C. 114/78,
Motions 451/78,
510/78 *

1. MUHAMMAD SA'ID BURKAAN

v.

1. MINISTER OF FINANCE
2. THE CORPORATION FOR RESTORATION AND DEVELOPMENT OF THE JEWISH QUARTER IN THE OLD CITY OF JERUSALEM, LTD.
3. MINISTER OF HOUSING

In the Supreme Court Sitting as a High Court of Justice

Cohn J., Shamgar J., Bechor J.

A. Lenman for the petitioner
D. Beinish, Director of the High Court Department in the State Attorney Office, for respondents Nos. 1, 3
M. Ben-Ze'ev, for respondent No. 2.

JUDGMENT

Cohn J.

The respondent is a government corporation, and its name testifies to its role in acting towards the restoration and development of the Jewish Quarter in the Old City of Jerusalem. On the ruins of the city it has constructed new buildings, and it is now ready to lease the apartments in these buildings for residential use. The petitioner in this case wanted to take lease of one of these apartments for his and his family's residence, but the respondent refused his application. This court issed an order nisi in which the respondent was called upon to show cause why it would not lease to him one of the apartments as to which it published a "Tender of Apartments to the Public" in February 1978.

2. The same "Tender of Apartments to the Public" determines that only one of the following may "participate in the tender": either a resident Israeli citizen who served in the Israel Defence Forces (IDF) (or received an exemption from military service, or served in one of the Jewish organizations that existed before May 14, 1948) or a new oleh who is resident in Israel. The petitioner admits that he is not an Israeli citizen, has not served in the military, and is not a new oleh: his citizenship is Jordanian, and he claims that he has always

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* (1978) 32 P.D.(2) 800.

resided in the Old City of Jerusalem. This court issued him an order nisi calling upon the respondents to show further cause why the provision restricting the tender of the apartments to Israeli citizens and new olim alone should not be voided.

3. Before the respondent proceeded to show its causes, it reiterated an argument that we have already had occasion to deal with in previous proceedings before this court*, according to which we should not allow this petition since the respondent is not a body that exercises public functions by virtue of law as provided by section 7(b) of the Courts Law, and is therefore subject to the jurisdiction of the regular courts, as distinct from the High Court of Justice.

In my opinion in Peretz v. Kfar Shmaryahu (1962) 16 P.D.2101 I already distinguished in this respect section 7(a) from section 7(b) of the Courts Law, and expressed my view that this court has jurisdiction under section 7(a) even against respondents who are not bodies that exercise public functions by virtue of law. I have not changed my view of the matter since then, in addition to which it has, in the meanwhile, been confirmed by the Court (Sharvat Bros. v. Society for the Old-Aged (1972) 27 P.D.(1) 620).

However, as is well known, our jurisdiction under section 7(a) is contingent on two elements: that no other court has jurisdiction over the matter, and that relief is deemed necessary in the interests of justice. It is my opinion that Mr. Ben Ze'ev, who pleaded before us for the respondent, argued correctly that jurisdiction over the matter rests in another court: the "Tender of the Artments to the Public" that was published by respondent amounts to an invitation to the public to submit an offer to the respondent (in the meaning of section 2 of the Contracts (General Part) Law, 1973): and although no contractual bond is created as between the offerer and the respondent as a result of submitting such offer, in any event both the respondent's tender and the offerer's offer come within "negotiations towards the formation of a contract" in the meaning of section 12 of the said law. And if indeed the clause in the respondent's tender contained an element of lack of good faith or failure to act in customary manner the offerer can seek declaratory relief in the authorized court.

However, after hearing the arguments and reading the affidavits and documents of all the parties at great length, we resolved to deliver an opinion on the merits of the matter, if only to prevent further unproductive litigation in another court.

