**HCJ 114/78**
**Motion 451/78, 510/78**

**Muhammad Said Burkan**

**VS**

1. **The Minister of Finance**

2. **The Corporation for the Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem Ltd.**

3. **The Minister of Housing**

**At the Supreme Court Sitting as the High Court of Justice**

**(26 February 1978, 14 June 1978, 4 July 1978)**

**Before the Justices H. Cohen, Shamgar, Bechor**

Opposition to an *Order Nisi* dated 19 Adar A 5738 (26 February 1978). The *Order Nisi* was revoked.

A. Lenman – for the petitioner;
Ms. D. Beinisch, Director of the HCJ Department at the State Attorney's Office – for the respondents 1, 3;
M. Ben Zeev – for the respondent 2

## Judgment

Justice C. Cohen: The respondent is a government corporation, and as its name suggests, its function is to promote the reconstruction and development of the Jewish Quarter in the Old City of Jerusalem. It has built new houses on the ruins of the City, and is willing to lease the apartments in these houses for residence. The petitioner herein sought to rent one of these apartments for the residence of himself and his family, but was denied by the respondent.

This court granted him an *Order Nisi*, under which the respondent was required to show cause why it will not lease to him one of the apartments for which it issued an "offer of apartments to the public" in February 1978.

2. The said "offer of apartments to the public" determines that only one of the following may "participate in the offer": either an Israeli citizen who is a resident thereof and has served in the IDF (or has been exempted from IDF service, or has served in one of the Jewish organizations prior to 14 May 1948), or a new immigrant who is an Israeli resident.

   The petitioner admits that he is neither an Israeli citizen, nor has served in the IDF, nor is a new immigrant: He is a Jordanian citizen and claims to have always been a resident of the Old City of Jerusalem. Thus, this court granted him an *Order Nisi* that requires the respondents to show cause why the provision restricting the offer of apartments to Israeli citizens and new immigrants only, should not be cancelled.

3. Until the respondent began presenting its reasons before us, it repeated an argument that it has already used in previous proceedings in this court, (HCJ 187/ 71, (1) and HCJ 275/74 – unreported), namely that we should not hear this petition, as the respondent does not fulfill public functions by law, as stated in section 7(b) of the Courts Law, and is therefore subject only to the jurisdiction of the regular courts, as distinguished from the High Court of Justice.

   Already in my Judgment in HCJ 262/62, (2), I distinguished in this matter between section 7(a) and section 7(b) of the Courts Law, and expressed my opinion that the this court has jurisdiction pursuant to section 7(a) also over respondents that are not bodies fulfilling public function by law. I have not changed my opinion since then, and in any event this court has meanwhile endorsed my opinion (HCJ 160/72, (3)).

   However, as is well known, our jurisdiction pursuant to section 7(a) is conditioned upon two: that no other court has jurisdiction over the matter; and that justice calls for the granting of relief. To my mind Mr. Ben Zeev, who appeared before us for the respondent, is correct in his argument that another court has jurisdiction in this matter: The "offer of apartments to the public" issued by the respondent is no more than an invitation to the public to submit a proposal (within the meaning thereof in section 2 of the Contracts Law (General Part), 5733-1973) to the respondent; and while no contractual relationship was yet created between the bidder and the respondent by the submission of the proposal, in any event both the offer of the respondent and the proposal of the bidder constitute "negotiations for the making of a contract", within the meaning thereof in section 12 of the said law, and if indeed the terms of the respondent's offer lacked good faith or constituted improper conduct, the bidder could have sought declaratory relief at the competent court.

   However, after we took the time to hear the arguments and read the affidavits and documents of all of the parties, we have decided to render our opinion on the merits of the issue, if only to prevent further futile litigation in another court.

4. The petitioner's argument is that the apartment he desires was built on land belonging to his ancestors, that he and his father were living there since 1947, and that the house in which they lived had belonged to Muslims "from time immemorial" and "Jews" had "never lived there". It turns out that the said house

was transferred from Jews to Muslims during the bloody riots of 1938; and that already several years ago the petitioner and his family moved to live in a new house they had built for themselves in Beit Hanina.

