C.A. 357/56

DAN BUS URBAN, INTER-URBAN PETAH TIKVA AND GREATER TEL AVIV COOPERATIVE SOCIETY LTD.

v.

YITZHAK YEHIEL

In the Supreme Court sitting as a Court of Civil Appeal
[March 28, 1958.]
Before Olshan P., Silberg J. and Sussman J.

Contract - Omnibus season-ticket - Unilateral variation of conditions by bus company - Reasonable notice required - Breach of contract.

A passenger bought at a reduced price a season-ticket good for 23 journeys on the omnibuses of the appellant cooperative. At the time of purchase of the ticket, the cost of a single fare was 55 prutot.[1)] Before the passenger had used up the whole of the ticket, the Ministry of Transport approved a rise in the fare from 55 prutot to 60 prutot. The appellant inserted a notice in the newspapers stating that tickets such as that held by the respondent would remain valid only until November 15, 1955. On the day following that date, November 16, 1955, the passenger sought to use his ticket on one of the appellant's omnibuses, but the ticket collector refused to recognize it.

The passenger brought an action in the Magistrate's Court, claiming as damages the value of the remainder of the unused ticket. The Magistrate dismissed the claim. The passenger appealed to the District Court which, by a majority, allowed the appeal.

1) The plural of prutah. This was the smallest coin used in Palestine in the early centuries of the present era. It was revived by the State of Israel where 1000 prutot = I.L. 1. It has since been abolished.

The omnibus cooperative appealed to the Supreme Court.

Held: (following *Martin-Baker Aircraft Co.* Ltd. *and Another v. Canadian Flight Equipment Ltd.)* that if the appellant cooperative desired unilaterally to change the agreement between itself and the passenger it must give reasonable notice, and in the present case a notice of 19 days was not reasonable. The appeal of the cooperative was accordingly dismissed and the claim of the passenger upheld.

Israel case referred to:

(l) *C.A.42/53 A. Yehezkeli* v. *I. Shaposhnik and Another* (1955) 9 P.D. 333.

English case referred to:

(2) *Martin-Baker Aircraft Co., Ltd. and Another v. Canadian Flight Equipment Ltd., Martin-Baker Aircraft Co., Ltd. v. Murison.* (1955) 2 *All E.R.* 722.

Caspi for the appellant.
Toister for the respondent.

SUSSMAN J. This is an appeal from a judgment of the District Court of Tel Aviv-Jaffa sitting as a Court of Appeal which, by a majority, set aside the judgment of the Magistrate's Court of Tel Aviv-Jaffa. The Magistrate had dismissed the claim of the respondent, the plaintiff in the court below, while the District Court gave judgment in his favour. The amount of his claim was for 360 prutot which in the appeal had shrunk in effect to 30 prutot. But the dispute raised a question of principle and in so saying I do not intend to

criticise the respondent for considering the matter of sufficient importance to warrant his having recourse to the courts.

2. The subject of the dispute is a "season-ticket at reduced price" valid for 23 journeys, which was sold to the respondent by one of the booking clerks of the appellant cooperative which runs a public omnibus transport service in Tel Aviv-Jaffa.

In the Road Transport Rules (Passenger Services), 1954, which were published in "Kovetz Hatakanot" (Official Regulations), No. 463, the Minister of Transport fixed the scale of fares which the cooperative was entitled to charge a passenger using its service. In the addendum attached to the rules it was provided as follows (at p. 1067):

> "3. Season-ticket at reduced price.
>
> (a) .....
>
> The price of season-tickets for 23 journeys is the same as the price of 20 journeys on all routes."

The figure "55" was printed on the season-ticket in question very conspicuously.

3. The respondent bought the ticket in question in the month of October, 1955, and managed to use it for 17 journeys. On November 16, 1955, he boarded an omnibus on Route No. 4 of the appellant cooperative, on which the fare until then had been 55 prutot. The ticket collector refused to *allow* the respondent to travel with the season-ticket which he held. The reason given was that the fare for the journey had gone up in the meantime and that the ticket was no longer valid. Indeed in the schedule of "fares for journeys as

from October 28, 1955", which was sent to the appellant by the Ministry of Transport, the fare for the journey on route No. 4, as from that date, was raised from 55 to 60 prutot. On the eve of the increase, on October 27, 1955, the appellant published a notice in the daily newspapers in the following terms: -

> "Season-tickets issued at reduced prices that are in the possession of the public will remain valid until November 15, 1955, for use on the same routes on which they are valid today."