4. The petitioner claims that the apartment of his desire was built on his family property, that he and his father lived there since 1947, and that the house they lived in was "from time immemorial" Moslem property and that "Jews never lived in it". It appears that the house passed from Jewish to Moslem possession during the period of

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* (Ramat v. The Corporation for Restoration and Development of the Jewish Quarter in the Old City of Jerusalem (1971) 26 P.D.(1) 118; and H.C. 275/14 - not published).

bloodshed rioting in 1938: and that several years ago the petitioner and his family moved to the new house that they built for themselves in Beit Hanina.

For the purpose of ruling upon the material questions before us, I would not attach any significance to the petitioner's present or previous place of residence: if he is to be allowed to present his offer even though not an Israeli citizen, it matters not where he lived previously. However, the petitioner's lies as regards his place of residence disqualify him from appealing to this Court: he attempted to create the impression that the respondent, through the force of the execution officer of the courts, evicted him and his wife and young children from an apartment in which they had long dwelled quietly and peacefully; and now that the respondent has built on the site a new apartment fit and proper for their residence, it refuses arbitrarily and discriminatorily to return it to them - when in actuality (and this is apparent between the lines of the petitioner's affidavit in Motion 451/78) it is they who abandoned that apartment a long time ago, leaving only some of their belongings therein.

Furthermore, as opposed to the petitioner's claim that his father acquired part of the ownership in that house in 1947 and that since then he and his family have lived there, we were presented, on behalf of the respondent, with a letter dated June 16, 1968 from the petitioner (and his father) to the Prime Minister and Minister of Finance in which it is written that they had been renting one of the apartments in the house for approximately five years, that is, since 1963. This letter was mentioned in the petition but was not enclosed therein, and we received no reasonable explanation for it being concealed from us.

It is an explicit rule that whoever perjures himself and bears false oath is not to be considered among those clean-handed and pure-hearted to whom this court hastens to give relief.

5. The present petition was filed on February 23, 1978. It was preceded by an extensive public media campaign in Israel and abroad, and even the television found it proper to cover the matter and to stage the drama of the eviction of the petitioner and his family from their apartment - the respondent says it was the petitioner's dramatization, and the petitioner says it was the television's. I shall assume in favor of the petitioner that he conducted this public campaign with good faith and in proper manner: and on this assumption I cannot find anything improper in trying to arouse public opinion as regards this matter before approaching the court, and thereby, perchance to bring about a change in the position of the respondent and the authorities.

This applies to the period before the filing of the petition: once that has occurred and the matter is pending judicial decision, recourse to the media and appeal to public opinion amounts to contempt of court. Not that we follow the English common law in prosecuting and penalizing editors and journalists; we are already accustomed to the American method that views freedom of the press as no less important than contempt of court (see in this respect C.K. Allen, Aspects of Justice (1958) p. 48). However a petitioner seeking relief from this

Court is obliged to keep silent outside the courtroom, less his recourse to the media be construed as an expression of no confidence in the court - whether he from the very start despairs of the court's readiness or ability to aid him or supposes that the court may be impressed by the journalistic publications or public opinion.

The respondent submitted an American newspaper of May 21, 1978 that contains an interview with the petitioner and in which he tells of his court proceeding "in abundant detail and with salient pleasure", in the words of the interviewer; moreover, he also gave the interviewer documents and correspondence on which he relies in his petition to this Court. It matters not that the interviewer tried to present, albeit in relatively brief manner, the position of the other party; in any event the quality and content of the article are neither here nor there. What counts is that the petitioner found it proper to use the public media so as to claim his rights while this matter was pending before us.

As far as I am concerned that is in itself sufficient to dismiss the petition ad limine.

In the same article the name of petitioner's counsel, Mr. Abraham Lenman, was also published, and he too gave information as to this proceeding. On the face of it that constitutes a violation of rule 16(4) of the Chamber of Advocates (Professional Ethics) Rules, 1966, and the State Attorney should consider whether it is appropriate to file a complaint.

6. The main thrust of the petitioner's argument is that the respondent discriminates unlawfully between persons (or between residents of the State) on grounds of their religion or nationality, in that it is prepared to lease the apartments to Jews and not to Moslems.

