

C.A. 103/63**JOSEPH BOHAKOV****v.****THE MAYOR, COUNCIL & INHABITANTS OF HERZLIA**

In the Supreme Court sitting as a Court Of Civil Appeal

[July 11, 1963]

Olshan P., Manny J. and Halevi J.

Administrative Law - forcible removal of fences and execution of work under road construction scheme - objections and protest by land owner - Town Planning Ordinance, 1936, secs. 7, 26 and 27 - Land (Acquisition for Public Purposes) Ordinance, 1943, secs. 5, 7 & 8.

Under a road construction scheme. the local authority planned to construct a road across the appellant's land. Notice was sent to the latter, asking him to vacate the land affected and move the fences and that in default the local authority would do so at his expense. The appellant refused to comply and informed the respondent that he would deny it and its agents access to the land. Some days afterwards, local authority employees tore down the fences involved, uprooted trees and began to lay a road close to the appellant's dwelling. The appellant called the police who did not interfere but merely noted what had occurred. The appellant later repaired the fences but they were pulled down again and in the presence of the police the uprooting of trees and other works continued by the local authority. The appellant sued for vacation of the land, an injunction and damages. He was unsuccessful but leave was given to appeal. He appealed in respect of vacation and the injunction which had been refused.

Held. The rule against self-help and taking the law into one's own hands is basic and absent express provision in that regard may not be departed from. The relevant law only provides for compensation and not for forcibly taking possession of land against the objections of the owner. Possession, even if rightful, can under Israeli law in the given circumstances, be obtained only through court.

Israel cases referred to:

- (1) *H.C. 37/49 - Zvi Goldstein v Custodian of Absentees' Property, Yaffo and others* (1949) 2P.D. 716.
- (2) *Cr.A. 48/49 - Emanuel and Mina Kahanovitz v Attorney-General* (1949) 2 P.D. 890.
- (3) *C.A. 332/60 - Jacob Ben-Ami v Attorney-General and another* (1961) 15 P.D. 138.

- (4) C.F. 134/51 *Tel-Aviv - Joseph Galinski and others v Mayor, Council and Inhabitants of Tel Aviv* (1952) 7 P.M. 208.

English cases referred to:

- (5) *Loosemore v Tiverton and N. Devon Rly. Co.* (1882) 22 *Ch.D.* 25.
(6) *Julius v Bishop of Oxford and another* (1880) 5 *App. Cas.* 214.

M. *Michalovskii* for the appellant

A. *Ber* for the respondent.

MANNY J. The sole question to be decided in this appeal is whether a local planning commission acting under the powers vested in it by sec. 27 of the Town Planning Ordinance, 1936, may forcibly take property against the wish of the owner without being required to apply to the competent court. The lower courts answered this question in the positive and hence this appeal.

The statutory provisions necessary for solving the problem are, so far as pertinent, the following:

Sec. 25 of the Town Planning Ordinance, 1936:

"At any time after... an outline or detailed town planning scheme has come into force, the Local Commission may proceed to the expropriation of any or all of the lands and buildings mentioned in the scheme as destined for expropriation. Subject to the provisions of sections 27 and 28 of this Ordinance the expropriation shall be carried out in accordance with the law in force from time to time concerning expropriation of land for public purposes as though the (Minister of Finance) had certified the scheme to be an undertaking of a public nature."

Section 27 of the same Ordinance:

"Notwithstanding anything in any other Ordinance contained, it shall be competent for a Local Commission to expropriate without

compensation any land which is included in a town planning scheme, and is required for the purposes of constructing, diverting or widening any road, street, playground or recreation ground included in the scheme, provided that not more than one quarter part of the area of the plot of any owner is so expropriated, and it shall be lawful for the Local Commission to enter into immediate possession of such land not exceeding one quarter part as aforesaid, for the purposes aforesaid..."

Sec. 28 of the Ordinance empowers the Local Commission to postpone completion of the expropriation for a period not exceeding two years.