As a result of this notice, the respondent was not allowed to use his season-ticket when he got on bus No. 4 on November 16, 1955. But the ticket collector explained to him that the appellant would be prepared to refund to him the value of the part of the ticket that had not yet been used.

4. The respondent sent to the appellant a notarial notice demanding refund of the damage caused to him as a result of the breach of its contractual obligations towards him. In a letter from its lawyer dated December 20, 1955, exhibit P/3, the appellant answered to the effect that the season-ticket did not entitle the respondent "to make so many journeys on a particular bus route" but that the respondent had purchased the right to make a number of journeys the price of each one of which was 55 prutot and that he could still continue to use his ticket even after the increase in the fares on those routes where the fare was 55 prutot. At the same time the appellant offered in the letter to refund the cash value of the unused part of the ticket.

5. The respondent refused both offers and lodged a claim for 360 prutot - the price of six omnibus journeys at the increased price - the cause of action being a breach of contract.

The magistrate dismissed the claim on two grounds. Her reasons were that as the price of tickets had been fixed by the authorities the travelling public was protected from arbitrary increases in the fares. "In these circumstances it is possible to plead that the use of the season-ticket as issued was valid only so long as the fare for the journey remained the same as at the time when the ticket was bought; the passenger being a party, as it were, to the change in the fare through the authorities who control fares." In any event. said the magistrate, and this was her second reason - there has been sufficient time until the fifteenth of November for the respondent to use up the ticket in accordance with the original conditions. And the plaintiff himself, in claiming damages, had not done what was necessary to mitigate the loss as he should have done by using up the ticket in full until the date fixed by the appellant.

Before I continue further with the facts of the case I would observe that this contention - that the respondent had failed in his duty to mitigate the loss - was not pleaded in the statement of defence of the appellant and that the magistrate was wrong in raising the point herself *(A. Yehezkeli v. I. Shaposnik and another* (l).)

6. The respondent appealed to the District Court and there the *learned* judges were divided in their opinion. The majority considered that the appellant had indeed committed a breach of the agreement it had made with the respondent. The minority judge however gave it as his opinion that there was no agreement to transport the respondent in its buses at all, but that the respondent had "converted money which was general legal tender for money of

another sort which was legal tender only amongst the ticket collectors" of the appellant *cooperative*. It was as if for the sum of one pound and one hundred prutot he had purchased 23 tokens each one of which would entitle him in the future when paying his bus fare to the sum of 55 prutot. According to the view of the minority judge, the appellant cooperative had not broken its agreement, for even after the increase in the fares each of the squares in the ticket was still worth 55 prutot which the appellant was willing to return to the respondent in cash. The District Court therefore by a majority entered judgment against the appellant for the sum of 360 prutot whereas the minority judge held that the respondent was entitled to only 330 prutot. Hence the appeal before us.

7. I must confess that at first I was almost of the opinion that the minority judge was right.

I was inclined to the view that buying the ticket was like buying so many stamps of 100 prutot each. This would not prevent the Postmaster-General from increasing, on the very next day, the postage rate payable on letters. And a person who bought the stamps could not claim that he was entitled to the right to send his letter to its destination at the old rate on the grounds that he had bought the stamps before the rise in rates. But the "agreement" with the post office is unlike any other agreement because the rights of the post office are statutory and are regulated by the provisions of section 3 of the Post Office Ordinance[1)]. However, the consensual basis notwithstanding, one party may buy in advance a coupon of a certain value which may be given in payment, when occasion arises,

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[1)] post *office* Ordinance, section 3 :

Power to fix rates and charges

3. The postmaster General may prescribe the rates and sums to be charged for such postal and other services as may be undertaken by the Postmaster General and the circumstances according to which those rates and sums are to be charged.

while at the time of such purchase no agreement for the sale of an article or the rendering of a service has been created; and the coupon only constitutes a kind of private currency.

When I examined the pleadings, however, it became clear that this contention was not what was pleaded at all in the statement of defence. In Paragraph 9 of that statement the Cooperative pleads "that the ticket must be considered as a pre-payment at the time of its purchase for 23 journeys at a certain price and not for journeys on certain routes." From this it seems to me that the parties agree that a contract had been made between them whereby the appellant undertook to transport the respondent in its omnibuses. And the language of the regulations above mentioned under which the season-ticket was issued supports this view. For the regulations speak of "season-tickets for 23 journeys" that are sold at a reduced price, as if 23 separate tickets had been sold and even in his letter to the respondent, exhibit P./3, the attorney of the appellant took the same point. Even so there remains some doubt regarding the question - did the appellant undertake to transport the respondent on those routes where at the time of the purchase of the ticket their fare per journey was 55 prutot or on those routes where the fare per journey would be 55 prutot at the time when the plaintiff was transported by the appellant?