For the purpose of deciding the material issues before us, I would attribute no significance to the petitioner's present or former place of residence: if he is entitled to submit a proposal even if he is not an Israeli citizen, his place of residence is irrelevant. But the petitioner's lies regarding his place of residence disqualify him from petitioning this court: He tried to make the impression as if the respondent had evicted himself, his wife and her small children, by the brute force of the execution office, from an apartment which they had occupied peacefully and quietly for ages and ages, and now after it has built at the same place a new apartment worthy and needed for their dwelling, it refuses out of arbitrariness and wrongful discrimination to return them thereto – while the fact (that emerges from between the lines of the petitioner's affidavit in motion 451/78) is that they had long since abandoned that apartment, leaving therein only a few of their belongings.

Moreover: contrary to the petitioner's allegation that in 1947 his father acquired part ownership in that house and since then he and his family have been living there, a letter has been submitted to us on behalf of the respondent, from the petitioner (and his father) to the Prime Minister and the Minister of Finance dated 16 June 1968, which states that they have been living in a rented apartment in that house for about 5 years, i.e. since 1963. This letter was mentioned in the petition but not attached thereto, and we have not received a reasonable explanation on its concealment from us.

It is an explicit biblical verse that one who swears falsely and lifts his soul to vanity is not among those who have clean hands and a pure heart, whom this court will assist.

5. The current petition was filed on 23 February 1978. It was preceded by an extensive public battle in the national and international media, and even the television deemed to address this matter and to stage the scene of the petitioner and his family's eviction from their apartment - the respondent claims - staged by the petitioner and the petitioner claims – staged by the television. I will assume for the benefit of the petitioner that he conducted this public battle in good faith and by legitimate means; and on this assumption I see no wrongdoing in the fact that before he came knocking on the gates of the court he tried to invoke public opinion in his matter, maybe even causing the respondents and the authorities to change their position.

   This is true before the filing of the petition: Once the petition was filed and the matter is pending judicial determination, approaching the media and mobilizing public opinion constitutes contempt of the court. We will not follow in the footsteps of the English common law and summon editors and journalists to court and try them under penal law: we are already accustomed to the American system that holds the view that the freedom of the press is equivalent to contempt of the court (see in this matter: C.K. Allen, Aspects of Justice (1958), P. 48, but a petitioner who seeks relief from this court, must observe silence out of court, lest

his approaching the media be interpreted as an expression of mistrust in the court - whether he has despaired in advance from the willingness or ability of the court to help him, or believes that the court may be impressed by publications in the press or by public opinion.

Lo and behold, an American newspaper dated 21 May 1978 was submitted to us on behalf of the respondent, containing an interview with the petitioner who told about his trial in "abundant detail and apparent delight", in the words of the interviewer; and not only that, he even handed the interviewer the documents and correspondence on which he is relying in his petition to this court. It is meaningless that the interviewer tried to express, if only in relative briefness, also the opposing position, and in any event, quality and contents of the article are irrelevant; what is decisive is that the petitioner deemed fit to use the media to claim his rights, while at the same time his petition was pending before us.

To my mind this is sufficient for us to dismiss the petition with prejudice.

That same published article also includes the name of Mr. Abraham Lenman, counsel for the petitioner, from whom too statements were made about this trial. *Prima facie*, this constitutes a breach of rule 16(4) of the Israel Bar Rules (Professional Ethics), 5726–1966, and the State Attorney should consider whether it would not be appropriate to file a complaint.

6. The main argument of the appellant [sic] is that the respondent is unlawfully and wrongfully discriminating between people (or between residents of the State) because of their religion or nationality, as it is willing to lease apartments to Jews and is not willing to lease apartments to Muslims.