Before addressing the merits of this argument, I wish to say that it cannot be heard from the petitioner. On the basis of the evidence before us it appears - and the petitioner does not deny - that he declared that according to his religion he is forbidden to sell land to Jews, whilst he is allowed to sell land to Moslems, and he is not prepared to violate his religious command in this respect. If that is the case, and the petitioner may discriminate between Moslems and Jews as regards the sale of immovable property and even considers himself commanded to discriminate between them - how can he protest against another person behaving similarly and discriminating between Jews and Moslems as regards the lease of immovable property? I wonder. (And perhaps discrimination that is befitting the Moslem religion is also becoming to the Jewish religion? See particularly Mishnah Avodah Zarah 1:8 and Maimonides, Hilkhot Accum Vekhukotehiem, 10: 3-4)

And if you wish to argue that discrimination that is permitted to an ordinary citizen is not permitted to a government corporation, I will likewise respond that a citizen who comes to this Court to demand

equity must himself in the first place act equitably. Any person who claims in this Court that a given incident of discrimination is wrongful must raise the burden of showing that he himself is clear of any flaw of similar discrimination. And whoever professes himself wrongful discrimination is told "you see the splinter in your brother's eyes, but not the beam in your own".

7. I have not been convinced that the respondent's requirement that the lessors of the apartment be Israeli citizens who served in the military or new olim, amounts to discrimination on grounds of religion or nationality, or any other kind of wrongful discrimination.

Firstly, the simple sense of the term "Israeli citizen" includes non-Jews, whether Moslem, Druze or Christian Israelis. Mr. Ben-Ze'ev's statement before us that the tender was intended to apply to Jewish Israeli citizens alone is in clear contradiction to the simple meaning of the text; and the judge does not go beyond what he finds in the text. The restriction to citizens who served in the army alone is reasonable in view of clear security considerations.

Secondly, it is not necessarily wrong to discriminate between citizens and non-citizens as regards benefits from national assets or other economic rights (see section 2(3) of the International Convention on Economic,Social and Cultural Rights, that was confirmed by the United Nations Assembly on December 16, 1966).

Thirdly, the need to restore the Jewish Quarter of the Old City arose only because the Jordanian forces invaded it, expelled the Jews, and plundered their property and destroyed their houses. It is only natural that the restoration be intended to revive the previous splendour of the Jewish community in the Old City, so that Jews will again, as in the past, have their own special quarter, alongside the Moslem, Christian and Armenian Quarters. There is no wrongful discrimination in the singular appropriation of these quarters each to its own community.

And fourthly, to the extent that there is discrimination against Jordanian citizens, who bear allegiance to the Kingdom of Jordan (like the present petitioner), such discrimination appears to me justified and proper; we cry out and protest against the wrong done to us by the Jordanians in the Old City, and it should not be demanded of us to give them the opportunity to return to settle specifically in the Jewish Quarter. Both security and political considerations explain and justify such discrimination.

8. The order nisi should be set aside and the petition dismissed.

Bechor J.

I concur with the opinion of my learned colleague, Cohn J., subject to the following comment: As regards the jurisdiction of this

Court, I am not sure that the petitioner can find relief in another court. If he had filed suit in the District Court under section 12 of the Contracts (General Part) Law, 1973, and proved his claim, he could have been awarded damages under section 12(b) of the law, but he does not at all desire compensation but seeks to receive an apartment in the Jewish Quarter of the Old City. There was therefore no alternative but to decide the substantive issue of this petition and I regard the words of my esteemed colleague on the merits of the case as decisive of the petition. In the course of hearing the reply, Attorney Ben-Ze'ev posed the issue clearly in terms of the restoration of the Jewish Quarter that was destroyed in our own generation, with the emphasis on "restoration", the intention being, in these circumstances, to restore the quarter as a Jewish Quarter. Therefore, as far as I am concerned, the last two paragraphs in section 7 of my esteemed colleague's opinion are of the essence of this matter.