8. Counsel for the appellant has stressed the point that the ticket had the figure "55" stamped on it and did not contain a description of the omnibus routes and at first glance this fact would seem to support the contention of the appellant. For if it had intended to sell tickets for specific routes, why were these routes in respect of which the ticket was valid not mentioned? But this hypothetical reasoning is contradicted by the language of the regulations under which the ticket was issued and sold, because the regulations provided for the sale of season-tickets of 23 journeys valid for all routes!

I take this to mean that the appellant was selling not a ticket of a certain value that would entitle its holder to transport of a certain value and price whenever required by him but a ticket that would entitle him to the right to make 23 journeys on certain bus *routes*. Because of the fact that the fare for the bus journey is the same on a number of routes - as for example routes numbers 4 and 5 - the appellant did not bother to print separate tickets for the different routes where the fare for the bus journey was 55 prutot, but issued a season-ticket of one kind that was valid for omnibus travel on all these routes. But there is no doubt that the appellant sold the ticket in compliance with the regulations and for this reason the number "55" was used only as a mark to indicate briefly the various routes - such as numbers 4 and 5 - where the fare per journey was 55 prutot, as if they had been set out on it.

9. Even so, did the ticket entitle the respondent to make 23 journeys on the above routes for an unlimited period of time? Although I have said that when the respondent purchased the ticket the parties had at that time made an agreement with regard to the 23 journeys on the omnibus, they did not define all the terms of the agreement except that the respondent was given the right from time to time to get on the bus on the routes indicated and to be taken to his destination. The question then is for how long a period did the respondent have to exercise this right? Suppose, on the one hand, that some one had purchased a ticket which afterwards he kept in his pocket-book for many years and finally just as the appellant had decided to suspend a route in order to keep up with the changing needs of the times - he came and claimed the right to use his old ticket. His claim would be refused. On the other hand, if the appellant had the right to cancel the route the day after it had sold the ticket, then for what purpose did the appellant sell a ticket valid for 23 bus journeys? This too is unlikely.

In a similar matter it was said in *Martin-Baker Aircraft Co., Ltd. v. Canadian Flight Equipment Ltd.* (2), at page 732:

> "It is to be borne in mind that this agreement is an agreement in a commercial or mercantile field... and I do not feel that the law merchant would normally look at such an agreement as this as being an agreement intended to constitute permanent relationships... The Common Law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties have made, on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract... where the contract makes no provision for fixing either price or premium or time... then the law is that a reasonable price or reasonable premium or reasonable time, will be implied."

The period for which the season-ticket was valid was not endorsed on it and we must impute to the parties that it was their intention that all the 23 journeys would be made within a reasonable period of time and it is the duty of the appellant to put at the disposal of the respondent the services of its buses during the whole of that period.

10. Did the appellant fix a reasonable period when it published in the press on October 27, 1955, a notice giving passengers a period of 19 days during which they could still use their tickets ? I am of the opinion that it did not.

Let us suppose that a ticket was bought a day before the publication of the notice regarding the rise in the fares and that the purchaser of the ticket was in the habit of travelling in the bus twice a day in order to get to his work. Failing something unusual the card would enable him to travel during 12 working days or two weeks. Of course some travel more frequently than twice a day. But when we come to imply a term such as this in a standard contract - which is imposed, after all, by one party unilaterally - we have to interpret the contract strictly against the appellant so that even extreme cases will be reasonably covered thereby.

The respondent gave evidence to the effect that sometimes he bought two season-tickets and although tickets are not for hoarding as the magistrate pointed out, it is not unreasonable to buy two season-tickets at the same time in order to save standing in the queue. Moreover as one of the majority judges of the District Court said there could be times when the ticket is not used either because the owner is ill. away on business or on vacation. and there are other occasions that one can think of as well, such as when one uses a taxi in the rush hour when it is difficult to get into an omnibus.

One has to take all these facts into consideration when one comes to fix the period during which the ticket is valid. I agree with the majority judges that 19 days is too short a period. For this reason the District Court was correct in holding that the appellant had broken its contract and I am of the opinion that the appeal must be dismissed.

OLSHAN, P. I concur.

SILBERG, J. I concur.

Appeal dismissed.

Judgment given on March 28, 1958.