Sec. 5 (1) of the Land (Acquisition for Public Purposes) Ordinance, 1943:

"Where the (Minister of Finance) intends to acquire any land for any public purpose, he shall cause a notice of such intention to be published in (*Reshumot*), and such notice shall be in the form A or the form B set out in the Schedule, whichever is appropriate... He shall cause a copy of such notice to be served on any person whose name is entered in the land registers as the owner of, or as a person having an interest in, the land..."

Sec. 7 of the same Ordinance:

"(1) The (Minister of Finance) may, in a notice given under section 5, or by any subsequent notice given in like manner direct any person having possession of the land to be acquired to yield up possession of the land on or before the expiration of the period specified in the notice on that behalf, which period shall not be less than two months from the date of publication of such notice in (*Reshumot*) unless the land is urgently required for the public purpose for which it is to be acquired..."

(2) At the expiration of the period specified in a notice given under subsection (1) the (Minister of Finance) shall be entitled to enter into or upon, and take possession of, the land accordingly."

Sec. 8 of this Ordinance:

"If the owners or occupiers of the land to be acquired refuse to allow the (Minister of Finance) to enter into possession, the Attorney-General may apply to the court which if satisfied that the (Minister of Finance) is entitled to possession under section 7 shall issue an order commanding possession to be delivered."

The reason which moved the majority in the District Court to give a positive answer to the question posed at the beginning of this judgment appears in the third paragraph of the majority judgment, as follows:

"It appears to us that the learned Magistrate was right on this point. Expropriation of property for public purposes requires, indeed, generally an application to court, when the owner of the expropriated property refuses to yield possession. That is the general provision found in section 8 of the Land (Acquisition for Public Purposes) Ordinance, but sections 25 and 27 of the Town Planning Ordinance are designed to exclude expropriations for special purposes, and one of these is the diversion of a road, for which the manner of taking possession is changed. The manner outlined in section 27 is to send thirty day prior notice so as to give the owner the opportunity of applying to court to stop possession being taken. That in brief is the difference: in general the expropriating authority is under duty to apply to the court, when the owner refuses to sell possession, but in the special cases specified in section 27, this duty, or more correctly this right, attaches to the owner."

I cannot agree with this conclusion of the District Court.

Section 23 of the Town Planning Ordinance of 1921, which preceded the Town Planning Ordinance of 1936, now in force, provided that

"(1) At any time after the date at which the scheme has come into force, the responsible authority may proceed to the expropriation of any or all of the lands and buildings mentioned in the scheme as destined for expropriation.

(2) The expropriation shall be carried out in accordance with the law in force from time to time concerning expropriation of land for public purposes: Provided that no certificate of the High Commissioner shall be required that the town planning scheme is an undertaking of a public nature."

And sec. 7 of the Land (Expropriation) Ordinance, 1927, which was in effect when the Town Planning Ordinance of 1936 was enacted, provided that

"If within fifteen days after the service of any such notice (to treat) the person on whom the same is served fails to state the particulars of his claim in respect of any land to which such notice relates or to treat with the promoters as to the amount of compensation to be paid or if the promoters and such persons do not within fifteen days agree as to the amount of such compensation,

(a) it shall be lawful for the promoters to enter into immediate possession of the lands referred to in such notice:

Provided that, if the owners or occupiers refuse to allow the promoters to enter into such possession, the promoters may apply to the president of the court who, if he is satisfied that the promoters are entitled to possession under this section, shall issue an order under his hand commanding possession to be delivered;..."

It follows from sec. 23 of the 1921 Town Planning Ordinance and sec. 7(a) of the 1924 Land (Expropriation) Ordinance that until the enactment of the 1936 Town Planning Ordinance, a Local Commission could not take possession of land against the owner's wish without resort to the courts.

Does sec. 27 of the 1936 Town Planning Ordinance change the position in this regard? I think that it does not, and for the following reasons.

