C.A. 84/64

BETH HANANYA, WORKERS' COOPERATIVE SETTLEMENT LTD.

v.

MOSHE FREIDMAN et al.

In the Supreme Court sitting as a Court of Civil Appeal
[30 July 1964]
Agranat D.P., Berinson J. and Manny J.

Cooperative societies - membership - admission of wives - effect of long unchallenged usage - Cooperative Societies Ordinance, sec. 1.

At a general meeting of the appellant society a resolution was adopted amending a certain provision of its constitution. The respondents, members of the society, sought a declaration that the resolution was void because wives of members had voted thereon although not formally members themselves. The appellant pleaded that the wives had been duly admitted to membership, that it was customary, as throughout the settlement movement, for wives to become members and that the respondents were estopped from denying such membership. The District Court granted the declaration claimed.

Held, granting the appeal, that whilst normally a person did not become a member unless duly admitted under the relevant law or according to a society's rules, the question was whether or not in formally accepting a husband as a member the intention was to exclude his wife. Such intention could only be established by examining the circumstances. In the instant case, the only conclusion that could be drawn was that admission of a husband included his wife, especially as wives had always been treated as members for all purposes. The mode of admission to membership was left by law to a society's constitution and the statutory definition of "member" was broad enough not to exclude those who became members in some manner other than that specified in such constitution.

A society's constitution was in the nature of a contract between it and its members or among the members *inter se.* In certain circumstances the contract might be varied by mutual consent evidenced manifestly in long continuous practice. Such variation received the force of a binding usage. That was so in

the instant case, wives having been accorded rights and obligations equal to those of their husbands. The court could not equitably disregard this situation and set it at naught.

To hold that the wives were not members would shake the society and others like it to their very foundations since it would render everything done by them void of all legal effect.

Israeli cases referred to:

(1) C.A. 25/50 - *S. Wolfson v Spinis Co. Ltd.* (1951) 5 P.D. 265: 4 *P.M.* 26.

Palestinian case referred to:

(2) C.A. 5/40 - *S. Cohen and Company and an*. v. *Abraham Capun* (1940) 7.P.L.R. 80; (1940) 1 S.C.J. 63.

English cases referred to:

(3) *Lyle-Meller* v. *A. Lewis and Co. (Westminster),* Ltd. (1956), 1 *All E.R.* 247.
(4) *Lewis H. Evans, Official Manager of the Agriculturalists' Cattle Assurance Company* v. *Aaron Smallcombe and an.* (1868) L.R. 3 H.L. 249.

American case referred to:

(5) *Francis* v. Perry (1913) 144 N.Y.S. 167.

R. Navat for the appellant.
A. Fichman for the respondents.

BERINSON J.: The appellant is a workers' settlement constituted as a cooperative agricultural society (hereinafter referred to as "the society" or "the settlement"), and the respondents are members of the society.

On 2 June, 1963, the general meeting of the society resolved to change the clause in the society's articles of association which deals with the settlement of disputes. At that

meeting, as at all meetings of the society, members' wives participated and voted. The respondents claim that the wives are not members. Because they participated, the respondents applied to the District Court for a declaration that the above resolution was null and void and that the clause in its version prior to the resolution, remained in force.

The society raised the following points in its defence:

1. The women were duly accepted as members.

2. In the settlement, as in all other workers' settlements of the Settlement Movement in Israel, there is a binding custom according to which wives are full members.

3. The respondents are estopped from denying the wives' membership.

These contentions were not accepted by the District Court and judgment was given in favour of the respondents. In the present appeal, the same three points are raised and I shall deal with each of them.

1. With respect to the procedure for accepting members into the society. Mr. Tobel. the secretary of the society. testified as follows:

> "Application for membership is always made by both spouses together and both sign the application which is in the form specified in the society's articles of association... The committee considers the application after making enquiries about the personalities and the health of both spouses. They are both sent for medical examinations. Should the committee find that one of the couple is unsuitable, neither is accepted. If the committee finds the couple suitable, it resolves to accept them and passes the matter on to the general meeting for approval. Only the name of the head of the family is designated in such approval. In my opinion, under this procedure the whole family is accepted as member."

