C.A. 447/58

A. v. B. AND ANOTHER

In the Supreme Court sitting as a Court of Civil Appeal

Olshan P., Sussman J., Landau J., Berinson J. and Witkon J.

Judgments and Orders—Declaratory Judgment—Discretion of Court—No proper purpose shown—Possibility of prejudice to third parties.

The appellant claimed an order in the District Court against the respondents, who were husband and wife, declaring that he was the natural father of a child born to the wife and registered as that of the respondents. The claim was struck out *in limine* and the appellant appealed.

Held, dismissing the appeal,

Per Olshan P. The granting of a declaratory order is in the discretion of the court, and having regard to the nature of the claim, public interest and morality, the prejudice to the status and interests of the child who was not even a party to the proceedings, and the fact that the appellant had not even told the court for what reason the order was required, the claim was rightly struck out.

Per Landau J. An action such as this, in which the court is asked to approve an act which offends against public morality with all the harm which it involves for the welfare of the child and for the adults concerned, and without it being shown that a proper purpose is being served, is a gross abuse of the process of the court and will not be heard.

Per Witkon J. An action for a declaratory judgment which does not serve a practical purpose involves a misuse of judicial authority which should not be entertained, and as the appellant had not disclosed any legitimate interest worthy of judicial protection that alone was sufficient to deny him access to the courts.

Per Berinson J. (Sussman J. concurring). The relief claimed is in the discretion of the court, and it is inconceivable that any court will grant the appellant's request which endangers the status and future of a minor who is not a party to the action and cannot defend himself, when the appellant has not shown in his claim what benefit he will derive therefrom.

Israel cases referred to:

(1) *C.A.* 238/55—*Aharon Cohen and Bella Bousslik v. Attorney-General* (1954) 8 *P.D.* 4; S.J., Vol II, 239.

(2) *C.A.* 291/56—*Ya'akov Szczupak v. Shmuel Rapaport and* 4 *others* (1959) 13 *P.D.* 39.

(3) *C.A.* 16/55—*Marasha Ltd v. Albert Massri* (1957) 11 *P.D.* 126.

(4) *File* 226/5714—*Husband A. v. Wife B.* (1954) Rabbinical District Courts Judgments, *Vol.* 1, *p.* 145.

English cases referred to:

(5) *Yool v. Ewing* [1904] 1 *I. R.* 434.
(6) *Holman and others v. Johnson, alias Newland* (1775) 98 *E.R.* 1120.

Trichter for the appellant.
Levitsky for the respondents.

OLSHAN P. By virtue of secs. 38(b) and 40 of the Courts Law, 1957, it has been decided to forbid the publication of the names of the parties and of the child involved in these proceedings.

This is an appeal from a judgment given in the District Court of Tel Aviv-Jaffa on December 4, 1958 by Lamm J. In terms of this judgment a claim filed by the appellant against the respondents for an order declaring that he is the natural father of a child registered as that of respondents, was struck out.

It is not in dispute between the parties that the respondents, husband and wife, have been lawfully married for more than ten years and that the child in question was born in December 1953.

The appellant, in his action, bases his claim on the allegation that he maintained sexual relations with the second respondent during the above-mentioned period, and also did so nine months before the birth of the child.

The defence is based upon a complete denial of all the appellant's allegations, and includes the averment "that the action was commenced vexatiously and/or for defamatory and denigratory purposes only. The plaintiff himself requested the dismissal of a similar action previously filed by him in this Honourable Court in Civil File 582/58. The earlier action was dismissed by a decision of the Registrar on 22.4.58."

The judgment, which is the subject of this appeal, states:

> "I agree with Mr. Trichter (counsel for the appellant) that an action should not be struck out when there are prospects that the court will decide in favour of the plaintiff. But this is not so in the present case. The action is in fact directed towards obtaining a declaratory judgment which will determine that the minor is illegitimate. I do not think that the

courts of this country are entitled to grant relief to a person so as to injure the rights of a child, even if I were to accept the allegations in the claim as true, although a situation is conceivable in which the interests of a child may demand such a declaration, especially where an unmarried woman is concerned. I find, therefore, that the claim is misguided and I strike it out as not disclosing a cause of action."

