H.C.J. 195/64

THE SOUTHERN COMPANY LTD. AND MARBEK SLAUGHTER HOUSE LTD.

v.

CHIEF RABBINICAL COUNCIL AND TEL AVIV-YAFFO RELIGIOUS COUNCIL

In the Supreme Court sitting as the High Court of Justice
[September 27, 1964]
Before Olshan P., Agranat D.P., Landau J., Witkon J. and Manny J.

Administrative law - grant of Kashrut licence with extraneous conditions - status of Chief Rabbinical Council - enforcement of religious law - Courts Law, 1957, sec. 7(a) and (b)(2).

The *kashrut* of the petitioners' establishment was not disputed but the respondents imposed conditions on the grant of the license - in particular requiring the petitioners (l) not to market their kosher meat to butcher shops which did not hold a licence from the first respondent and (2) to market their non-kosher meat to non-Jewish butchers alone and on guarantee that the meat would not find its way into the Jewish market - which the petitioners claimed had nothing to do with the *kashrut* of their slaughterhouse and imposed a heavy financial burden on them, in addition to being discriminatory since the conditions were not imposed on other slaughterhouses. The licences of butcher shops selling the petitioners' meat were also withdrawn.

The first respondent. the body responsible for *kashrut* licences did not appear but informally intimated that the High Court of Justice had no jurisdiction to interfere with its halachic decisions and considerations.

Held The attitude of the first respondent suggested a claim to immunity from judicial process rather than a claim of lack of jurisdiction of the part of the High Court of Justice. The rule, however, was that all are equal before the law, unless the legislature has otherwise expressly provided, as in the case of the President of the State and, with qualifications, members of the Knesset. Whilst the legislature had assigned to the first respondent powers in certain areas of religious activity of an administrative nature, together

with the necessary funds out of the State's Budget, it had not found fit to grant it immunity from the operation of the Courts Law. Nor could the High Court, acting as it does under that Law, grant immunity and thereby bar access to aggrieved citizens. The first respondent also was not a judicial tribunal to which the High Court's jurisdiction did not extend. Accordingly the statutory powers of judicial review, vested in the High Court were exercisable vis-a-vis the first respondent to the extent that it derived its authority from secular law and not withstanding that it is subject to the religious law appertaining to the matters with which it deals. The High Court will not prevent the first respondent from applying religious law, or issue *kashrut* licences in its place, or even intervene in disputes as to the interpretation of religious law.

These matters did not arise in the present case and the sole issue was whether the first respondent had been discriminatory and acted *ultra vires* in denying the petitioners a licence unless they undertook to abide by the conditions sought to be imposed on them. In the absence of any defence,. the allegations of the petitioners were *prima facie* sustainable.

The first respondent's powers of ensuring *kashrut* for the observant did not include powers to enforce it against the non-observant. The two conditions mentioned above seemed to dictate to whom the petitioners might sell their meat, and failing any explanation it was difficult to discern any connection between these conditions and the *kashrut* of the meat. which was not in dispute. The imposition of these conditions was therefore *ultra vires*.

Israel case referred to:

(1) H.C. 65/51 - *Jabotinsky and Cook v. Weizmann* (1951) 5 P.D. 801; I S.J. 75.

G. *Hausner,* H. *Goshen* and *A. Shmaltz* for the petitioners.
Y. Pribus for the second respondent.
Attorney-General (M. Ben Zeev), Z. *Terlo* and *M. Cheshin for* the Attorney-General.

The first respondent did not appear.

OLSHAN P. On 11 August 1964 we announced out decision as follows:

> "This court has jurisdiction to deal with the case. We accede to the request of the Attorney-General and postpone the hearing of the application to 1 September 1964:"

These are the reasons, publication of which was postponed because of the vacation.

On 14 July 1964 an order *nisi* was issued directed to the Chief Rabbinical Council, the first respondent, and the Religious Council of Tel Aviv-Jaffa, the second respondent, ordering them to show cause "why the first respondent should not give instructions for the supervision of *Kashrut* (ritual lawfulness) in the slaughterhouse of the petitioner in Kiryat Malachi, subject only to the conditions connected to matters of *Kashrut* in the same slaughterhouse"; and against the second respondent, "why it should not market meat slaughtered in the said slaughterhouse in the Tel Aviv-Jaffa area on instructions only given to it by the first respondent aforesaid, and why the second respondent should not be prevented from withdrawing the licences and approvals from the butcher shops in the Tel Aviv-Jaffa area which sell *kasher* meat slaughtered in the above slaughterhouse in accordance with the instructions given to it by the first respondent aforesaid".