(1) As I have already said, when this section was enacted the 1926 Land (Expropriation) Ordinance was in force and according to the provision in sec. 7(a) thereof whenever the owner of land sought to be expropriated refused to deliver possession, the expropriators had to apply to court to obtain an order for delivery of possession. Although sec. 27 of the 1936 Town Planning Ordinance, which permits the Local Commission to enter into immediate possession, after one month's notice in writing to the owner, makes no mention of the matter of applying to court of the above-mentioned proviso, that can be explained by the fact that sec. 25 of the 1936 Ordinance had already directed that the expropriation shall be effected "in accordance with the law in force from time to time concerning the expropriation of land for public purposes."

(2) The 1943 Land (Acquisition for Public Purposes) Ordinance - which replaced the 1924 Land (Expropriation) Ordinance - also makes a court application obligatory for obtaining an order for delivery of possession when the other refuses to yield up possession. In subsection 7(2) of the 1943 Ordinance, authorising the expropriators to enter into possession, the word "immediate" which appears in subsection 7(a) of the 1926 Ordinance is omitted, but the omission is of no significance for the reasons set out in the previous paragraph.

(3) The rule that a person may not take the law into his own hands is basic to our legal system and consequently, in the absence of clear provision to the contrary, no intention of ousting it may be attributed to the legislature. As Maxwell, *The Interpretation of Statutes* (9th ed.) pp. 85 - 86, puts it:

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness..."

In construing the words of an Act of Parliament, we are justified in assuming the Legislature did not intend to go against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend."

I have been unable to find in secs. 25 and 27 of the 1936 Town Planning Ordinance, or in any other part thereof, any such language which should compel me to conclude that the legislature did indeed intend to depart from the said rule. It seems to me that all that the legislature intended in secs. 25, 27 and 28 of the said Ordinance was to provide for a summary manner of expropriating land without compensation for the purposes of highways and playgrounds and recreation grounds and to empower the Local Commissioner to postpone completion of the expropriation for a period not exceeding two years (a postponement which could not be made under the existing law regarding the expropriation of land for public purposes) and on the other to apply to expropriation the provisions of the existing law to all other matters relating to the carrying out of expropriation.

For these reasons, I would accept the appeal, set aside the judgments of the District and Magistrate's Courts and order the respondent to vacate the land which it seized and refrain from entering or carrying out any work thereon or within its bounds, without a prior order of a competent court.

HALEVI J. The facts giving rise to the present dispute are as follows. On 6 April, 1959 the Tel Aviv Planning Commission gave effect to Detailed Planning Scheme No. 403 regarding the building of a road in the Herzliah area. The scheme was published in *Reshumot* (No. 699) on 17 September 1959. The road as planned affects parts of several plots of land, and crosses *inter alia* the north-west part of the appellant's plot. A notice from the local planning commission for Herzliah was sent to the appellant on 29 February 1962, signed by the Mayor and municipal engineer and informing him that the municipality "intends proceeding to the carrying out of the necessary works" for making the planned road and "therefore you are requested, in accordance with section 27 of the Town Planning Ordinance, 1936, to remove all your possessions from the place and move the fence to the correct boundary line in accordance with the plan annexed," and "if, within 30 days from receipt of this letter, you do not carry out the required work, the municipality

will do so" and "all expenses will be charged to your account." At the beginning of April 1962, the Mayor of Herzlia and the municipal engineer visited the appellant to influence him to comply with this notice, but he refused, telling them expressly that he also refused to permit the respondent or its employees to enter his plot of land and carry out any road works according to the plan. It should be noted that the plot in question includes the appellant's dwelling and an orange grove fenced with iron network. Municipal employees appeared on 10 April 1962 and broke through the fence on the north-west side of the plot, drove a tractor onto the land, uprooted the trees and leveled the ground there for a road close to the house. The appellant who was then ill in bed was only able to get to the part affected after the fence had been broken. Notwithstanding his protests, the municipal engineers continued their operations and forcibly seized that part of the land. A policeman called by the appellant made a note what was happening but did not intervene. After the municipal employees left the place, the appellant repaired the fence but during one of the following nights the fence was again broken through and the next morning the municipal employees turned up once more, this time accompanied by six policemen to prevent the appellant from interfering with them. They carried on uprooting the trees and leveling the ground. They forcibly occupied the part affected, against the appellant's protests. Finally the appellant took legal proceedings for the respondent to vacate the land and claiming an injunction and damages. The action was dismissed by the learned magistrate and his judgment was upheld by a majority in the District Court, with leave to appeal to this Court. Appellant's counsel limited the appeal before us to the first two prayers, vacation of the land and an injunction.