Counsel for the appellant submits that the learned judge was not entitled to strike out the claim without affording the court an opportunity of considering the evidence which the plaintiff could adduce in order to obtain the declaration which he sought.

This would appear, at first sight, to be an argument of substance and as a rule the courts are not anxious to exercise the power given to them by Rule 21 of the Civil Procedure Rules. In the result, however, I have reached the conclusion that the decision of the learned judge should not be disturbed. As he correctly states in his judgment, it is inconceivable that a court considering a claim such as this will exercise its discretion in favour of the plaintiff and agree to grant a declaratory judgment as sought, for the court must apply the utmost care when a minor is likely to be adversely affected.

But it is not this opinion which was expressed by the learned judge that served as the ground for his striking out the claim. From the context it is clear that the decisive reason for his ruling was that which appears in his concluding statement:

> "I therefore find that the claim is misguided and I strike it out as not disclosing a cause of action."

This accords with the provisions of Rule 21.

Counsel for the appellant criticizes this conclusion and it would appear, at first glance, that there is substance in this criticism.

The criterion for striking out a claim pursuant to Rule 21 is that the judge who is asked to strike out a claim under this Rule must assume that the plaintiff will succeed in proving at the trial all the facts alleged in his statement of claim. Upon this assumption, the judge is to ask himself the question whether, in law, the facts thus proved constitute a basis for the right asserted in the statement of claim. It is only in a case where the judge may properly say that, though the alleged facts are established by the evidence, the right asserted is not legally recognised, that he may exercise the power given him by Rule 21 and strike out the claim. If we are to apply the above criterion in the present case, the strictures of appellant's counsel would appear to be sound.

These are the facts upon which the appellant bases his claim:

(a) The male and female defendants have been married for more than ten years.

(b) From July 1952 the plaintiff had maintained intimate relations with the female defendant and cohabited with her.

(c) At the end of February or early March 1953, i.e. about 9 months before the child was born, the plaintiff and the female defendant spent six days in Shefayim and had sexual relations there.

(d) The male defendant was impotent and/or otherwise incapable of procreation.

(e) Since July, 1952, the female defendant had cohabited with no one except the plaintiff.

(f) Relying on the facts set out in the statement of claim or some of them the petitioner believes and claims that he is the natural father of the child.

(g) The defendants have never denied the plaintiff's allegations concerning his paternity of the child and the female defendant has not even really rejected his demand that the child be surrendered into his custody.

If it be assumed that the plaintiff will prove all these facts, he will thereby establish that he is the child's natural father. Accordingly appellant's counsel questions the action of the learned trial judge in striking out the claim upon the ground that it does not disclose a cause of action.

Had this not been an action for a declaratory judgment—i.e. for an equitable remedy the granting of which lies within the court's discretion—I would, perhaps, have found more substance in the appeal.

As I have said, the respondents deny most emphatically all and each of the allegations and assert that the claim was filed "vexatiously and/or for defamatory and denigratory purposes only". If there is only a scintilla of truth in the respondents' denials, the filing of the claim is singularly scandalous. One appreciates the concern of the respondents about the unsavoury details which the appellant was ready to put to the court together with all the "evidence" and "examinations" and the pernicious effect this will have upon the child. Their concern is understandable even if in point of truth they are quite confident that the appellant would ultimately fail. But in the light of the criterion for applying of Rule 21 we have to deal with the appeal without regard to the denials of the respondents.