The order *nisi* was granted on the basis of the petitioners' complaints contained in their application to some of which we will refer.

It is by virtue of the "Jewish Community Rules", even before the establishment of the State, and by virtue of legislation of the Knesset (Budget Laws), and the Jewish Religious Services Budgets Law, 1949, and the regulations made thereunder, that the respondent institutions exist, and the control of *Kashrut* and the granting of *Kashrut* certificates come within their authority.

The petitioners applied to the respondents for a *Kashrut* licence to enable them to market meat slaughtered by them in the said slaughterhouse as meat recognised by the Rabbinate as *Kasher* meat.

In the negotiations with the respondents the petitioners were not confronted with any argument that the slaughtering in their slaughtering house was defective from the point of view of Kashrut.

The respondents, however, put different conditions as conditions precedent to the issue of a *Kashrut* certificate as requested.

The petitioners argue that these conditions have no connection whatsoever with matters of *Halachah,* that putting these requirements as a condition to the granting of the requested Kashrut licence is ultra *vires* and that the respondents refuse their application for peripheral considerations which have no relevance to the question whether the meat marketed by the second petitioner is *Kasher or* not; that is to say, because of considerations relating to matters not within the respondents' authority such as economic and monetary matters and the like.

The second petitioner has declared that it cannot agree to some of the above conditions but is prepared to abide by all the conditions imposed by the Rabbinate on other slaughterhouses in Israel, and that all discrimination directed against it in this respect is invalid.

Among the conditions indicated by the petitioners we will mention two:

(a) that meat slaughtered in the petitioners' slaughterhouse should be marketed only to *Kosher* butcher shops, that is, butcher shops whose owners have *Kashrut* certificates from the Rabbinate, and that it is forbidden to market it to the owner of a butcher shop who does not hold a Kashrut certificate from the Rabbinate;

(b) that the petitioners may not market those parts of the meat remaining after slaughtering, which are presumed to be *trefah* (forbidden), without the consent of the local representative of the Rabbinate, and that the petitioners must undertake not to deliver or market in any form whatsoever this *trefah* meat, except to non-Jewish merchants (or non-Jewish butcher shops), and then only upon receipt of secure financial guarantees from the buyers, such as bank guarantees, to back their undertaking that parts of such meat will not find their way, directly or indirectly, into the Jewish market.

These two conditions are cited only by way of example, because the application spreads over twelve pages, to which many documents are attached, in which the above

conditions and other conditions are to be found which might impose upon the petitioners a very heavy financial burden, and also conditions, compliance with which might bring the petitioners into conflict with various secular laws - so the petitioners argue.

Copies of the application with the documents attached were served on the respondents. The second respondent submitted an answer on the merits, indicating that it is not concerned with the issue of *Kashrut* certificates and that in this respect it is subordinate to the District Rabbinate of Tel Aviv; whilst the respected Chief Rabbinical Council submitted no answer but Rabbi A. Gottlieb, its secretary, sent a letter in which he notified the Court that the Chief Rabbinate had adopted three resolutions, of which the third is, "It is not within the competence of the High Court of Justice to interfere with halachic considerations or in halachic judgments issued by the Chief Rabbinate Council."

The first resolution said that in all matters relating to *halachic* judgment "the considerations of the Chief Rabbinical Council are only halachic and in this respect subordinate to the laws of the Torah and other instructions as to what and how to decide cannot be accepted."

The second resolution said, "The Chief Rabbinical Council rules according to halachic considerations when and how a *Kashrut* certificate will be granted on its instructions, and from these considerations it cannot budge".

It should be made clear that in the mere failure by the first respondent to file an affidavit in answer to the application and in its non-appearance no contempt of court has occurred. In all cases of mandamus, the respondent is free to reply or not to reply to the application. At the conclusion of every order *nisi* it is expressly stated, "The respondents must submit their replies, *if they so desire,* within ... days ...". Furthermore, when the respondent does not reply and does not appear (as a party) the order *nisi* does not automatically become an order absolute. But a respondent who does not react does not, thereby, refute the factual and legal arguments of the petitioner. The respondent takes a very serious risk as to the facts proved by the petitioner without contradiction or refutation.