We have a distinguished rule that we should never give our assistance in any matter that amounts to discrimination between persons on grounds of their religion or nationality. But, notwithstanding, when applying this great principle, we must not close our eyes to reality and to actual conditions, and must beware of creating discrimination of another kind or in the reverse direction and of prejudicing the safety of human life.

Shamgar J.

1. I agree with the opinion of my esteemed colleague, Cohn J.

2. Petitioner's learned counsel wished to found the cause for the petition on the argument of wrongful discrimination. Had there been anything sound in his words of legal interpretation, this Court would have given relief to the petitioner as requested, for the rule that no person should be discriminated against on grounds of race, sex, nationality, community, country of origin, religion, opinion or social status is a fundamental constitutional principle which is incorporated and enmeshed in our fundamental legal conceptions and an integral part thereof.

However, the issue before us is not a matter of equal rights to housing, as the petitioner endeavoured to present it, but rather concerns the right of governmental authorities, and the public corporations that assist them, to restore the ruins of the Jewish Quarter of the Old City of Jerusalem.

3. The scholars maintain that the said Quarter existed in its present location or its close environs - except for certain intervals of time, due to the physical annihilation of the Jewish population therein, its expulsion from the city, or the administration of effective prohibitions to prevent its return thereto - since the seventh century of the present era, and thereafter continuously from the 13th century until it was destroyed to its foundations, after being occupied by the Jordanian army subsequent to its invasion into the land west of the

Jordan river in the year 1948. However, ever since Hadrian's attempt (in 130 A.D.) to alter its identity and change its name from Jerusalem to Ilia Capilalina, there have been recurring attempts to remove the Jews from their capital.

There exist grounds for the view that the residential areas in the Old City have been divided into quarters according to communities, each one being allocated its own quarter, since the beginning of the 11th century, although there are quarters that were formed even before the said date (for example, the Quarter and the Jewish Quarter); likewise there were periods in which an additional Jewish Quarter existed in the north-east of the city (Juiverie) and many of its inhabitants fell victim to the Crusade Conquest in 1099.

At the beginning of the 19th century (1836) approximately 3250 Jews lived in the said Quarter out of a total population of 11,000 in the Old City, and in 1870 they numbered 11,000 out of a total population of 22,000 in the Old City. But as a result of the expansion of Jerusalem outside the City walls, and thereafter largely due to the bloodshed riots that occurred in Palestine in the years 1920-21, 1929 and 1936-1939, the Jews were driven out of parts of the Jewish Quarter, until they were totally expelled therefrom after the military occupation of the Old City in 1948. It may be noted that it is not disputed any more that the house which this petition concerns served as a Jewish residence at least until 1938.

When the Old City was liberated in the Six Day War, the government decided to revive its previous splendour, that is, to restore the Quarter and raise it from its ruins, and to populate it with Jewish inhabitants so that it again would become part of the mosaic of the other congregational quarters of the Old City, as it was throughout the many centuries before the expulsion of the Jewish population by the Jordanians in 1948; in the words of Witkon, J. in H.C. 275/74 (Bass v. Minister of Finance - not published):

> "The Government decided to restore the Quarter and populate it with a Jewish community, so that it be a place fitting to its historical, national and religious significance, one which is unequalled in Israel and the entire world".

4. The restoration of such historical and national site is a public purpose for the realization of which one may appropriate private property, and there is no wrong in this so long as it is done according to law, through lawful procedures and against proper compensation or substitute housing.

All these conditions have been met in the present case, since the petitioner was offered the choice of an alternative apartment inside or outside the Old City, or monetary compensation.

However, he refused to accept these, since he is bound by the fiat of a religious Moslem scholar with whom he consulted, who regarded such as amounting to sale of immovable property to a Jew, which is forbidden on his understanding of the principles of the Islam. This prohibition apparently has special import for the petitioner, who is a citizen of Jordan and whom Constitution determines the Islam as the religion of the state (article 2 of the Jordanian Constitution).

