CA 30/92

Simchah Naiman

v.

Attorney-General

The Supreme Court sitting as the Court of Civil Appeal

[4 April 1992]

Before President M. Shamgar and Justices D. Levin, Y. Malz

Appeal on the judgment of the Tel-Aviv-Jaffa District Court (Justice A. Meyushar) on 22 November 1991 in Estates File 2687/71.

Facts: In 1971, the appellants' father bequeathed to the appellants an apartment, subject to the stipulations that the apartment could not be sold or leased for a period exceeding twelve months, and that any member of his family who came to Israel would be entitled to stay or live in the apartment. In 1974, the appellants applied to the court to sell the apartment, but their application was denied by the trial court and on appeal. In 1990, the applicants applied once again to the court to sell the apartment, arguing, *inter alia*, that considerations of public policy should allow them to sell the apartment, since none of them had come to live in Israel as the testator had hoped. The trial court once again denied the application.

Held: The mere passage of twenty years, and general considerations of public policy, are insufficient to justify cancelling an express stipulation in the deceased's will that prevented sale of the apartment.

Appeal denied.

Legislation cited:

Inheritance Law, 5725-1965, ss. 30(b), 42, 72(a).

Israeli Supreme Court cases cited:

[1] CA 245/85 *Engelman v. Klein* [1989] IsrSC 43(1) 772.

[2] CA 477/88 *Attorney-General v. Tel-Aviv University* [1990] IsrSC 44(2) 476.

For the appellants — A. Israel.

For the first respondent — A. Elitzur, Head of National Appeals Department, Custodian-General Section.

JUDGMENT

President M. Shamgar

1. This is an appeal against a judgment of the Tel-Aviv–Jaffa District Court, which denied the application of the appellants to cancel the restriction in paragraph 2 of the will of the late David Naiman, according to which they are prevented from selling the apartment owned by them at 27 Eilat Street in Holon.

2. The following are the relevant facts:

The late David Naiman died on April 29, 1971. In his will, which was written two days before he died, the deceased bequeathed all his property to his children, who are the appellants before us, according to a distribution formula set out in the will. The property of the deceased included, *inter alia*, the apartment which is the issue in the case before us; this too he bequeathed to the appellants according to the distribution formula that he determined, but with regard to the apartment the deceased stipulated a condition, whereby the heirs would not be permitted to sell the apartment or to lease it for a period exceeding twelve consecutive months. It is not superfluous to quote the text of the provisions of section b2 of the will, which states:

> 'With regard to the apartment that belongs to me and which is situated at 27 Eilat Street, Holon, and which is known as parcel 17/14 of block 7132, I bequeath the ownership therein to my children in the shares as stated in sub-clause 1 above, but I stipulate that my children shall not be permitted or entitled to sell and/or transfer the ownership of the apartment or to lease it or rent it out for a period exceeding twelve months.
>
> Only my executors shall be entitled to lease the apartment for the said period to whomever they deem fit and on such conditions as they deem appropriate and to deal with maintenance of the apartment and to pay all the taxes and expenses for maintenance of the apartment out of the rent money.
>
> …

> At any time when one of my children comes to Israel, he shall be entitled to live in the apartment for the whole period of his stay in Israel, and in such a case he shall be liable to pay the municipal taxes and the maintenance expenses.
>
> Should two or more of my children come to Israel, the right to live in the apartment shall belong to the one who came to Israel first.'

The will was admitted to probate on 19 December 1971. The appellants, who live outside Israel, were not pleased by the aforesaid stipulation in their father's will. Already in 1974 the appellants applied to the court in an attempt to change the restrictive stipulation in the will and to allow them to sell the apartment and divide the proceeds of sale. The District Court denied the application, and an appeal submitted to this court in that matter was denied (CA 250/74). In 1990 the appellants again applied to the court with an application to allow them to sell the apartment that they inherited. The District Court denied the application, and this is the appeal before us.

3. The applicants present two main reasons to convince the court that there are grounds to amend the original order of probate issued in 1971:

The *first* argument is that if the deceased had known that twenty years after his death his children would still be living outside Israel and there would be no likelihood that the existence of an apartment in Israel would convince them to come and stay in Israel or to immigrate to it, as he hoped, he would agree that his children could sell the apartment. For this purpose, the appellants propose to apply section 30(b) of the Inheritance Law, 5725-1965, which concerns a mistake in a will.

The *second* argument is that the restrictive stipulation in the will is contrary to public policy, for two reasons:

(a) Because of the stipulation in the will, the apartment stands deserted, and its condition is deteriorating, at the very time that there is a housing shortage in Israel.

(b) It is necessary to restrict the control of the dead over the living, particularly in view of the fact that the said stipulation in the will is unreasonable.

4. Under section 72(a) of the Inheritance Law, the court that made an order of probate of a will may amend it or cancel it on the basis of facts or arguments that were not before it at the time when the order was made, but —

> 'The court may not consider a fact or an argument that the applicant could have brought before it before the order was made, or which he could have brought before it subsequently but did not do so at the first reasonable opportunity.'

The trial court pointed out that the only fact that is apparently new in the case before us is the passage of time. The appellants have aged twenty years since the will was signed, and they are now in their fifties. This, of course, is insufficient in itself to justify amending the order of probate of the will given in 1971. The passage of time, in itself, is insufficient, in the circumstances of the case before us, to justify a reconsideration of the order or parts thereof. Even the arguments of the appellants on the merits of the case contain nothing of substance that is new compared to what they argued in the past.

