CA 419/84

Appellant: **Shmuel Tuchmintz**

v.

Respondent: **Lorna Carmel (Tuchmintz)**

In the Supreme Court sitting as Court of Civil Appeals

[Feb. 28, 1985]

Before Justices M. Bejski, S. Levin, A. Halima

[1] MP 215/83, HCJ 247/81 *A. Sefati v. P. Sefati*, IsrSC 37(2) 181

[2] CA 490/77 *Natzia v. Natzia*, IsrSC 32(2) 621

[3] CA 4/80 *Munk v. Munk*, IsrSC 36(3) 421

Appeal of the judgment of the Tel Aviv-Jaffa District Court (Judge S. Aloni) of May 30, 1984 in OM 280/84. Appeal denied.

The Appellant *pro se*

M. Morgenstern on behalf of the Respondent

Justice M. Bejski

1. The Respondent petitioned the Tel Aviv-Jaffa District Court by originating motion for the enforcement of the Appellant's obligation to purchase a 3 room apartment for her, and for the appointment of a receiver to execute that obligation. The proceedings and hearing were very abridged, and not only were the parties not examined on their affidavits, but there was almost no

recourse to summations. In its judgment, the trial court ordered the Appellant to fulfil the said obligation, and appointed Advocate Shloush as a receiver, granting him the necessary authorities for the sale of the apartment known as parcel 548/7 in section 6630. The appointment of the receiver would enter into force in six months, if by that time the Appellant had not purchased an apartment for the Respondent in accordance with the obligation.

Thus, the appeal before us.

2. The obligation concerned is found in paragraph 12 of a divorce agreement that the parties signed on Aug. 15, 1978, in which, in dozens of paragraphs and subparagraphs, they arranged the complex of their relations in contemplation of a divorce and the future of their two daughters. From among all the matters addressed by the agreement, we are concerned only with the arrangement concerning the apartments: the Appellant undertook to purchase for the Respondent, at his expense, and within one year of the divorce, an unfurnished, 3 room apartment in the area of Neve-Avivim in Tel Aviv, which would be registered in its entirety in the Respondent's name. Upon the fulfillment and performance of this obligation, the Respondent is required to convey to the Appellant, without consideration, the rights registered in her name to a 5 room apartment in which the spouses resided with their daughters, and to transfer its exclusive possession to him. At the signing of the agreement, the Respondent signed a notarized irrevocable power of attorney that empowered a lawyer to act on her behalf to do everything that may be necessary for performing her obligation. A consent decree was granted to the divorce agreement in PS 2737/77, and the spouses were divorced by a *get* [Jewish bill of divorce – trans.]. In the meantime, also as agreed, the Respondent and the daughters continued to live in the spouses' 5 room apartment, without any change in the registration, until the Appellant would purchase a 3 room apartment for the Respondent. The large apartment is registered in the name of both parties, in equal parts.

However, the Appellant did not purchase a 3 room apartment for the Respondent – not within a year of the divorce, and not in the following years – and that is what led the Respondent to initiate the proceedings by originating motion, as stated above, and the judgment which the Appellant challenges.

3. In his affidavit, which serves as defense pleadings, the Appellant raised only one defense claim, which is that after signing the divorce agreement, and before the passage of the year mentioned in paragraph 12, the Respondent gave notice that she wished to remain in the large 5

room apartment. In support of that, the Appellant appended a note in the Respondent's handwriting, dated July 10, 1979, on which is written:

> I have decided to stay in the apartment where I'm living at 9 Rav Ashi St. which is owned half by me and half by Sammy. I have decided to stay here indefinitely, and Sammy and I have to write up a contract regarding to that when I come back from the States.

The Appellant adds in his affidavit that he and the Respondent reached an agreement that she would remain in that apartment until the younger daughter would reach majority (she is now 10 years old), and accordingly, the obligation under paragraph 12 above in regard to the purchase of a 3 room apartment would be postponed, in addition to other accompanying conditions. There is no written support for the version regarding the agreement to postpone the purchase of the apartment, and even the Appellant speaks only of a parol agreement. However, according to the wording of the Respondent's note, quoted above, it is clear that she intended to draft a written agreement upon her return from the United States. And although some four years have elapsed since, no written agreement has been drafted.

The honorable trial judge did not refer in any way to the Appellant's version, and made no finding in that regard, stating:

> Even if I were to accept the Respondent's (the Appellant before us – M.B.) claim, that would not suffice to prevent granting the request before me.

And the granting of the suit was briefly explained as follows:

> It was not argued that a new agreement rescinded the Respondent's obligation, and it was not argued that this new agreement is permanent, and that on its basis the Plaintiff could never demand the performance of the said obligation. Moreover, if an agreement was reached that contradicts a valid judgment, the Respondent could have submitted a request to amend the judgment on a claim of changed circumstances, for as long as the judgment stands and has not been amended, there is no reason not to execute it.

4. The Appellant raises the objection that inasmuch as he was not examined on the version presented in his affidavit in regard to the postponement of the date for purchasing the 3 room apartment, he met his evidentiary burden in regard to the later parol agreement to change paragraph 12 of the divorce agreement, and nothing prevents proving the rescission or change of a written agreement by spoken statement and witnesses when the rescission or change is later, since such evidence does not contradict the written agreement (Y. SUSSMAN, CIVIL PROCEDURE (Boursi – Peretz & Tuvim, 4th ed., 5734, 386 (Hebrew)), and a distinction should be drawn between a claim against a document and a claim against a lawsuit or a defense. While there is a presumption that the document represents all that was agreed at the time it was made, such a presumption does not exist in regard to what transpired thereafter. "Even a very detailed contract may be rescinded by an oral agreement of a few words, and why should this additional meeting of wills not be given force if there is reliable testimony to it?" (E. HARNON, LAW OF EVIDENCE (Academic Press, vol. I, 5732) 167 (Hebrew)).