Since we are concerned with a unique factual situation, that is, the restoration of a historical and national site both in name and essence, while preserving its character and identity and to a large extent through its reconstruction, it is not surprising that the respondent did not deem it proper to lease an apartment in the quarter to the petitioner, and it was entitled to act in such manner.

Furthermore, in light of the character of the historical Quarter one wonders why the petitioner found it proper to take part in the tender and to make his demands, in view of the fact that he and his family originally came from Hebron and their ties with the Quarter arose from an arrangement of rented housing from 1947 in a house in the Quarter, a fourth part of the ownership of which was acquired by the family during 1947 and 1948, and which was inhabited by Jews until 1938 as aforesaid. It may be noted that if it had been decided to respond affirmatively to the petitioner, and the plan to restore the place as a Jewish Quarter had been relinquished, it is difficult to see how a similar application from another person could have been refused.

One must necessarily conclude that the respondent has good reason to entertain suspicions that the petitioner's refusal to accept alternative housing or payment of proper monetary compensation, and similarly his concealment of the fact that he is in fact living in a new eight-room house that he built for himself and his family in Beit Hanina,are all indicative of his principled attitude, and that he adhered to his intent despite all the aforesaid because the restoration of the Jewish Quarter of the Old City is a source of irritation to him,as it was for many powerful persons who attempted from time to time, usually without too much success, to prevent the settlement of Jews in Jerusalem.

In all likelihood this also explains why the petitioner received extensive monetary support from a society, some of whose members profess that the State of Israel has ceased to exist and that the Christian Church has taken its place.

("The New Testament indeed sees the church as replacing the nation of Israel"; quoted from an issue of Quaker Life, September 1976, p.93 and submitted as evidence in Motion 451/78.)

Every person is entitled to adhere to and also preach such way of thought and faith without hindrance whether here or in any other place, but he cannot complain if the authorities of the State of Israel are not prepared to adopt this approach and to act upon the conclusions of disintegration and self-denial that necessarily arise therefrom.

To conclude, it follows from the aforesaid that the petitioner's real causes, whatever their form, are not grounded on the prohibition against wrongful personal discrimination, but rather turn in actuality upon the question whether the authorities are entitled to restore the Jewish Quarter in accord with its name and essence, or whether the governmental authorities are now obliged to suppress and repudiate the identifying characteristics of the said Quarter.

5. Some of the false factual arguments that were raised by the petitioner have been noted in the opinion of my esteemed colleague, Cohn J., and I have nothing to add in this respect.

I wish only to comment on the sad manner in which the petitioner distorted the facts when describing the attitude towards him on the part of the authorities in general and the respondent in particular.

6. Among the arguments raised before us there was inter alia, reference to the rulings of the Supreme Court of the United States as regards the prohibitions of segregation in housing and education, but those are immaterial in the special circumstances described above (as to their orientation see the Courts opinion in Yick Wo v. Hopkins, 118 U.S. 356, 373-4). It should be noted here generally, that automatic transferal from place to place of all the varied forms and ways in which the rule of equality has been applied, without taking into account special conditions and circumstances, can be misleading to no small extent; for example, compulsory integration of school children there, which forces the English language and Anglo-Saxon culture on each and every student and is regarded there as the height of equality, could be considered here to be compulsory assimilation if an Arab student were to be forced because of it to forego a separate school system in which studies are conducted in his own language and in accord with his own culture. Similarly, there were special circumstances in which this Court approved arrangements that prohibited Jews from praying on the Temple Mount and in light of those special circumstances did not consider that to be violation of the freedom of religion and religious worship.

It follows also that whoever wishes to apply indiscriminately rules that attach to the field of housing to the matter of the restoration of a unique historical quarter is confusing distinct issues and misunderstanding the constitutional principles on which he relies.

Order nisi set aside.

Judgment given on July 4, 1978