

CA 3071/91

**Hula Taha Ali Jabrin****v.****1. Hader Abdullah Assad Jabrin****2. Abdullah Assad Jabrin**

The Supreme Court sitting as the Court of Civil Appeal

[7 July 1993]

*Before Justices A. Barak, S. Levin and T. Or*

Appeals on a 'partial judgment' of the Haifa District Court (Justice T. Strasberg-Cohen) on 26 June 1991 in Civil File 231/87.

**Facts:** The appellant (the wife) and the first respondent (the husband) built a house on the property of the second respondent (the husband's father) with his consent. The spouses later divorced. The wife sued the husband and his father, arguing against the husband that she was entitled to the value of half the rights in the house by virtue of the equitable rule of joint ownership between spouses, and against the husband's father that he had unjustly enriched himself at her expense. The lower court found for the wife against the husband, but denied her claim against the father. The husband appealed the former ruling and the wife appealed the latter.

**Held:** The wife was entitled against the husband under the rule of joint ownership, and she was entitled against the husband's father under the laws of unjust enrichment.

Appeal of the wife allowed; appeal of the husband denied.

**Legislation cited:**

Land Law, 5729-1969, s. 21.

Unjust Enrichment Law, 5739-1979, s. 1.

**Israeli Supreme Court cases cited:**

[1] CA 809/90 *Lidai v. Lidai* IsrSC 46(1) 602.

[2] FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* IsrSC 42(1) 221.

[3] CA 463/79 *Jabran v. Jabran* IsrSC 36(4) 403.

For the appellant — Y. Sharon.

For the respondents — M. Hussein.

## JUDGMENT

### **Justice A. Barak**

1. Hader Abdullah Assad Jabrin (the husband) was married to Hula Taha Ali Jabrin (the wife). They lived together for fourteen years. They had three children. They lived together in a house that they built themselves on land belonging to Abdullah Assad Jabrin, the father of the husband (the father). Subsequently the spouses divorced. The wife sued the husband and the father in the District Court. Against the husband she argued that by virtue of the rule of joint ownership of property she was the owner of half the rights in the value of the house (without the land). Against the father she argued that he continued to have possession of the house and consequently also of the wife's share in the value of the house. Thereby he was unjustly enriched at her expense. The District Court decided first to determine whether the wife had a cause of action against the husband and against his father. The District Court (Justice T. Strasberg-Cohen), in a 'partial' judgment (on 26 June 1991), accepted the claim against the husband and denied the claim against the father. This was appealed to this court by the husband (CA 3484/91) and the wife (CA 3071/91).

#### *The husband's appeal*

2. After the 'partial' judgment was given, the District Court continued to try the claim of the wife against the husband. The trial concentrated on the assessment of the value of the house (without the land). At the end of the trial (on 1 May 1992) judgment was given, determining the value of the house. Now we have before us the appeal of the husband against the 'partial' judgment. In his arguments before us, the wife's attorney raised the argument that the appeal on the 'partial' judgment requires leave, and this was not requested nor was it granted. The husband was entitled, of course, to appeal the final judgment, but he did not do this. Indeed, the partial judgment is merely a 'decision'. As long as the final judgment was not given, this decision could be appealed with leave. When the final judgment was given, it

‘swallowed’ up the ‘partial’ judgment given in this case. The husband should therefore have appealed the final judgment (by right), but he did not do so. For this reason the appeal ought to be denied. In order to mollify the husband I will add that the appeal ought to be denied on the merits also. The findings of the lower court are soundly based on the evidence. On the basis of these findings it was correctly held that the rule of joint ownership of property applies. The husband did not succeed in rebutting this presumption. We therefore deny the husband’s appeal.

*The wife’s appeal*

3. The District Court denied the wife’s claim against the father with a brief statement that ‘there is no basis for holding the second defendant — the father of the first defendant — liable to pay the plaintiff what her former husband owes her by virtue of the rule of balancing resources.’ The wife argues against this. She argues that the father is unjustly enriched at her expense. In reply the father argues that his right to the house is lawfully his — by virtue of his ownership of the land on which the house was built — and therefore he should not be regarded as someone who was unjustly enriched. In this disagreement we share the wife’s opinion. It is true that the father is the owner of the house in property law. Nonetheless, the house was built with the money and resources of the husband and the wife, and the father enriched himself at the expense of the husband and wife. The (legal) ownership of the father in the house does not rule out the right of the wife — to the extent of her share in the enrichment — against him by virtue of the laws of unjust enrichment. Prof. D. Friedman commented on this:

‘The fundamental idea is that property law does not determine the question of enrichment. The purpose of the rule stating that “fixtures go with the land” is not to enrich the owner of the land at the expense of another’ (D Friedman, *Laws of Unjust Enrichment*, Boursi — H Peretz, 2<sup>nd</sup> edition, 5742-1982).

When the enrichment accrues without the consent of the (property) owner, a special ‘restitution’ arrangement, which is hard on the benefactor, is prescribed in s. 21 of the Land Law 1969. When the enrichment occurs with the consent of the owner who agreed to the building of the house on the land, the Land Law does not deal with the problem (cf. CA 809/90 *Lidai v. Lidai* [1]). The absence of an arrangement is not a negative arrangement. The problem finds its solution in the general law (cf. FH 20/82 *Adders Building Materials Ltd v. Harlow and Jones GMBH* [2]). Under this law, when there is an agreement between the parties, the rights are determined thereunder. In the

absence of a contract — and not every consent (of the land owner) gives rise to a contract — we must follow the general provisions of the Unjust Enrichment Law 1979 (cf. CA 463/79 *Jabran v. Jabran* [3]). Under these provisions, when the owner is unjustly enriched, he is liable to restore the benefit in kind, and if this is impossible or unreasonable, he must pay its value (s. 1 of the Unjust Enrichment Law).

4. What is the value of the enrichment in the case before us? This question was not considered in the lower court. As we saw, Justice Strasberg-Cohen treated the claim of the wife against the father as imposing the obligation of the son on the father, but that is not the case. The obligation of the husband (under the rule of joint ownership of property) is separate from the obligation of the father (under the laws of unjust enrichment). Therefore the relief of the wife against the husband is separate from the relief of the wife against the father. Moreover the value of the obligation may be different. The husband is liable for half the value of the house (without the land). The father may be liable to repay (real) expenses of the improvement. Another possibility is that the father may be liable for the increase in the value of the land resulting from the improvement. This problem of the value of the improvement was not considered at all, neither in the lower court nor before us. In the circumstances we are of the opinion that the case should be returned to the lower court for it to make findings in this respect and to give judgment. It should be emphasized that the wife is not entitled to receive double enrichment, and she is not entitled to receive the unjust enrichment money both from the husband and from the father. This matter also must be clarified by the lower court.

The result is that the husband's appeal (CA 3484/91) is denied. The husband shall pay the wife legal expenses in a total amount of 5,000 NIS. The wife's appeal (CA 3071/91) is allowed, and the case is returned to the District Court, as stated in our judgment. The father shall pay the wife legal expenses in a total amount of 5,000 NIS.

**Justice S. Levin**

I agree.

**Justice T. Or**

I agree.

Appeal of the wife allowed; appeal of the husband denied.

7 July 1993.