However, in the present case we do not know if the Appellant's version was found reliable, in the absence any reference to it in the judgment that is based on a finding, and even on such an assumption, the Appellant could overturn a final judgment issued in proper proceedings, only by means of a separate suit. The Respondent's attorney agrees with this conclusion, adding that a duly rendered judgment is not normally overturned indirectly and incidentally, but requires a separate suit for that specific purpose (MP 215/83, HCJ 247/81 [1] at p. 185). The argument, as raised, is not so unambiguous from a purely procedural perspective, inasmuch as the Appellant does not at all argue for the overturning of the judgment or the rescission of the agreement given thereupon, nor does he does even argue for the rescission of paragraph 12 thereof, but rather argues as to the agreement in regard to the postponement of one of the obligations.

Even before addressing the procedural question, how can the Appellant support his version in regard to postponing performance, if even under the most generous assumption in his favor that what he claimed in his affidavit was adequately proved and believed (which, as noted, was not held), the question would remain as to whether the Appellant can substantively prove what he seeks to prove, which is another argument made by the Respondent's attorney.

5. A divorce agreement given the force of a judgment is a property agreement in the sense of the Spouses (Property Relations) Law, 5733-1973 (hereinafter: the Law), which establishes in sec.

2(d) that "An agreement between spouses confirmed by a judgment for divorce of a religious court shall be treated as a property agreement confirmed under this section." According to sec. 1 of the Law, not only must the property agreement itself be in writing, but "any variation of such an agreement shall be in writing". And in addition to the requirement that both the property agreement and any change in it specifically be in writing, there is the additional requirement under subsecs. (a) and (b), which establish:

> 2. (a) A property agreement and any variation thereof require confirmation by the District Court…or the religious court which has jurisdiction in matters of marriage and divorce of the spouses.
>
> (b) Confirmation shall only be given after the civil or religious court has satisfied itself that the spouses have made the agreement or variation by free consent and in understanding of its meaning and effects.

While the parties before us married before the Law entered into force, and sec. 14 states that sec. 3 and the other provisions of Chapter Two will not apply to spouses who married prior to the Law's entry into force, it was already held in CA 490/77 [2] at p. 624, that "the significance of this provision is that sec. 2, which is in the first chapter of the Law, applies even to spouses who married prior to the Law's entry into force. Therefore, a property agreement between such spouses, made after the Law's entry into force, is subject to the provisions of the first chapter of the Law, including sec. 2." Section 1 of the Law speaks of a property agreement made between spouses, and indeed, when the agreement before us was made, the parties were spouses. The section does not require that they also be in the same status of spouses at the time of making a change in a property agreement. But as far as the writing requirement for a change in a property agreement is concerned, the requirement under secs. 1 and 2 and the writing requirement, both for the property agreement itself and for changes thereto, is not merely evidentiary but is primarily substantive, and the legislature did not suffice only with the writing requirement, but further added provisions as to the need for its confirmation by a judicial instance, as stated in CA 4/80 [3] at p. 428:

> …a property agreement is not valid unless a judicial instance is satisfied that the agreement was made with free consent, without pressure, and that both parties understood exactly what was concerned and the possible effects of their signing the agreement.

And Justice S. Levin added in that same matter, at p. 429:

> The proceeding that is the subject of the appeal is similar to the proceeding for making a will before an authority under sec. 22 of the Succession Law, 5725-1965, and the purpose of reserving the confirmation authority specifically to a judicial instance is to make certain that it is irreproachable, that the parties to the agreement understood the meaning of the agreement and its effects, and signed of their own free consent.

6. As we have seen, the Appellant does not even argue that postponing the date established in section 12 of the agreement in regard to purchasing the apartment, which undoubtedly constitutes a variation of a property agreement, was made in writing as required under section 1 of the Law. I any event, the requirements of section 2 in regard to the court's confirmation of a variation, after being satisfied that the parties understood the meaning and effect of the variation, and that is was made with free consent, were not met. Reliance upon the note in which the Respondent expresses her desire to continue to stay in the 5 room apartment does not even meet the writing requirement, as it expressly states that she would have to write an agreement in that regard when she returns from the United States, and that was never done, let alone was any request made to the court in this regard. We find that the substantive conditions in regard to changing a property agreement were not met, and it is of no consequence in which proceeding this claim is raised, whether in a separate suit or as a defense in response to the Respondent's suit, since the result would be the same, i.e., that the Appellant cannot rely upon a written document that would prove the change in regard to postponing the date regarding which he argues. Therefore, this argument must ultimately be denied in whatever proceedings.

7. The Appellant raised another argument in regard to the Respondent's lack of good faith in performing the agreement, in knowing that the sale the apartment at the present time is subject to land appreciation tax in a considerable amount that the Appellant claims he cannot afford. It would seem that this is the true reason why the Appellant needs to postpone the sale of the apartment until the sale will be tax exempt. He expressly stated this when he tried to negotiate a mutually agreed arrangement without success.

Not only was no groundwork laid that would show the fault of the Respondent, and whether at some earlier time the sale would have been free of land appreciation tax, but this argument is not relevant to the subject of this proceeding, and there is no need to address it.

In summary: this appeal should be denied, and the Appellant should be charged for the Respondent's costs and legal fees in the amount of 500,000 shekels, with interest and linkage in accordance with the Adjudication of Interest and Linkage Law, 5721-1961.

Justice S. Levin

I concur.

Justice A. Halima

I concur.

Decided in accordance with the opinion of Justice Bejski.

Given this day, 7 Adar 5745 (Feb. 28, 1985).