Furthermore, it *is the right of every respondent* to raise preliminary objections to the jurisdiction of the High Court of Justice claiming that the subject matter of the petitioner's application is not within the competence of this Court, and he may raise the point that the High Court must refrain from exercising its authority. It can also happen that such a respondent, in raising this kind of plea, is doing a service to the Court and the judicial system.

Just as this Court would fail in its duty to the State and its citizens, were it to refuse to exercise its jurisdiction, when the matter is according to law within its jurisdiction and justice demands its intervention, so the Court will not be eager and will fear assuming powers which the law has not granted it, since otherwise it would prejudice the principle of the rule of law. From this point of view, a respondent who raises a *convincing* argument that the Court actually has no jurisdiction in a given matter also fulfils a civic duty.

As to the above mentioned letter of the secretary (even if we regard it as an answer), it should be noted that it does not deal with the petitioners' complaints that in this matter there was no refusal from the Chief Rabbinical Council as a result of halachic considerations, complaints, according to the petitioners, supported by evidence relating to certain conditions (amongst others) imposed on them. In the first and second resolutions, only "halachic judgments" of the Chief Rabbinical Council generally were mentioned relating to the manner in which it reaches these and nothing whatsoever was said about the petitioners' argument that in the present matter it diverged from this path and therefore acted outside its authority. In this argument of the petitioners we cannot find any denial of the jurisdiction of the first respondent to act according to the *Halachah. The complaint, as we have said, is that* it *acted outside its jurisdiction.*

In other words, this letter means, at the most, that the first respondent always bases itself on the *Halachah and* that as far as concerns the petitioners' complaint is not even obliged to deny it nor are the petitioners entitled to require this court to go into the matter. It follows from the third resolution of the first respondent, therefore, that the High Court has no jurisdiction either to interfere in halachic rules or to deal with any petitioner who charges that it acted not in accordance with halachic considerations, and that it has no jurisdiction to ask the first respondent whether the charge is true and request explanations,

because in its view it is enough that it, the first respondent, states publicly that it always directs its steps solely according to the halachic rules.

All this means that the petitioners may not apply to this Court, despite section 7 of the Courts Law, since the first respondent is above that Law, and therefore is not obliged to reply either to the citizen or to the High Court before which the petitioners' complaint was brought and that the first respondent has the power to determine the scope of jurisdiction of the High Court in this respect.

Such an argument is in effect not an argument of lack of jurisdiction but a *quasi argument of* immunity *from the authority of the courts of this country.*

The rule in this country is that all are equal before the law, except where the legislator expressly provides otherwise.

The only institution which is immune from the courts is the President of the State and this is regulated by law. (As to the immunity of Members of the Knesset, that is limited and is also regulated by law.)

Before the said Law was enacted, including the provision as to the immunity of the President of the State, the question arose whether it is possible to issue an order *nisi* (of mandamus) against the President of the State. In *Jabotinsky and Cook v Weizmann* (1), this Court refused an order *nisi after intervention by the Attorney-General who claimed lack of jurisdiction.* The question was whether, in the light of section 11 of the Law and Administration Ordinance, the status of the President of the State is to be regarded like the status of the British Crown against which no orders issue. This Court did not accept the argument of the Attorney-General and held that as regards the immunity of the President of the State, the situation here is similar to that in the U.S.A. and not England.

An order *nisi* was refused not because of the immunity of the President but because the object of the petitioners' complaint there was purely political, relating to the executive and parliamentary authorities. In any event there *the matter was not connected with a citizen who complained that the respondent was violating his rights* or denying them. The matter

was, as I have said, political and in point of the principle, then prevailing and now found in section 7(a) of the Courts Law, the Court did not find that justice demanded its interference.

It is true that the Rabbinical Council was given a certain area of activity by the State regarding religious services relating to Jews, and in this area it was granted certain powers. But the legislator did not think it right to grant immunity to this respected institution, exempting it from the applicability of the Courts Law, and certainly the High Court which is also subordinate to the Law cannot assume jurisdiction (which was never given to it) to grant it such immunity and bolt the doors of this Court to a citizen.

In order to remove what was called by the learned Attorney-General a misunderstanding, one must pause to consider the terms "judgments" and "halachic judgments" mentioned in the letter of the first respondent's secretary.