In as far as granting a declaratory judgment lies within the court's

discretion—and a plaintiff may not demand this remedy as a vested right—then, even if the claim had not been struck out by virtue of Rule 21 and the matter had come to trial, the court, having regard to the nature of the claim, would have had the power to dismiss it *in limine* before hearing the evidence, upon deciding that bearing in mind the nature of the claim, public interest and morality and the prejudice to the interests and status of the child (who is not even a party to the action) it is not prepared to use its discretion in favour of the plaintiff to grant him the relief he claims.

I have not found in English or American law a single case like the one before us, of a person who purports to be the father of a child by alleging illicit sexual relations with a married woman and seeks a declaratory judgment which necessarily involves proclaiming that the child is illegitimate.

In as far as granting a declaratory judgment is discretionary, the court may consider the plaintiff's conduct even from a moral viewpoint and pose the question whether in equity the plaintiff deserves the relief which the judge is by law competent, but not under a duty, to grant.

It is not to be overlooked that in declining to grant a declaratory judgment at the outset of the trial, the court does not decide the merits of the dispute between the parties. If the case reached the stage of hearing and the court had announced at the commencement that no matter what the evidence will be it is not prepared to grant the relief prayed for, because in equity the plaintiff does not merit it—the court would not thereby have decided the paternity question.

The discretionary nature of the relief in granting a declaratory judgment as explained above is to be gathered from the many precedents cited by the Deputy President (Cheshin J.) in his judgment in *Cohen and Bousslik v. Attorney-General* (1).

After mentioning all the authorities, the Deputy President said:

> "The court, in considering *all* the circumstances of the case before it, particularly as we are dealing with relief which originated in the Courts of Equity, cannot, and should not, disregard the behaviour of an applicant and the background of his actions which, he submits, have created the rights in respect of which he seeks an authoritative declaration from the court."

Likewise Sussman J. said (at pp. 36-37):

"I am not prepared to dispute the principle enunciated by Justice Cheshin, namely, that in considering whether or not to grant declaratory relief, the court may take into account the behaviour of the parties, as reflected in the actions which constitute the basis which serves for their application to the court."

Silberg J. was also of the same opinion. The two last-named justices only disagreed with the judgment of the Deputy President on the question whether from the point of view of the public interest the relief sought should be granted.

Does the plaintiff come to court with clean hands in the present case—as reflected in the *statement of claim itself?*

He says: "I maintained sexual relations with a married woman. The child born five years ago and registered as the lawful child of the defendants is illegitimate. He is my son. Please make a declaratory judgment confirming my allegations and proclaim me as the child's father." He does not even trouble to tell the court why he requires such a declaration. The question of the appellant's conduct arises not just with regard to the female defendant but vis-a-vis the child who was not made a party to the proceedings at all, and particularly with regard to public morality.

To my mind there is no shadow of a doubt as to the reaction of the court in connection with the exercise of its discretion in favour of a plaintiff such as this.

In *Szczupak v. Rapaport* (2), also a case of a declaratory judgment, no problem involving public morality arose. Nevertheless, the Court of Appeal declined to deal with the lower court's conclusion regarding the very right which the appellant had claimed and stated (at p. 40):

"As indicated, the appellant claimed a declaratory judgment. When a plaintiff makes such a claim, the burden is upon him not merely to prove his right but also to convince the court that the circumstances demand this right to be determined by means of a declaratory judgment alone. The appellant here (as well as in the District Court) did not deny that it is possible for him to connect with the municipal sewage system without any difficulty and that the first, second and third respondents have agreed that it be done at their expense. That being so, the plaintiff has not succeeded in convincing the court how he will be aggrieved or prejudiced if

the right which he claims will not be established by means of a declaratory judgment. On the contrary, his insistence is likely to arouse a suspicion, or more correctly an impression—and we wish to emphasize that this has not been proved —that here the question is one of scoring a triumph or of other motives which are not clear to us. Since on the one hand the appellant has not succeeded in convincing the court of the necessity for the relief sought, and since on the other hand his attitude tends to create the impression aforesaid, it follows that he has not discharged his duty of convincing us that he should be granted a declaratory judgment. We have therefore decided to dismiss the appeal accordingly."

