H.C.J 101/54

FAKHRY KAMEL JIDAY

v.

THE CHIEF EXECUTION OFFICER HAIFA DISTRICT COURT

and CLAIRE HANNA SWEIDAN

In the Supreme Court sitting as the High Court of Justice
[February 4, 1955]
Before Agranat J., Goitein J. and Berinson J.

Court of Catholic Melkite Community - Composition of court - Members appointed by resident of Lebanon - Relations between Israel and Lebanon - Whether state of war - United Nations - General Armistice Agreement between Israel and Lebanon - Termination of war - Trading with the enemy.

The second respondent, the wife of the petitioner, claimed maintenance against her husband in the religious court of her community, the Greek Catholic Melkite Community. The religious court gave judgment in her favour and the petitioner, her husband, appealed to the Court of Appeal of the Community. The Appellate Court confirmed the judgment and ordered the petitioner to pay his wife the sum of IL. 90.- per month as follows: IL. 60.- monthly, commencing April, 1953, and the balance from his share in his father's estate, due after the father's death. The second respondent duly applied to the first respondent to execute the judgment. The petitioner thereupon opposed the execution of the judgment. The Execution Officer rejected the opposition. Accordingly a petition was presented to this court and an order nisi was granted calling upon the first respondent to show cause why he should not refrain from executing the judgment of the religious court of October 22, 1953. On the return day arguments on behalf of the petitioner and the second respondent were heard.

Held : that the order nisi should be discharged.

English cases referred to:

(1) *Robson v. Premier Oil and Pipe Line Company, Limited;* (1915) 2 Ch. 124.

(2) *Tingley v. Muller;* (1917) 2 *Ch.* 144.

(3) *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial and Overseas);* (1954) *A.C.* 495.

(4) *Ertel Bieber and Company v. Rio Tinto Company, Limited; Dynamit Actien-Gesellschaft v. same; Vereinigte Koenigs and Laurahuette Actien-Gesellschaft fuer Bergbau und Huettenbe-trieb v. same;* (1918) *A.C.* 260.

(5) *Joyce v. Director of Public Prosecutions;* (1946) *A.C.* 347.

(6) *Schering, Limited v. Stockholms Enskilda Bank Aktiebolag and Others;* (1946) *A.C.* 219.

(7) *Hangkam Kwingtong Woo v. Liu Lan Fong alias Liu Ah Lan:* (1951) *A.C.* 707.

Sharf for the petitioner.

No appearance for the first respondent.

Koussa and *Margarian* for the second respondent.

Bar-Or, Deputy State Attorney, for the Attorney-General.

GOITEIN J. giving the judgment of the court, and after stating the facts as set out in the headnote, continued: The petitioner based his case on three main grounds:

1) The religious court which gave judgment does not bear the same name as the tribunal mentioned in the Palestine (Amendment) Order in Council, 1939;

2) the three judges who composed the Court of Appeal were not members of the religious community to which the parties belonged;

3) the Patriarch who appointed the members of the Court of Appeal resides in Lebanon and is therefore considered as an enemy. By the Law of Israel, therefore, he may not appoint judges to sit in Israel.

The arguments of the second respondent in reply to these contentions may be summarized as follows:

1) The community uses several names but there is only one Melkite Community and the court which sat in the present case is the court of that community;

2) according to the regulations of the community, Catholics who are not members of the Melkite community may be appointed as judges of the Appellate Court;

3) the Patriarch is not an enemy. The State of Israel raises no objection to his activities as Head of the Melkite Church. The State of Israel permits his representative in Israel, Bishop Hakim, to cross to Lebanon in order to meet the Patriarch.

We shall deal with the petitioner's three submissions in the order set out above. As to the first submission:

Article 51 of the Palestine Order in Council of 1952, prior to its amendment, read: "Subject to the provisions of Articles 64-67 inclusive, jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order." The words "established and exercising jurisdiction at the date of this Order" were deleted by the amendment of 1939 which also inserted a list of nine Christian communities, and the Jewish community, as follows:

The Eastern (Orthodox) Community.
The Latin (Catholic) Community.
The Gregorian Armenian Community.
The Syrian (Catholic) Community.
The Armenian (Catholic) Community.
The Chaldean (Uniate) Community.
The Jewish Community.
The Greek Catholic Melkite Community.
The Maronite Community.
The Syrian Orthodox Community.