Until I express what is on my mind on the merits of this argument, I will first say that it is not the petitioner who can raise such an argument in this court. From the evidence material before us it appears – and the petitioner does not deny – that he has stated that according to his own religion he is prohibited from selling land to Jews, while he is allowed to sell land to Muslims, and would not be prepared to breach the commandments of his religion in this regard. However you look at it, if the petitioner is allowed to discriminate between Muslims and Jews in respect of the sale of land, and even deems himself commanded to discriminate between them, how can he possibly be indignant towards another person who acts the same way and discriminates between Jews and Muslims in respect of the lease of land? Well I wonder! (Perhaps discrimination that is befitting of the Muslim religion is also befitting of the Jewish religion? See: Foreign Worship Mishna, A, 8, and Rambam, Akum Halachas and their respective laws J, 3-4).

And if you were to say that discrimination permissible to an ordinary citizen is still not permissible to a government corporation, I will reply that a citizen coming to this court seeking integrity must first practice integrity himself. He who claims in this court that such and such discrimination is wrongful, bears the burden of proving that he himself is clean of any hint of such discrimination. And he who bears the torch of wrongful discrimination for himself, it is said to him, people who live in glass houses shouldn’t throw stones.

7. I have not been convinced that the respondents' requirement, that the lessees of the apartments be Israeli citizens having served in the army, or new immigrants, constitutes discrimination on grounds of religion or nationality or any other wrongful discrimination.

   First of all, by definition “Israeli Citizen” includes a “non-Jew”, whether he be an Israeli Muslim, an Israeli Druze or an Israeli Christian. Mr. Ben Zeev’s statement before us that the intention was to include Jewish Citizens of Israel only stands in utter contrast to the simple interpretation of the language; and the judge does not have before him other than what his eyes see in writing. The restriction to citizens having served in the army is evidently due to plain security considerations.

   Second, it is not necessarily wrongful to discriminate between citizens and non-citizens in respect of enjoyment of the nation’s assets or other economic rights (see Article 2(3) of the International Covenant on Economic, Social and Cultural Rights that has been approved by the United Nations Assembly on 16 December 1966).

   Third, the need to reconstruct the Jewish Quarter of the Old City only arose because the Jordanian armies invaded it, drove out the Jews, plundered their property and demolished their homes. Naturally, the reconstruction is aimed at restoring the former glory of the Jewish settlement in the Old City, so that the Jews will once again, as in the past, have their own unique quarter, alongside the Muslim, Christian and Armenian quarters. There is no wrongful discrimination in distinguishing these quarters, each quarter and its congregation.

   And fourth, insofar as there is discrimination against Jordanian citizens who owe allegiance to the Jordanian King (as the petitioner before us), such discrimination appears to me to be justified and legitimate: We are grieving and protesting over what the Jordanians have done to us in the Old City, and we cannot be expected to open the gate wide to them to come back and settle, of all places, in the Jewish Quarter. Both security and political considerations explain and justify such discrimination.

8. The *Order Nisi* should be revoked and the petition dismissed with prejudice.

Justice Bechor: I concur with the judgment of my honorable colleague, Justice H. Cohen, subject to the following note: Regarding the jurisdiction of this court, I am not certain that the petitioner may receive his relief at another court. Had he filed his action at the district court according to Section 12 of the Contracts Law (General Part), 5733 – 1973, and would have proven his complaint, he could have gained compensation according to Section 12(b) of the Law, and yet he does not desire compensation at all, but only to receive an apartment in the Jewish quarter of the old city. Therefore, there was no avoiding deciding the material issue in this petition, which decision I see in my honorable colleague’s opinion on the merits, during the hearing of the answer, Adv. Ben Ze'ev clearly focused the issue on that the subject matter is the reconstruction of the Jewish quarter which was destroyed in our generation, the emphasis being on "reconstruction", and that in the circumstances of the case, what is meant is the reconstruction of the quarter as a Jewish quarter, and

therefore, in my opinion, the last two paragraphs in Section 7 of my honorable colleague's Judgment are the essence of this matter.