Mr. Tobel's opinion did not meet the approval of the learned Judge who held that "acceptance of members into the cooperative society may not be implied - it must be explicit". He deduced this from the definition of the term "member" in the Cooperative Societies Ordinance, and from the society's articles of association (hereinafter referred to as "the articles") which specify that the decision of the administrative committee to accept a member must be approved by the general meeting.

It is true that usually a person does not become a member unless he has been duly accepted in accordance with the provisions of the law and the articles as they stand. Nevertheless, it seems to me that the learned Judge was in error here. First, we are not dealing with the question of implied acceptance of members. There is no dispute that the women, together with their husbands, signed the written applications for joining the society or that the committee would decide whether to accept or reject both husband and wife. The committee's decision would be passed to the general meeting for approval and the general meeting would approve the application in the name only of the husband. The sole question that might arise is what was the intention of the general meeting in giving its approval? Was it to approve the husband alone and to reject the wife or to approve them both even though formal expression of such approval was made in the name of the husband alone. In the *Corpus Juris Secundum.* vol. 7. p. 56, sec. 23(b), we find:

> "One may become a member of an association by formally signing its articles, or in any other way that shows a mutual agreement between himself and the existing members that he is a member. But membership is a question of intent and cannot be established by any facts which fail to show the existence of a mutual intent that one shall be a member of the association... It is sufficient if the existing members agree to accept him as a member, and he agrees to become such, with the mutual understanding that he shall be entitled to all the rights and privileges incidental to membership, and shall assume all the duties and obligations attaching thereto, the question of membership depending on the intent and understanding of the parties."

The task therefore is to discover the true intention of the parties, having regard to all the circumstances of the case. First and foremost, obviously, the conduct of the parties at the

time of the application and their understanding of the outcome must be considered. Mr. Tobel's testimony regarding the acceptance of new members was absolutely clear. He found no express approval by the general meeting of the acceptance of the wives as members of the society but he testified that the approval of the general meeting in the name only of the husband, is viewed as approval of both husband and wife: "When it is decided to accept a new member, a whole family, and not just the one member, is accepted". This also emerges from the fact that the settlement does not accept bachelors. Bachelors who joined the settlement when it was first founded were required to marry within two years and those who did not do so were forced to leave. "At present" said Mr. Tobel, "there are no bachelors on the settlement".

It is a fact that throughout the existence of the settlement, new members have been accepted in the above manner and when a new family is accepted, everyone considers the wife to be a member with equal rights and obligations in every respect. Wives participate in the activities of the settlement together with their husbands; they participate in the general meetings and enjoy the right to vote, they are elected to the institutions of the settlement and act in its name, just like their husbands. Accounts in the settlement are kept in the name of both spouses on the clear assumption that both are members of the society.

In the light of these facts, the only possible conclusion is that the association in its general meetings would accept both spouses as members, even though only the name of the husband appeared in the minutes.

This conclusion certainly does not contradict the articles of association, for, as we have said, the intention of the general meeting in approving the decision of the committee in the husband's name only is to accept both husband and wife as members. The best evidence of this is that subsequent to the approval, the wife is treated by all as a member of the settlement in every way. Nor is this conclusion contrary to the law, as the learned Judge thought, relying on the definition of "member" in section 2 of the Cooperative Societies Ordinance. According to this definition:

> " 'Member' includes a person joining in the application for the registration of a society and a person admitted to membership after

registration in accordance with the rules (of the society) and this Ordinance and the regulations made thereunder."

I have already said that the admission of the women was in fact consistent with the articles of association, for the action of the general meeting can only be interpreted as approval of the membership of both husband and wife. The Cooperative Societies Ordinance and the regulations made thereunder do not prescribe conditions for the admission of members. The regulations stipulate only that every association must in its articles of association specify the conditions for the acceptance of members, and the method of choosing them. When the choice is made in accordance with the articles, all the requirements of the law relating to this matter are satisfied. Similarly, the definition of "member" in terms of "includes" is not exhaustive, i.e., it does not preclude the possibility of a person becoming a member of the settlement in a manner different from those specified in the definition. Consequently, even if the admission of the women did not conform to all the specific provisions of the articles of association, nevertheless, since they were in fact recognized as members for many years, enjoying the benefits and bearing the responsibilities of membership, such *de facto* recognition gives rise to the assumption that their membership is in order *de jure* as well.