From this list it is clear that there is only one Melkite community and there is no other community the name of which at all resembles the Greek Catholic Melkite community.

The judgment of the Court of Appeal was issued on the Court's note paper. The heading in Hebrew read: "The Religious Court of the Catholic Community". In the Hebrew name the word "Melkite" is missing. But immediately following the Hebrew name appears the English title "Catholic Melkite Religious Court", and above those words a heading in Arabic which may be translated "The Religious Court of the Catholic Melkite Community". Also, on the seal of the court affixed to the various documents appears the phrase in English "Catholic Melkite Religious Court of Appeal".

We find nothing in the Order in Council which makes it necessary for the religious courts to make use of any particular name. The correct way of formulating the question, therefore, is: Was the religious court which tried the dispute between a husband and a wife, members of the Greek Catholic Melkite community, the religious court of the Greek Catholic Melkite community? We have no hesitation in saying that the court competent under the Order in Council to deal with cases between members of that community sat in the case before us, and furthermore that that court is the only court having jurisdiction to deal with matters of personal status of members of that community. Consequently, the petitioner's argument that the first respondent should refrain from executing the judgment of the religious court of the Greek Catholic Melkite Community on account of some inaccuracy (if it really exists) appearing in the title of the court on the papers, is unsubstantiated, and we do not have to rely upon the affidavit of Mr. Koussa to the effect that the judgment in fact emanated from the court of that community.

As to the petitioner's second contention, the answer is found in the regulations, in the Arabic language, brought to our attention by counsel for the second respondent. The regulations were printed in Lebanon and are entitled "Lettre Apostolique, Donnee Motu Proprio par Sa Saintete le Pape Pie XII Glorieusement Regnant - Les Proces Pour l'Eglise Orientale" - (authorised translations by the Papal Committee for the Code of Canon Law for the Orient). Regulation 71 of those Regulations reads: "The judges and officials mentioned in Regulations 38 et seq. may be chosen also from persons who are members of different communities". From the evidence of Mr. Koussa, who is appearing for the second

respondent, and who is also the Legal Adviser of the Greek Catholic Melkite Community, it appears that this Regulation is also applicable to the Appellate Tribunal which sat in this case.

Counsel for the petitioner, in making this submission, did not direct our attention to any law or regulation concerning the constitution of a Christian Ecclesiastical Court. There is no indication in the Order in Council which might be taken as forbidding or rendering incompetent a court some of whose members belong to another community.

We must remember that the Melkite Community is one of the Catholic Communities at the head of which is the Pope, resident in the Vatican. We do not therefore see anything wrong in the composition of the court if, in the case before us, there sat Catholic judges belonging to another community. It follows that the first respondent was right in refusing to entertain this objection made by the petitioner to the execution of the judgment of the Court of Appeal of the Melkite community.

The third, and the most interesting, submission put forward by the petitioner, relates to the fact that the appointment of the judges who constituted the Appellate Tribunal was made by the Melkite Patriarch whose residence is in Lebanon. If I understood him correctly, counsel for the petitioner bases his submission on the following propositions:

a) Lebanon is in a state of war with Israel or at least is not in a state of peace with her;

b) every person who resides in Lebanon is to be regarded as an enemy with whom all intercourse and contacts are prohibited ;

c) the Melkite Patriarch resides in Lebanon and is, therefore, an enemy and as such cannot appoint judges to determine any matter, religious or secular, in Israel ;

d) in consequence, the judges who sat in the present appeal, by virtue of an appointment made by the Patriarch in Lebanon, gave a judgment contrary to the law of Israel, and the first respondent, therefore, should refuse to execute it.