It is a sacred rule for us never to lend a hand to anything that harbors discrimination between people due to their religion or nationality. However, at the same time, when implementing this grand rule, we cannot ignore the reality and the situation in the field, and must make sure not to create discrimination of another kind, or in another direction, and not to harm the safety of human lives.

Justice Shamgar: 1. I agree with the opinion of my honorable colleague Justice H. Cohen.

2. The petitioner's learned counsel sought to establish the grounds of the petition on the existence of wrongful discrimination. Had there been any substance to his legal interpretation, this court would have granted the petitioner the relief he seeks, because the rule prohibiting discrimination between people on grounds of race, gender, nationality, congregation, country of origin, religion, opinion or social status, is a fundamental constitutional principle, which is integrated and woven into our fundamental legal concepts and constitutes an integral part thereof.

   However, the issue before us is not one of equality of the right to housing, as the petitioner it trying to present it, but rather of the right of the governmental authorities and the public corporations who aid them, to reconstruct the Jewish quarter in the old city of Jerusalem from its ruins.

3. In the opinion of researchers, the said quarter has existed in its current location or in its near surroundings – except for certain intervals which derived from the physical annihilation of the Jewish population in it, its expulsion from the city or the imposition of effective prohibitions to prevention its return – from the seventh century AD, and thereafter continuously, from the 13th century until it was destroyed to the ground after being conquered by the Jordanian army, following its invasion in 1948 west of the Jordan; however, since Hadrian (130 AD) tried to change its identity and Jerusalem's name to Aelia Capitolina, repeated attempts were made to keep the Jews away from their capital.

   There are grounds to the conjecture that residence in the old city has been divided into quarters according to congregation, each congregation with its own quarter, since the beginning of the 11th century, although some quarters took shape earlier (for example, the Armenian quarter and the Jewish quarter); there have also been periods in which there was another Jewish quarter in the north-eastern part of the city (Juiverie) and many of those who lived there during the crusader conquest in 1099, were also its victims.

   In the early 19th century (1836) approx. 3,250 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 general population of 22,000 in the old city, but due to the building of Jerusalem outside the walls, and thereafter no little due to the bloody riots that occurred in Israel in the years 1920-1921, 1929 and 1936-1939, the Jews were pushed out of parts of the Jewish quarter, to the point of complete expulsion after the conquering of the old city in 1948. Incidentally, there is currently no longer

any dispute that also the house contemplated in this petition, served at least until 1938 as a Jewish residence.

Once the old city was released in the six-day war, the government decided to restore its past glory, i.e., to reconstruct the quarter, build it up from its ruins and inhabit it with a Jewish population, so that it may once again be integrated in the mosaic of the other congregational quarters in the old city, as was the case over the many centuries before the Jewish population was expelled by the Jordanians in 1948; as stated by Justice Vitkon in HCJ 275/74 (Bass Vs. the Minister of Finance et al. – unreported):

> "The government has decided to reconstruct the quarter and populate it with a Jewish community, so it may be a place of reflection of its historical, national and religious significance, unequalled in Israel and worldwide".

4. The restoration of a historical and national site as aforesaid, is a public goal, for the fulfillment of which it is permitted to expropriate private property; and there is no fault therein, so long as it is done according to the law and the proceedings set forth therein, and against appropriate compensation or provision of alternative housing."

All of these were fulfilled in the case at bar, since the petitioner was offered alternative apartments in or outside of the old city or monetary compensation, at his choice; but he refused to accept them, because he preferred the command of the Muslim religious sage, with whom he consulted, who deemed it a type of sale of land to a Jew, which is forbidden, according to his interpretation, by the principles of Islam. To the petitioner, who is a citizen of Jordan, whose constitution determines Islam as the religion of the State (Section 2 of the Constitution of Jordan), such a prohibition probably carries special weight.

Since this is a unique set of facts, i.e. the reconstruction of a historic national site in name and substance – while maintaining its character and identity – and to a large extent while restoring it, it is no wonder that the respondent did not see fit to sell the petitioner an apartment in the quarter, and it was entitled to do so.