I could in fact have ended my judgment here but because both sides argued at length on two other questions of great public importance, in that they relate not only to the present litigants but to all the workers' settlements belonging to the Settlement Movement, I will also deal with these questions as briefly as possible.

2. The second submission of the appellant is, as I have said, that the practice with respect to the acceptance of members has become so firmly rooted that it has become a binding custom which the respondents may not deny. The practice has been the same since the settlement was founded in 1951. Moreover, all other settlements belonging to the Workers' Settlement Movement have followed the same practice for as long as the Movement has existed. Mr. Arazi, a member of the secretariat of the Movement and the coordinator of its membership committee, pointed out: "I am familiar with the procedure for accepting members in all the settlements in Israel. In all settlements, it is customary for the acceptance of members to include the acceptance of female workers". There is no doubt that all those concerned knew of the practice and conformed to it. The learned Judge,

however, thought that the practice cannot be binding because it is contrary to the law. The contradiction, he thought, lay in the fact that by giving the right to vote to both a member and his wife, a member would have two votes, whereas section 16(1) of the Cooperative Societies Ordinance allows each individual member one vote only. It would seem that conceptually, this view is based on the ancient rule of the Common law, taken from the Pentateuch, that a man and his wife are "of one flesh" (Gen. 2:24) and therefore the wife's act is that of the husband. This view is fundamentally wrong from both a legal and a factual point of view. The wife's right to her own opinion is given to her by virtue of her separate personality and membership. When the wife expresses her opinion on matters concerning the settlement, she is exercising this right of hers and in no manner can her vote be equated with the vote of her husband. Consequently, the husband is not given two votes but only one by virtue of his membership and the wife too has a vote by virtue of her membership. There was therefore no violation of the provisions of section 16(1) of the Ordinance.

In support of his view denying the binding force of the above practice relating to the mode of accepting new members. the learned Judge quoted the following passage from Wurtzburg. *The Law relating to Building Societies.* (9th ed.) p. 21:

> "As between the society and its members, a course of dealing at variance with the rules, for whatever length of time it may be pursued and acquiesced in, is of no validity whatsoever."

The author himself adds a warning note to the effect that the authorities upon which this statement is based are not particularly strong and that his words must be read with caution. I have looked at those of the sources which I could obtain and can find in them nothing clear and explicit in support of Wurtzburg's view. And it is no wonder, for the principle emerging therefrom does not, in my opinion, conform to the accepted position of the law on this matter. The very same author says elsewhere (at p. 41):

> "Sometimes a person is estopped, by virtue of an agreement and acceptance, from denying the legality or validity of a new regulation."

That is correct. The articles of association are only an agreement between the society and its members, or amongst the members themselves, under which they proceed by mutual consent. In certain circumstances, a deviation from the articles of association will have effect because of such consent. When the deviation persists continuously for a sufficient period of time and is known to all those concerned and decisive in their mutual relations, it acquires the force of binding custom which the law recognizes, just as it recognizes every other custom or commercial usage which those concerned cannot deny.

For this reason, there is no doubt that the usage with respect to the acceptance of members in the appellant settlement, in terms of duration, persistence and continuity and in view of its familiarity *(Wolfson v* Spinis (1) and *Cohen* v. *Capun* (2)], has become a binding custom not to be challenged.

3. The last argument is that in view of the circumstances, the respondents are estopped from denying the membership of the wives.