The respondent, there is no doubt, seized possession of part of the appellant's plot by threats and force and according to sec. 24 of the Ottoman Magistrates Law the appellant is entitled to a judgment for vacation of the land unless the respondent can show that it had a legal right so to take possession. The respondent relies on sec. 27 of the Town Planning Ordinance which provides that, notwithstanding anything contained in any other Ordinance, a Local Commission may, after serving 30 days written notice to the owner, "enter into immediate possession of such land", provided obviously - and this is not in dispute - that the area affected does not exceed one quarter of the plot of the owner. The question we have to answer is whether the words "it shall be lawful for the Local Commission to enter into immediate possession of such land" entitled the Commission to occupy the land by threats or force, in spite of the owner's refusal and opposition. I agree

with the view of my friend, Manny J., that since sec. 27 does not provide explicitly that the Commission may so occupy land, the answer to our question must be in the negative.

The source of "to enter into possession" or "to enter into immediate possession" in this context is English law. Many statutes have been enacted in England in the past 150 years with regard to expropriation of land for different public purposes, including the laying of roads, railways and the like. They vest in "the promoters" (whether private individuals, such as railway companies, or public bodies, such as municipalities) a right of entry on to the land required, after certain conditions have been met. Thus, sec. 85 of the Land Clauses Consolidation Act, 1845, provides that "it shall be lawful for the Promoters... to enter upon and use such Lands", and sec. 2 of the Acquisition of Land (Authorisation Procedure) Act, 1946, that "the acquiring authority may enter on, and take possession of, the land" and subsection (5) thereof that "a power to enter on and take possession of land conferred... under this section may... be exercised without notice to or the consent of any person." To enforce the right of entry, where the owner refuses to allow the promoters to enter or actively hinders them, sec. 91 of the 1845 Act (which has not been repealed even in the special cases of the 1946 Act) provides that "it shall be lawful for the Promoters... to issue their Warrant to the Sheriff to deliver possession... to the Person appointed in such Warrant to receive the same, and upon the Receipt of such Warrant the Sheriff shall deliver Possession of any such Lands accordingly."

Thus English law permits "promoters" who have "a right of entry" under special enactments to take possession without the consent of the owner of the land, but if the owner refuses to give or actively interferes with the taking of possession the law refers the promoters to the sheriff, the court's execution officer, and he takes possession of the land in face of the refusal and against the wishes of the owner or occupier and delivers the land to the promoters or their agents. According to English Common Law, as explained by Agranat J. in *Goldstein v Custodian of Absentees' Property* (1), the person having "a right of entry" does not need a judgment of court to implement his right; he may take the law into his own hands and obtain the land even by force from anyone not entitled to possession, except that the very act of entry by force or threat of force is a breach of the peace and a criminal offence under the Statute of Forcible Entry of Richard II. Accordingly, for "promoters" to effect their right of entry without breach of the peace and the commission of a criminal offence, sec. 91 of the said Act enables them to call upon the

Sheriff who in such an event is mandated to act without a court order on the strength only of the promoters' warrant.

In *Loosemore v Tiverton & Devon Rly Co.* (5), the defendant company, having a right of entry under a special Act, actually succeeded in entering on the plaintiff's land in spite of his written refusal to allow them to do so, without any breach of the peace (see *pier Fry J.* at 37). The plaintiff took action against the company for return of the land, pleading *inter alia* that in the absence of an application to "the execution officer" under sec. 9 the taking of the land was unlawful.