Moreover, in light of the nature of the historical quarter, one should wonder that the petitioner deemed fit to bid in the tender and make his demands, when the affiliation to the quarter, of his own and of his family who are from Hebron by origin, derived from paying rent for housing since 1947 at a house of the quarter, one quarter ownership of which was purchased by the family in the years 1947 and 1948 and which, until 1938, was occupied by Jews as aforesaid.

On a side note, had the petitioner's request been granted and the aim of reconstructing the area as a Jewish quarter been abandoned, it is impossible to see, *prima facie¸* how it would have been possible to refuse any similar request by anyone else.

There is no escaping the conclusion that there is also truth to the respondent's concerns that there is more than meets the eye in the case, and that the petitioner's refusal to accept alternative housing or payment of proper monetary

compensation, as well as his concealing of the fact that already since 1973 he has actually resided in a new eight-room house, which he has built for himself and his family in Beit Hanina, are an indication of his principles, and that he is insisting upon his intentions notwithstanding all of the aforesaid, because he finds fault with the reconstruction of the Jewish quarter in the old city, as have many and mighty who have tried, from time to time, mostly without much success, to prevent the residence of Jews in Jerusalem.

This is, probably, also why the petitioner has received very extensive support from an association, some of whose activists believe that the people of Israel are no more, and that they have been replaced by the Christian church.

("The new testament indeed sees the church as replacing the Nation of Israel";

Quoted from issue no. 93, of Quaker Life, September 1976, which was filed as evidence in Motion 451/78).

It is everyone's right to adhere undisturbed to such thoughts and beliefs as presented above, and even to preach the same, either here or elsewhere; but he cannot complain if the authorities of the State of Israel are not willing to adopt such approach and act according to the self-undoing and self-disparaging conclusions entailed thereby.

In conclusion, as indicated by the aforesaid, the petitioner's reasons, in essence and substance, however cloaked – are not rooted in the prohibition on wrongful personal discrimination, but revolve, rather, around the question of whether it is permitted to reconstruct the Jewish quarter in its name and essence, or whether the governmental authorities are now required to obscure and assimilate the identifying features of the said quarter.

5. Some of the false factual arguments raised by the petitioner have been listed in the Judgment of my honorable colleague, Justice H. Cohen, and I shall add no more.

   I shall only note that the manner in which the petitioner has distorted the facts, in describing his treatment by the authorities in general, and by the respondent in particular, is regrettable.

6. The arguments raised before us included, inter alia, reference to a judgment by the Supreme Court of the United States regarding the prohibition on segregation in housing and education. However, it is irrelevant to the special circumstances described above (on their direction, see, *inter alia*, the statements of the court in re Yick Wo. V. Hopkins 118 U.S. 356, 373-4, [4]). It shall be noted here in general, that an automatic transfer from one site to another, of the whole variety of modes and methods in which the rules of equality have been applied, with no consideration for the special conditions and circumstances, is to a large extent misleading: For example, the compulsory integration of students in the USA, which forces the English language and the Anglo-Saxon culture on every student, which is considered there the pinnacle of equality, could be deemed here as forced assimilation, if an Arab student were therefor forced to give up a separate school in which studies are conducted in his own language and according to his own culture; and there have been special circumstances in which this court sanctioned

arrangements which prohibited Jews from praying on the Temple Mount, without deeming the same, due to such special circumstances, as a prohibited violation of the freedom of religion and the freedom of religious worship.

It follows also that anyone seeking to apply, without distinction, rules from the branch of housing to the reconstruction of a unique historical quarter, is confusing the issues and misunderstands the constitutional principles on which he relies.

Decided, to revoke the *Order Nisi* and to dismiss the petition with prejudice.

The petitioner shall bear the costs of respondent no. 2 in the sum total of 1,000 Israeli pounds.

Issued today, 29 Sivan 5738 (4 July 1978).