The source of the jurisdiction of the High Court is found in the various subsections of section 7 of the Courts Law, 1957. The jurisdiction of the High Court relating especially to religious tribunals springs from section 7(b)(4) which speaks of *religious tribunals,* recognised as such by the law, including the rabbinical courts, the decisions of which are called and are also regarded as "judgments". Institutions to which the Law has not granted a status of courts are not included in section 7(b)(4), for instance, the Chief Rabbinical Council, is not a tribunal in this sense, even if in dealing with the matters under its jurisdiction, it acts according to halachic principles and calls its decision "halachic judgments". From the point of view of the Courts Law the Chief Rabbinical Council is a body recognised by the law of the State "as exercising public functions by virtue of law" (section 7(b)(2) of the Courts Law).

Just as a rabbinical court whose jurisdiction is determined by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 comes within section 7(b)(4), so also the Chief Rabbinical Council - an authority recognised by the State in that certain administrative powers relating to different religious services are vested in it - comes as such within section 7(b)(2) of the Courts Law. The fact that the matters are dealt with by the Chief Rabbinical Council on the basis of "halachic judgments" can be of great importance regarding the

merits of a dispute brought before the High Court but it has no bearing at all on the jurisdiction of the High Court to hear and examine a citizen's complaint against a public authority on the ground that it discriminates between him and others without legal basis or that it has acted outside the scope of its jurisdiction and other like grounds.

In such a case the High Court must open its doors to the citizen who complains, give ear to his complaint and grant him relief if he proves that his complaint is well-founded in law. It is that which the High Court has been ordered to do by the legislator in section 7(a) of the Courts Law:

> "The Supreme Court sitting as a High Court of Justice shall deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of *any other court or tribunal"* (emphasis added).

And the beginning of section 7(b) reads as follows:

> "Without prejudice to the generality of the provisions of subsection (a), the Supreme Court sitting as a High Court of Justice shall be competent...
>
> (2) to order State authorities, local authorities and officials of State authorities or local authorities, and such other bodies and individuals as exercise any public functions by virtue of law, to do or refrain from doing any act in the lawful exercise of their functions...".

By virtue of this provision the High Court has issued and continues to issue orders against every institution or person who exercises a function recognised by the law, such as Government Ministers, including the Prime Minister, various State institutions and even the Chief Rabbis.

In order to avoid another misunderstanding it should be noted that the High Court reacts and demands explanations only from a body that acts as a body recognised by the

(secular) law in using the powers or authority granted to it by law, from a body which in *its actions* relies on its recognition by the secular legislator for the purpose thereof. As has been said, the fact that such a body also generally relies on "halachic judgments" does not detract from the jurisdiction of the High Court.

The supremacy of section 7(a) and section 7(b)(2) of the Courts Law governs every public officer or public authority or public body recognised by the State, and to the extent that they derive their powers or authority from the legislator (here called the secular legislator). To the extent that the Chief Rabbinical Council exercises such powers and authority - notwithstanding that it applies the halachic rules to the merits of the matters brought before it - the section rules so long as the secular legislator has not provided otherwise.

This does not mean that this Court will conclude that the first respondent must not act according to the halachic rules in a matter within its jurisdiction, or that this Court wilI assume jurisdiction to issue *Kashrut* certificates in place of the respondents, or one of them - we were not requested to do that even by the petitioners.

Furthermore, had the petitioners' application been based on the argument that there are serious differences of opinion between the parties as to the interpretation of a certain Halachah and had the petitioners wanted to impose their own interpretation on the respondents - it is doubtful if they would have even obtained an order nisi.

But this is not the case here. The petitioners' complaint is that the respondents have exceeded their jurisdiction in using considerations which have no connection to the *Halachah* relating to the granting of *Kashrut* certificates for meat slaughtered in their slaughterhouse. (The petitioners have never denied the need that the slaughtering should be under rabbinical control.)

Let it be clear that in dealing with the question of our jurisdiction we must look at the matter from the point of view of the secular legislator. We must deal with it on the presumption that under the Jewish Community Rules the first respondent has the power and authority to control *Kashrut* in order to issue *Kashrut* certificates as petitioners' counsel

proved at least prima facie. At this stage we do not have to take any position on this subject, because it will have to be dealt with when the merits of the case are considered, if at all.

