in this country is in accordance with the rules laid down in the leading English case of *Kruse v. Johnson* (1898) (23), which they have followed in practice...
>
> During the period of the Mandate this question was in fact decided in several judgments in which municipal bye-laws were held to be invalid on account of unreasonableness...
>
> Since the establishment of the State no municipal bye-law has indeed been invalidated for unreasonableness (and,