"It is said that the Defendant's entry was void for this reason, that the Plaintiff had, before they entered, notified to them that he should refuse to allow their entry, which it is quite plain that he did on the 5th of July, and it is said that, when the landowner refuses to allow the company to enter, they can enter only through the intervention of the sheriff. For that purpose reference was made to the 91st section of the Land Clauses Consolidation Act... It is said that that authority carries with it an obligation, and that the company could not enter, except with the assistance of the sheriff. Now, in the first place, the words of the section are very plain, 'it shall be lawful' and it has been determined *in Julius v Bishop of Oxford* (6) after great discussion by the 'House of Lords' that the words 'it shall be lawful' in a statute mean 'it shall be lawful' and nothing more, unless there is something in the context or the circumstances of the case which turns words of permission into words of obligation... In my judgment, therefore, the words create an obligation to set the sheriff in motion only where it would be unlawful to enter without his intervention, that is where the entry would be forcible if the company acted upon their right of entry. In the present case all that had been done was to refuse to allow an entry, he did not in any way obstruct the company's entry of the 6th of July, he was not there, and he did not come on the ground till the 9th of July, and an entry does not become forcible, merely because a person says, I refuse to allow you to enter. In my judgment, the entry was perfectly valid." (*ibid.*, 4142).

It follows from these observations of Fry J. that had the taking of the land been effected by the use or threat of force, that would not only have been a breach of the peace and a criminal offence but also a departure of "the right of entry" vested in the promoters under the special Act. That is also implied by Cripps, *Compulsory Acquisition of Land* (16th ed.) para. 2 - 122, p. 2077, who in reliance on this case states: "It would seem that the promoters may enter premises without issuing their warrant to the sheriff, although the owner refuse entry, provided they can do so peacefully." Thus also in England, the home of the Common Law, on a conservative view, it is at least doubtful whether "a right of entry", accorded by a variety of expropriation enactments, includes a right to seize land by the use or threat of force.

The law current in Israel regarding the taking of land and its return is fundamentally different from English Common Law. The difference was explained by Agranat J. in *Goldstein* (1] at 724 - 25. The second part of sec. 24 of the Ottoman Magistrates Law absolutely debars the use of force and requires the person having the right of possession, who forcibly takes land from anyone in occupation without right, to restore the land to the previous occupier: only by going to court may he claim his land. This rule applies equally to the taking of land with the assistance of the police. "A person cannot, by his own power or with the assistance of the police, remove another who occupies his property without right, but he must apply to the competent court and obtain an order for recovery of possession" (*ibid.*, 726). There exists in Israel in addition a criminal prohibition of forcible entry similar to that under the English Statute of Forcible Entry. Sec. 96 of the Criminal Code Ordinance, 1936, lays down that

"any person who, in order to take possession thereof, enters on any land... in a violent manner, whether such violence consists in actual force applied to any other person or in threats... is guilty of a misdemeanour. Such misdemeanour is termed forcible entry. It is immaterial whether he is entitled to enter on the land or not."

See also *Kahanovitz v Attorney-General* (3).

It is in the light of the general law applicable in Israel, as also in Palestine when the Town Planning and other relevant Ordinances (the Land (Expropriation) Ordinance and the

Land (Acquisition for Public Purposes) Ordinance were enacted, that one must understand and construe sec. 27 of the Town Planning Ordinance. If "the right of entry" vested in expropriators under English law is restricted by a prohibition of the use of force, *a fortiori* is it under Israeli law. Sec. 27 provides that "it shall be lawful for the Local Commission to enter into immediate possession" but not that, in the event of a refusal by the owner or occupier or his actual opposition to entry, the Commission may take possession by the use of or threat of force or with the assistance of the police.