Suppose that the Chief Rabbinate did not exist as a recognised institution, financing itself out of the budget of the State and receiving official State approval for its activity in a certain area of life - either by grant of jurisdiction or by recognition of its jurisdiction - but that the situation is that it exists as a result of internal organisation and that each Rabbi can issue *Kashrut* certificates for meat. Suppose that the petitioners are interested in receiving a certificate precisely from the Chief Rabbinate which refuses to grant it except on the two above conditions: not to sell *Kasher* meat to a Jew who does not eat *Kasher or* to an owner of a butcher shop who does not hold a *Kashrut* certificate, and not to sell the *trefah* parts even to a non-Jew, unless he gives a sure guarantee that they will not reach Jews, either directly or indirectly. In such a case even the Chief Rabbinate would have openly stated the reasons for its refusal, that it is interested that all Jews in the country without exception should eat *Kasher* meat and that it thinks that to avoid the possibility of Jewish owners of butcher shops, who do not hold *Kashrut* certificates, buying Kasher meat (when there is a shortage of meat) would exert pressure and be an efficient means for imposing the system of *Kashrut* on the entire Jewish public in the country. In such an event one would have thought that it would be permitted so to act, because the petitioners' application to the Chief Rabbinate would have been regarded as if made to an institution, under the status and moral and religious standard of which they sought protection. 1 think that the Chief Rabbinate would have then said to the petitioners, "if you wish, in order to market your *Kasher* meat to enjoy our protection and religious and moral influence, you must accept the above conditions in order to help us enforce *Kashrut* on the Jewish public". In such a hypothetical case it would not have been possible to complain about the non-official Chief Rabbinate, because in its intention to enforce a regime of Kashrut it uses pressure unrelated to the jurisdiction granted to it by the State. Certainly in such a case, it would not have been a matter for the High Court. But the situation here is different. Why was an order nisi issued? The petitioners pointed out that in pursuance of secular law they need a *Kashrut* certificate from the Chief Rabbinate and the local Religious Council, because jurisdiction in matters of *Kashrut* have been granted by the State to these and not to others. Because petitioners' counsel in his application referred to various enactments, one would have presumed that it

was so unless the argument is refuted by the respondents when the matter is dealt with on the merits.

When the petitioners complained in their application about the various conditions that the first respondent intended to force on them, among them the two conditions abovementioned, then at least *prima facie* - so long as the complaint has not been refuted - it seems that the petitioners' complaint is well-founded, at least to an extent which entitles the petitioners - and imposes on this Court the obligation - to ask for an explanation from the respondents and to test the petitioners' complaint by the legal principles and rules which the (secular) law requires, and of course in the light of the respondents' explanations, if submitted.

What is *prima facie* the substance of the petitioners' complaint which obliged this court to hear the petitioners' application?

The Rabbinate was given authority by the State to control *Kashrut for Jews interested in Kashrut,* so that those who observe *Kashrut* at home or in living generally will know that the meat sold to them at a butcher shop of which the owner holds a *Kashrut* certificate from the Rabbinate is really *Kasher.* But this authority is not aimed at enforcing a regime of Kashrut of Jews who are not interested in it.

Prima facie, at least, the two abovementioned conditions seem to be necessary in order to dictate to the petitioners to whom they should sell their product and to whom they should not. And in the absence of any explanation it *is difficult co see the connection between this and the question whether the petitioners' meat is Kasher.*

No argument was heard that the conditions, about which the petitioners complained, have any connection with the carrying out of *Kasher* slaughtering in the petitioners' slaughterhouse or to their marketing of *Kasher* meat; that is to say that if the petitioners will sell *Kasher* meat to non-Jews or to a Jew who wants to buy it because its quality is *better and not because* it *is Kasher,* then *all the meat* of the petitioners will be turned into *Trefah* meat.

It seems therefore that at least *prima facie,* what emerges from the petitioners' complaint is that it is not because of any defect in the *Kashrut of* their meat that they are refused a *Kashrut* certificate, but in order to use the petitioners as a means to enforce *Kashrut* on Jews who do not observe *Kashrut* or so that all owners of Jewish butcher shops will be forced to have *Kashrut* certificates from the Rabbinate. So long as it was not argued and shown that according to the *Halachah,* without imposing the conditions, the petitioners' meat cannot be regarded as *Kasher,* there is no doubt that the petitioners' demand to test their complaint that the respondents acted beyond their powers, is based in law. Such an argument was not heard or even hinted at.

It is clear from the foregoing that our decision as aforesaid takes up no position on the merits of the case; neither as to the respondents' jurisdiction nor as to excess of jurisdiction, as the petitioners argue.

The foregoing reasons serve only to explain this Court's approach to a hearing of the petitioners' application on its merits.

Judgment given on September 27, 1964.