A fortiori when the petitioner comes with unclean hands, as above explained. Pomeroy in Equity Jurisprudence (5th ed.) Vol. II, p. 91, sec. 397, speaking of the principle of clean hands in connection with equitable remedies says:

> "It says that whenever a party, who as *actor* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

At page 117, section 402, he says:

> "The principle is thus applied in the same manner when the illegality is merely a *malum prohibitum,* being in contravention to some positive statute, and when it is a *malum in se,* as being contrary to public policy or good morals."

And at page 133, section 402e:

> "Even in this situation, however, it has been held that a person who marries another, knowing that the latter has a husband or wife living, is not an 'innocent or injured party', and the courts will refuse a formal decree of nullification."

This is very close to the case before us, for there is no doubt that the purported marriage is invalid, although the court will decline to assist him by granting relief which lies in its discretion.

And at page 143, section 404:

> "A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemened and pronounced wrongful by honest and fairminded men, will be sufficient to make the hands of the applicant unclean."

Courts are particularly circumspect and exercise abundant caution when the relief claimed is likely to affect the status of a child, such as to attach to him the status of an illegitimate person.

In *A v. B.* (4) a case decided by the Rabbinical Court of Tel Aviv, it was said (at p. 149):

> "As for the plaintiff, it is clear that a person is not believed to say of the child of a woman married to another that the child is his, not the husband's, so long as the latter does not say that the child is not his."

In most instances, this problem arises when a man reputed to be the father or to whom paternity is attributed, endeavours to obtain a declaration that he is not the father. Even in such a case, when the plaintiff does not base his claim upon grounds which clash with public morality, his course will encounter many obstacles, if it involves a declaration that the child is illegitimate.

Borchard on Declaratory Judgments (2nd ed.) p. 486, writes:

> "On the other hand while allowing the child to protect its status through declaratory actions some British Courts have refused to allow a putative father to bastardise a child by securing a judicial declaration that a child born to his wife was not his on the theory that he was adequately protected by the defence available to him should the child claim maintenance. Yet there seems a good reason why the plaintiff's legal interest in rejecting the imputation of fatherhood should have been judicially protected by declaration.

The Appellate Division in New-York in a recent case pointed out a distinction between a declaratory proceeding to establish illegality of a child, in which the *child is a necessary party,* and a proceeding in the Domestic Relations Court for an order of support, which is not an adjudication of illegality, if the husband is held not to be the father of the child."

An instructive illustration of the matter under consideration is the case of *Yool v. Ewing* (5). There, the plaintiff filed a claim against one defendant who had formerly been his wife and from whom he was divorced and against a second defendant who was the young female child of his former wife. In this action he asked for a judgment declaring that the child was not his daughter and also as against the first defendant an order prohibiting her from representing the child as his daughter. They had been married in 1894 and following the marriage a son was born. The parties separated in March 1895 and thereafter no longer cohabited as husband and wife. The wife and the son lived in a town near which the plaintiff lived. In April 1898 the plaintiff sailed for India and returned in the year 1900. The female infant was born in December 1898 and the mother registered her as the daughter of the plaintiff. She did not inform the plaintiff of his birth at all. In 1900 a divorce decree was granted on grounds of her adultery and custody of the infant son was given to the mother pursuant to an agreement between them, which recited that the son was the only child of their marriage. When the action was begun, the mother was married to the man with whom she had committed adultery.

The judgment (at p. 811) reads:

"It was sought to show not alone that the plaintiff was not the father of the child, but that another person was. Now the presumption of legitimacy in the case of a child born during wedlock is not one *juris et de jure*.... But the presumption is of enormous strength, and will not be rebutted in an ordinary case, where husband and wife live together, by mere evidence, or even proof, that a person or persons other than the husband had improper relations with the wife. In such a case the law on *the clearest grounds of public policy* and decency will not *allow an enquiry as to who is the father.* But it might be otherwise here, for this is not in this respect an ordinary case, as the husband and wife were not living together under the same roof."