Regarding expropriation under the Town Planning Ordinance generally, sec. 25 provides that "subject to the provision of section 27... the expropriation shall be carried out in accordance with the law in force from time to time concerning expropriation of land for public purposes." This provision refers us to the Land (Acquisition for Public Purposes) Ordinance, and secs. 7 and 8 thereof which touch upon the taking of possession. Whilst sec. 7 is essentially similar to sec. 27 of the Town Planning Ordinance, and in my judgment there is no substantive difference between "to enter into or upon, and take possession of, the land" (sec. 7) and "to enter into immediate possession of such land" (sec. 27), sec. 8 goes on to add the provision, not found in sec. 27, that in the event of the owner or occupier refusing to allow the expropriating authority "to enter into possession" under sec. 7, that authority may apply to the District Court and if the court is satisfied that the authority "is entitled to enter into possession under section 7" it shall order delivery of possession. This section is parallel to sec. 91 of the Land Clauses Consolidation Act of 1845, except that instead of a right to go directly to the sheriff there is here - in accordance with the fundamental difference between English Common Law and the general local law regarding the need in such matters to apply to court - a right to move the District Court by way of motion to order enforcement through the Execution Officer, after proof of the right to take possession. (See *Galinski v Tel Aviv Municipality* (4)). The respondent's argument which apparently found favour with the Magistrate and the majority in the District Court is that in view of the words "Notwithstanding anything in any other Ordinance contained" in sec. 27 and their non-repetition in sec. 8, the Local Commission need not, nor indeed is allowed to, apply to the Court to enforce its right to take possession in an expropriation under sec. 27. Hence, the conclusion that it was the intention of the legislature that the Commission was entitled, in the event of the owner or occupier refusing to allow it to take possession under sec. 27, to use force, including the police, for that purpose. This reasoning appears to me, with all respect, to be erroneous.

The error, in my opinion, lies in the very view about the nature of "the right to enter into possession" and the relationship between sec. 7 and 8 of the Land (Acquisition for Public Purposes) Ordinance. Sec. 8 is not intended to restrict the right of possession conferred by sec. 7 but to add to it by providing when necessary for a summary way to effectuate it. A person who reads sec. 7 as giving the expropriator seemingly a right to seize possession by any means, including the use of force against the owner or occupier, will see the provision of sec. 8 as a restriction on this right, that is as a deviation from sec. 7. The conclusion will be that by virtue of the words in sec. 25 of the Town Planning Ordinance, "Subject to the provisions of section 27," and the words in sec. 27, "Notwithstanding anything in any other Ordinance contained," the deviation found in sec. 8 will not apply to the right of possession under sec. 27 and this right will include - as would the right under sec. 7 were it not, in this view, for sec. 8 - the right forcibly to obtain possession from the owner or occupier who refuses or opposes it. However, according to the view I favour for the reasons given above, the right itself "to enter into possession" or "to enter into immediate possession" does not, having regard to general Israeli law, include any right to take possession by the use or threat of force towards the owner or occupier. Accordingly the person having the right under sec. 7 - and so also the person having the right under sec. 27 - needs the court's assistance to enforce his right against a contesting owner or occupier. And sec. 8 of the Land (Acquisition for Public Purposes) Ordinance gives him a summary means of achieving this goal: see *Ben-Ami v Attorney-General* (3). I do not think that the words "Subject to the provisions of section 27" and "Notwithstanding anything in any other Ordinance contained" appearing in secs. 25 and 27 of the Town Planning Ordinance, which lays down the *priority* of sec. 27 over any contrary matter provided in any other Ordinance, negates the right of the Local Commission to apply, even in the case of sec. 27, to the District Court by motion under sec. 8, since that section is not in conflict with sec. 27 regarding the Commission's entitlement to possession but is intended to complete it and add a convenient way for its realisation. In any event, whether the Commission may apply by motion to the District Court or needs to bring an ordinary action for possession in the Magistrate's Court, sec. 27 does not empower it to take possession by the use or threat of force and thus, contrary to the general law of the country, obtain possession from the owner or occupier.

For these reasons, in my judgment, the appeal should be allowed and the two prayers of the appellant granted.

OLSHAN P. I agree that the appeal should be allowed.

Appeal allowed

Judgment given on July 11, 1963.