Counsel for the second respondent stressed that most of these submissions were political rather than legal. He did not reply to them seriatim but he did argue that they were all based on an incorrect supposition of fact, namely; that the Government of Israel does not permit contacts or intercourse with the Patriarch in Lebanon. The opposite is true. The Government of Israel permits Monsignor Hakim to cross the Lebanese frontier in order to meet with the Patriarch and discuss with him religious questions of concern to the Melkite community.

It is a matter for regret that counsel for the petitioner did not develop his ideas fully but merely placed them before us. He quoted no authority in support of the supposed prohibition upon religious intercourse. Nevertheless the submission is a weighty one and we must deal with it.

As in many other spheres, so in its relations with its neighbours, the State of Israel is unique. It may not be possible to find any direct support for the submissions brought before us, either in Oppenheim or in any other book on Public International Law. But we have a special agreement with Lebanon which clearly defines the legal aspects of relations between the two countries, and we must therefore first examine that agreement very closely in order to determine accurately the legal nature of the relations subsisting between the two countries. Before doing so, let me stress that both Israel and Lebanon are members of the United Nations and are bound to conduct themselves in accordance with what is laid down in the Charter. For that reason, in order to find the answer to the question whether Israel is in a state of war with Lebanon, we have to look to both these international documents which have been published in the State Records of Israel.

Article 33, paragraph 1, of the Charter of the United Nations provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

Article 37, paragraph 1, states: "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means incidated in that Article, they shall refer it to the

Security Council," and according to Article 38 : "Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute."

The consequence of this is that States members of the United Nations cannot be in a state of war so long as they have made no effort to reach agreement with their enemy or so long as the Security Council has not reached a decision concerning the state of affairs which has come into existence between the two States.

So far as we are concerned there also exists, as I have already mentioned, a special and additional international obligation imposed upon Lebanon and Israel not to employ warlike methods to achieve a political objective desired by one or other of them. Article 1(1) of the Israel-Lebanese General Armistice Agreement of March 23, 1949, imposes the following obligations upon each of its parties:

> "The injunction of the Security Council against resort to military force in the settlement of the Palestine question shall henceforth be scrupulously respected by both Parties".

The subparagraph immediately following describes the situation so clearly that it is impossible to assume for one moment that a state of war exists between the two countries once they have signed the Agreement:

> "No aggressive action by the armed forces of either party shall be undertaken, planned or threatened against the people or the armed forces of the other".

And by subparagraph 3:

> "The right of each party to its security and freedom from fear of attack by the armed forces of the other shall be fully respected." Article 3 of the Agreement establishes a general armistice between the armed forces of the two parties, paragraph 3 of that Article clearly stating: "No

warlike act or act of hostility shall be conducted from territory controlled by one of the parties to this Agreement against the other party."

By Article 8 of the Agreement, "the present Agreement is not subject to ratification and shall come into force immediately upon being signed." It is also of interest to recall that by Article 8, paragraph 3, if the parties wish to revise the Agreement or any of its provisions or to suspend its application, other than Articles 1 and 3, they may do so by mutual consent. In short, the two countries bound themselves not to employ force one against the other. In addition to this it is a fact that the Agreement has now been in force for more than six years. It follows therefore that the underlying submission advanced by counsel for the petitioner that the two countries are in a state of war is completely unfounded. True, they may not yet have reached a state of peace, but those principles which forbid the maintenance of contacts with the enemy apply to a very different situation, namely, one of actual war.

Our situation might properly be described as one of termination of war. In Oppenheim's International Law (vol. II, 7th edition, 1952, at p. 596) it is said: "A war may be terminated in three different ways. 1) Belligerents may abstain from further acts of war, and glide into peaceful relations without expressly making peace through a special treaty..."

Furthermore when representatives of the Government of Egypt appear before the Security Council and argue that they are entitled to prevent Israel ships from passing through the Suez Canal on the ground that a state of war exists between Egypt and Israel, the representatives of Israel always give the same answer: there is no state of war between Israel and her neighbours.