Notwithstanding the admissions of the defendant which were proved, the action was dismissed and (at page 812) it was said, following a suggestion that the result might have been different, had this been a suit for divorce:

> "But it is a suit mainly and really not against Mrs. Ewing but against the other defendant, the infant. The decree sought for against her is a decree *in rem;* that is a decree that would be final, and binding and conclusive."

The judgment later explains that despite the rule (similar to our rule) concerning the power to make declaratory judgments, even without additional relief, a court will not render such judgments if they are not required in connection with positive rights at the time of the action. And no declaratory judgment will be given if it is only required by the plaintiff in connection with what appears to him as future or possible future rights.

> "Nor must anything I have said to be taken to mean that this court has not ample power to decide questions of legitimacy, when necessary, as for instance, when a claim is raised in which legitimacy is a material element in determining rights. If an action were brought against the plaintiff here for the maintenance of the defendant Dorothy, it would be open to him to contest it on this ground that though born during wedlock, the defendant was not in fact his child" (at p. 816).

From the foregoing I have no doubt that had the appellant's action come to Lamm J. for trial (and not by way of a motion to strike out pursuant to Rule 21) he would have been entitled even at the outset, relying simply on the statement of claim, to inform the parties that he was not prepared to exercise his discretionary power in favour of the appellant in order to assist him by recognizing his paternity by means of granting a declaratory judgment, because he did not regard him meritorious as explained above.

The only question then that arises in the appeal before us is merely a procedural question, namely, was the learned judge permitted to adopt this attitude within the framework of Rule 21, upon the ground that no cause of action was disclosed. In other words, does the fact or circumstance showing that a plaintiff is, or is not, deserving of relief which lies within the discretion of the court constitute an element of the cause of action.

In an action of the kind now before us, this fact may form an element in the cause of action in a negative sense. Let me explain. In an ordinary action for a declaratory judgment the burden is upon the plaintiff, as stated in *Szczupak v. Rapaport* (2), "to convince the court that the circumstances demand this right to be determined by means of a declaratory judgment alone." Nevertheless, if the plaintiff does not expressly set out in the statement of claim the circumstances which entitle him to discretionary relief, it is almost certain that the action cannot be struck out on the basis of Rule 21. If the statement of claim is silent in the matter, the court will say that since prima facie there is nothing within the statement of claim itself to indicate that the plaintiff is not entitled to the assistance of the court, such omission is not to be regarded as a defect in the statement of claim so as to permit the exercise of the power given by Rule 21. In such a case, if the defendant seeks to strike out in reliance on Rule 21, the court will refuse the application, and will say that the question whether the plaintiff is entitled to discretionary relief has to be resolved in the course of the trial in the light of the circumstances which unfold themselves and on the evidence adduced by the parties with reference to the right itself claimed by the plaintiff.

Only in a very rare case, such as in the one before us, when the statement of claim itself discloses circumstances which show conclusively that the court must refrain from assisting the plaintiff by exercising its discretion in his favour—even on the assumption that the plaintiff can prove the facts set out in the statement of claim—in such a case there is, in my opinion, a possibility of applying Rule 21, because what is sought by the plaintiff will not be granted him even if he should prove these facts.

Just as in the normal situation the reason for striking out the claim is that no purpose will be served by continuing with the proceedings, because even if the plaintiff proves the facts the right claimed will not thereby be proved, so here the reason is that there is no purpose in dealing with the action on its merits because even if the plaintiff proves the facts, his right to obtain a declaratory judgment will not thereby be established.

In an action for specific performance, for example, if the defendant applies to strike out the action under rule 21, upon the contention that the plaintiff has not come with clean hands, his application will fail. The court will then say that since there is nothing in the statement of claim to indicate the absence of "clean hands," but only the defence