5. With regard to the argument of mistake in a will, there is no justification for this. One can understand from reading the will that the deceased intended to give the appellants a basis to allow them to live in Israel, if they come here, in the hope that this would encourage them to come and visit Israel and even perhaps settle down here in the future. We do not have before us any figures about the frequency of the visits of the appellants to Israel, but it would appear that the hope of the deceased has failed.

The appellants argue that now that twenty years have passed, and they are in their fifties, there is no likelihood that their father's hope will be realized, and since the deceased wanted their best interests, it can be assumed that if he had foreseen the situation that has been created, he would have allowed them to sell the apartment.

This argument has no foundation in the will of the deceased.

The said stipulation in the will is not expressly limited by time, nor can any time limit be understood by implication. The will was not made by the deceased against the background of a factual situation, in which the appellants were about to come and live in Israel. The factual situation — from the viewpoint of the appellants' connection with Israel whether at the time when the will was written or at present — has not changed, except for the passage of time. Now, like then, they are foreign residents. I do not think that it can be understood that the incentive stipulated in the will is limited by time. There is no hint of this in the language of the will or in the circumstances of the case, and in any event we do not have any 'provision of a will that was made because of a mistake', as stated in section 30(b) of the Inheritance Law.

6. The other argument of the appellants was that the aforesaid stipulation in the will should be cancelled, not because this was the presumed intention of the testator, but in spite of his intention, for the reason that the stipulation is contrary to public policy.

This court has recognized the possibility of disqualifying a stipulation in a will for the reason that it is contrary to public policy, even if the stipulation is not contrary to law. The authority to do this derives from the general application of the principle of 'public interest' in our law, including in the laws of inheritance (CA 245/85 *Engelman v. Klein* [1]; CA 477/88 *Attorney-General v. Tel-Aviv University* [2]).

Notwithstanding, it is only natural that the scope given to the general expression 'public policy' varies with the context and the matter under discussion. Its scope in the law of inheritance is not the same as its scope in the law of contract:

> '…It is only natural that the considerations relevant in the law of contract do not necessarily apply in the law of wills, just as the considerations that apply in both of these do not necessarily apply in tax law or property law or the law of torts. We must refer to the special considerations that apply in this case and examine them on the merits' (*Engelman v. Klein* [1], at p. 785).

One of the main principles in the field of the law of inheritance is the desire to give validity to the wishes of the testator. Therefore one must be cautious when considering the disqualification of a stipulation in a will that conveys the express wish of the testator.

7. The appellants' argument is that public interest necessitates the disqualification of the stipulation because of the growing need for apartments in Israel. This argument raises many problems. First, it is not certain that only the sale of the appellants' apartment will achieve this purpose in the best possible way, for it is possible that the same result may be achieve by leasing the apartment in accordance with the provisions of the testator. It is hard to understand why the apartment has not been leased and in any event why it has been neglected. Second — and this is the main point — can the existence of a general need of society be a justification for changing the will of a private individual? I think that if we adopt this argument, little will remain of the freedom to make a will.

8. The appellants also argued that the ability of the dead to control the living ought to be limited.

Any recognition of the freedom to make a will recognizes the power of the dead person to control events that happen after his death, at least with regard to his property. Sometimes this control is more evident and sometimes it is less so. In Israeli law there are several provisions that give expression to the ability of the deceased to continue to control his estate.

Obviously this control is not absolute, and it must be restricted. Provisions in a will may be illegal, immoral or contrary to public policy, such that the court will order them not to be upheld.

What are these provisions? *Engelman v. Klein* [1], considered the 'excluder stipulation', namely a stipulation in a will that determined that if one of the heirs challenged the inheritance, his rights would be negated. It was held in that case that this provision is *not* contrary to public policy. Examples were given in the judgment of provisions that would be considered contrary to public policy, such as a stipulation that specifies divorce, religious conversion or destruction of a rare asset as a condition for benefiting under the will (*ibid.*, at p. 784). In our case, we are dealing with a stipulation that restricts the ability to make dispositions with regard to the apartment. In other words, the apartment is merely preserved as a family property. It is difficult to see how this stipulation is contrary to public policy.

It is true that the effective use of property is an important principle, but so too is the ability of testators to do what they wish with their property, which includes bequeathing it as they wish. The Inheritance Law includes a balance between the power of the deceased and other interests. This balance is found, for example, in s. 42 of the Inheritance Law, which restricts the power of the testator to control his property after his death to two generations of heirs or to the number of heirs who are alive. The attempt of the appellants to reduce the freedom to make a will to a period of 20 years is not consistent with the balance stipulated by the Law in this matter.

9. With regard to the claim about the apartment being neglected, this fact, as stated above, is a consequence of the omissions of the appellants or their representatives in Israel. If the problem of the housing shortage is what motivates the appellants, they may make use of the permission given to them to lease the apartment, each time for a reasonable fixed period, in accordance with the provisions found in the will.

In conclusion, this is the fourth time that the courts in Israel have been inconvenienced by the appellants with the same application, without there being a real change of circumstances to justify this. It would appear that the

time has come for the appellants to come to terms with their father's will and not to inconvenience the courts again and again.

10. The result is that the appeal should be denied. The appellants shall pay the expenses of the respondent in a sum of 8,000 NIS.

Justice D. Levin

I agree.

Justice Y. Malz

I agree.

Appeal denied.

4 April 1992.