The second proposition, too, is unfounded. If there is no specific law in Israel - and Mr. Sharf has not referred us to any such law - prohibiting all relations between an Israeli and a resident of Lebanon, we cannot decide that such relations are illegal.

In England, together with specific laws such as the Trading with the Enemy legislation, there exists also the common law which prohibits intercourse, not only of a

commercial character, in time of war between persons resident in England and enemy territory. In the eighteenth century the judges restricted this prohibition to commercial intercourse, but during the nineteenth they extended it to cover other forms of contact.

In the present century, when war has become global and all contact is considered dangerous, the prohibition has been broadened still further and in time of war almost every kind of contact between a person resident in enemy or enemy-occupied territory is regarded with suspicion. (See *Robson v. Premier Oil and Pipe line Co. Ltd.* (1).)

It is interesting to note that modern judgments stress that the prohibition today is to be found, in nearly every case, in statute law and not in the common law, and that all instances where the Crown has granted a licence, whether general or specific, are excluded from the scope of the prohibition.

The prohibition derives from the determination of the State to prevent activities likely to be of advantage to the enemy in time of war and the judges do not prohibit benefits likely to accrue to the enemy after the termination of the war. The following dictum of Lord Parker in *Tingley v. Muller* (2) (at p. 158), is well-known and is often cited in judgments:

> "The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes".

In the recent judgment of the House of Lords in *Arab Bank Ltd. v. Barclay's Bank* (3), it is said (at p. 498) :

> "Meanwhile the State of Israel had passed certain legislation... On May 19 it passed a Law and Administration Ordinance... By Article 11 of that Ordinance, it was provided that the law which existed in Palestine on May 14, 1948, would remain in force... Since the law which existed in Palestine on May 14, 1948, embraced the common law of England in regard to trading or communicating with the enemy, it

became illegal for anyone in Israel to have intercourse with anyone in enemy territory."

From the arguments of counsel in that case it appears that they agreed that the English common law concerning intercourse with the enemy in time of war also applies in Israel. But for that I would have thought, with all respect to the learned Law Lords, that they did not pay sufficient attention to Article 46 of the Palestine Order in Council which introduced into this country the English common law only in so far as local legislation does not extend or apply. But in Palestine (as now in Israel), legislation has been passed dealing with intercourse with the enemy, such as the Defence (Finance) Regulations, 1941, and the Trading with the Enemy Ordinance, 1939, According to this latter Ordinance, a person will be regarded as trading with the enemy if he has any "commercial, financial or other intercourse or dealings with or for the benefit of an enemy..." From this it follows that the prohibition against an Israeli trading with an enemy or maintaining intercourse with him derives not from the English common law but from the mandatory Ordinance. To what does the Ordinance refer? To commercial or financial intercourse but not to other types of intercourse with an "enemy" within the meaning of this legislation. The fact that the word "intercourse" is inserted between "commercial, financial" and "dealings" suggests that the legislator had in mind commercial intercourse or at least did not have in mind intercourse of a religious nature. It is perfectly true that in the English judgments, from the end of the eighteenth century up to the year 1954, many dicta can be found to the effect that intercourse is not restricted to commercial intercourse but extends to all intercourse (see the speech of Lord Dunedin in *Ertel Bieber and Co. v. Rio Tinto Co. Ltd.* (4), at p. 267), but there are no decisions concerned with intercourse other than financial, commercial or similar intercourse. I do not include trials for treason, for they are concerned with circumstances of a completely different character. (See *Joyce v. Director of Public Prosecutions* (5).)

Immediately after the termination of the Second World War the House of Lords dealt with the whole question of intercourse with the enemy in the leading case of *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag* (6), in which it relied on the *Ertel Bieber* case (4) of the First World War, and quoted the following remarks of Lord Dunedin :

> "From these cases I drew the conclusion that upon the ground of public policy the continued existence of contractual relations (note the words contractual relations) between subjects and..... persons voluntarily residing in the enemy country which (1) give opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy... is obnoxious and prohibited by our law".