After all that has happened. it is difficult to understand how the respondents summoned up courage to argue against the membership of the wives. One only has to see how in the past the respondents served in various capacities in the society and were elected at meetings in which women participated and voted. Together with their wives, they initiated various claims against the appellant in which they admitted that they and their wives were members of the society. All members of the settlement, including the respondents, looked upon the women as members of the settlement with rights and duties equal to those of the men, and not a murmur has been heard against membership of women since the settlement was founded. Now, after all this. the respondents wish to exclude the women, saying: "What happened in the past happened, but it was worth nothing, as if it had never happened." A person attempting to make such a claim must be clearly told: "What happened in the past is still valid, and will continue to be so in the future." A court of equity will not consider an argument which disregards the facts of life and attempts to dismiss them with a wave of the hand. The court will act upon the principle that a person must stand by his deeds and his words when another has acted upon them and, as a result, prejudiced his situation.

Counsel for the respondents claims that the respondents' belief that the women were members was founded on a mistaken legal outlook and took no account of the real position. This contention is incorrect for a number of reasons. The question whether a particular person is a member of a society is a question of fact, see *Francis v Perry* (5) at p. 281, which quotes the Legal Encyclopaedia of America and England vol. 25, (2nd ed.) p. 1134, and no one will dispute that misrepresentation of fact is grounds for estoppel. We have already seen that the question of the membership of the wives hinges on determining the intention of the general meeting and that, too, is a question of fact. At most, it might be said that this is a factual conclusion arising from that which was proved, or that it is a mixed question of fact and of the law concerning the legal relationship between the parties. Even were it so, we have found a judgment of Denning J., in *Kyle-Melle rv. Lewis & Co.* Ltd. (3) (at p. 250), according to which misrepresentation, or deception,give rise to estoppel. In his words:

> "I do not think that it is necessary to go into these refinements about law and fact. I am clearly of the opinion that this assurance was binding no matter whether it is regarded as a representation of the law or of fact or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law which was restricted to representations of existing fact; but we have got far beyond the old common law estoppel now. We have arrived at a new estoppel which affects legal relationships."

The absence of any action which the actual situation demanded, when the position was known, is liable to be interpreted as a silent admission or as acceptance of the law, preventing the relevant party from later arguing the opposite. Such estoppel, arising as a result of silence when the position was known, has found expression in the decision of the House of Lords in *Evans* v. *Smallcombe* (4), where the Court ruled that shareholders in a company, who knew how a situation was developing and remained silent, are estopped from challenging the outcome if they did not protest at the time the event occurred...

The District Court also held that one of the conditions for the application of estoppel was not fulfilled since no proof existed that the settlement had, by reason of the conduct of the respondents, changed its position to its detriment. "If the respondent settlement wishes

to make the required changes in its articles of association, it can easily hold another general meeting and see to it that only the male members participate." This is a very narrow view of the issue and it misses the main point. The estoppel that was claimed against the respondents does not concern the said resolution of the general meeting but rather the question of the wives' membership: the fate of the decision hinges on this latter question. A determination to the effect that the women are not members of the settlement would be of tremendous importance and could shake the settlement to its very foundations. A workers' settlement is a way of life based on the principles of equality, mutual aid and responsibility, and the existence of communal living and services for the benefit of all the members, including women whose status and rights are equal to those of the men. From an analytical point of view, a decision that the wives are not members of the settlement and consequently are denied the right of lawful participation in the social and economic activities of the settlement would be a hard blow to the structure of the settlement and to the principles it advocates and would mar its character. From a practical point of view, such a decision would mean that everything that has been done in the settlement since its inception is without force and void *ab initio* because everything that took place at the meetings and in its institutions occurred with the participation of the women as subjects of equal rights to those of the men. Furthermore. in the light of Mr. Arazi's testimony, that the same situation applies in all the settlements belonging to the Cooperative Settlements Movement of Israel. it may be said chat everything that has been done in all the settlements and in the Settlement Movement itself from the very start is, and always has been, devoid of legal force. Obviously, such a result is most grave and could cause total confusion to the appellant and to all the ocher workers' settlements in Israel. This Court must do everything within its power to prevent the creation of such a terrible situation, to the extent that the law allows such action. Fortunately, the law does make such action possible, as explained above, for a number of reasons.

In view of what we have said, the appeal is allowed, the decision of the District Court is hereby over-ruled, and the respondents' action dismissed, and the costs from both this Court and the District Court, in the sum of I.L. 1200, will be borne by the respondents.

Appeal allowed

Judgment given on 30 July 1964.