Lord Thankerton in the *Schering* case (6), added (at p. 238):

> "The contracts which fall under this principle of public policy are clearly contracts the performance... of which after the outbreak of war may involve the consequences which the principle..... seeks to avoid, but it is equally clear that there are certain well established exceptions to the contracts thus broadly defined."

Can we deduce from these judgments - and as I have emphasized the judgments deal with only one type of intercourse, commercial intercourse - that the appointment of judges by the Patriarch is likely to open the way to the conveyance of information which may hurt the conduct of the war (when there is no war), or may tend to increase the strength and resources of the enemy? And the stress which the English judgments place upon the situation existing *flagrante bello* excludes completely from their contemplation the type of relation subsisting today between Israel and the Lebanon.

I have found nothing in the authorities - and counsel for the petitioner has not referred us to any such authority - to indicate that the prohibition applies to priests when concerned with religious matters. For example: there are in Israel a number of Jews who have immigrated from Egypt. Suppose an immigrant were to bring a case before the Rabbinical Courts in which the question arises when or whether he was married or whether he is somebody's heir - and the answers are to be found in the offices of the Rabbinate in Cairo - I should have thought that so long as there is no war between the two countries, the Chief Rabbi of Israel could legally apply to the Chief Rabbi of Cairo in order to obtain authoritative information required for the purposes of the case before the Rabbinical Court.

I would even go so far as to say that intercourse of this character is permitted so long as the law does not forbid it. If the statement made by the second respondent is true - and no one has denied it in this case - that Israel authorizes the journeys undertaken by Monsignor Hakim from Israel to Lebanon in order to confer there with the Melkite Patriarch, then you have here a licence on the part of the State and that, on all accounts, is sufficient to remove the prohibition on the intercourse between the inhabitants of enemy states.

Counsel for the petitioner desires to extend the English common law to unreasonable limits. In this connection I would recall the words of Lord Simonds in the case of *Woo v. Lan Fong* (7), at p. 720:

> "... the contentions of the appellant involve a grave extension of the common law, and that that extension means not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the rewriting of them in conditions in which their foundations are shaken."

The judges of the Religious Court perform their duties as independent judges and they do not have recourse to the Patriarch in connection with cases which they are trying. It follows that when they give judgment after having heard the facts and the arguments of the litigants before them, their judgment cannot be attacked simply on the ground that there might arise some doubt whether the Patriarch who appointed them is to be considered as an enemy because he resides in a country which is itself alleged to be enemy territory.

Mr. Koussa suggested another approach to the problem. He argued that although the Patriarch resides physically in Lebanon, spiritually he is to be considered as residing in each one of the countries over which his religious authority extends. I am not ready to accept this submission as made, but a similar line of argument may be accepted. If the State recognises the court of a religious community which possesses a well-known hierarchy outside its borders, then it must allow that hierarchy to perform its functions in accordance with the laws and customs of that community. If the State desires to prevent the Patriarch, who resides abroad, from dealing with the affairs of his community in Israel, then it must enact appropriate legislation.

Were there any substance in the arguments put forward by counsel for the petitioner, we should have expected that the Attorney-General, who defends the interests of the State, would have supported those arguments. The representative of the Attorney-General was invited to appear in court and, if he thought fit, oppose the execution of the judgment rendered by judges appointed by the Patriarch who is physically resident in Lebanon. The representative of the Attorney-General appeared before us on the return day and informed us that he had no interest in the case and we acceded to his request that he might withdraw. We see in the absence of any opposition on the part of the Attorney-General to the execution of the judgment the agreement of the State to what has been done, in this case, by the Patriarch who resides abroad.

Counsel for the petitioner attacked the judgment from another point of view, namely, that it provides for a portion of the maintenance to be met out of the inheritance which the petitioner may receive upon the death of his father. The petitioner argues that he has no wish to see his father's death and has no interest in the inheritance which will then be his. This court is unable to interfere in this or any other part of the judgment of the Religious Court since the matter of maintenance between husband and wife lies within the exclusive jurisdiction of the religious courts.

For these reasons the order nisi is discharged.

Order nisi discharged.

Judgment given on February 4, 1955