Privy Council Appeal No. 58 *of* 1939

Jaber Elias Kotia and another – – – – *Appellants*

v.

Katr Bint Jiryes Nahas – – – – – – *Respondent*

FROM

THE SUPREME COURT OF PALESTINE, SITTING AS A COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JULY, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* LORD JUSTICE CLAUSON]

The two appellants in this matter are the only brothers of Ibrahim Elias Kotia, who died intestate and childless on the 7th December, 1937, a national of and domiciled and resident in the Lebanese State. The respondent is the widow of the deceased. The brothers claim that certain "mulk" land (i.e., land possessed in full ownership, see *Tsinki* v. *King's Advocate* [1920] A.C. 743 at p. 746) of the deceased situate in Palestine ought to be divided in the proportions of nine twenty-fourths to each brother and six twenty-fourths to the widow, i.e., in accordance with the Sharia Moslem law prevailing in the Lebanese State: the widow on the contrary claims that the land in question ought to be divided in the proportions of one-quarter to each brother and one-half to the widow, proportions adopted in cases of intestacy by the Ottoman law, and, according to the arguments of the widow, applicable to the present case by virtue of the law of Palestine.

The District Court of Jaffa on the 31st July, 1938, ordered the issue of a certificate of succession in relation to the property in question and the moveables of the deceased in Palestine in accordance with the contention of the brothers, thus giving one-quarter to the widow. On the 31st October, 1938, the Supreme Court of Palestine, on appeal from the District Court, directed the order of the District Court to be set aside and an order substituted ordering a certificate of succession to issue giving (in accordance with the widow's contention) a one-half share in the mulk land to the widow and a one-quarter share to each of the two brothers. Although the certificate issued under the order of the District Court extended to moveables in Palestine, no question was raised either in the Appellate Court or before their Lordships in regard to the deceased's moveables in Palestine. Before their Lordships the argument was confined to the question of succession to the deceased's immoveables in Palestine, and it is this question alone which their Lordships have considered.

The following are the provisions of the law of Palestine which are relevant to the matters in dispute:—

The Palestine Order in Council, 1922.

Article 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.

Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

Article 51. Subject to the provisions of Articles 64 to 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. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

Article 58. The Civil Courts shall exercise jurisdiction over foreigners, subject to the following provisions:—

Article 59. For the purpose of this part of the Order the expression " foreigner " means any person who is a national or subject of a European or American State or of Japan, but shall not include:—

(i) Native inhabitants of a territory protected by or administered under a Mandate granted to a European State.

(ii) Ottoman subjects.

(iii) Persons who have lost Ottoman nationality, and have not acquired any other nationality.

The term " subject " or " national " shall include corporations constituted under the law of a foreign State, and religious or charitable bodies or institutions wholly or mainly composed of the subjects or citizens of such a State.

Article 64. (i) Matters of personal status affecting foreigners other than Moslems shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an ordinance is passed conferring such jurisdiction.

(ii) The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile, in which case the latter shall be applied.

(iii) The District Court, in trying matters of personal status affecting foreigners, shall be constituted by the British President sitting alone. In trying matters of personal status affecting foreigners other than British subjects, the President may invite the Consul or a representative of the Consulate of the foreigner concerned to sit as an assessor for the purpose of advising upon the personal law concerned. In case of an appeal from a judgment in such a case the Consul or representative of the Consulate of the foreigner concerned shall be entitled to sit as an assessor in the Court of Appeal.

By the Palestine (Amendment) Order in Council, 1935, the following Article was substituted for the original Article 59 as from 1st April, 1935.

59. For the purposes of this part of the Order, the expression " foreigner " means any person who is not a Palestinian citizen.

Under powers contained in the Order in Council the Succession Ordinance, 1923, was established on the 8th March, 1923. The material provisions of that Ordinance as appearing in the current Revised Ordinances are as follows:—

Section 2. In this Ordinance, unless the context otherwise requires—

" foreigner " means any person who is a foreigner within the meaning of Article 59 of the Palestine Order in Council, 1922;

" immovable property " includes miri land and mulk land;

" mulk land " includes all heritable land or interests therein, not being miri land;

" the Ottoman Law " means the Provisional Law relating to the succession to immovable property dated 3 Rabi ul Awal, 1331, as set forth in the second Schedule to this Ordinance.

PART II.—JURISDICTION OF CIVIL COURTS.

Section 3.—(1) The civil courts shall have exclusive jurisdiction in all matters relating to the succession to, . . . every Palestinian citizen and any other person, not being a foreigner;

Provided that such citizen or other person was not at the date of his death either a Moslem or a member of one of the religious communities.

(2) They shall also have exclusive jurisdiction in all cases in which a dispute arises as to the succession to, or the will of, a foreigner, other than a Moslem.

Section 4. Subject to the provisions of section 21, a civil court shall distribute successions within its jurisdiction according to the following rules:—

(i) Where the deceased was a member of one of the religious communities and was not a foreigner the provisions of section 11 shall apply.

(ii) Where the deceased was a Palestinian citizen and was not a member of one of the religious communities, the provisions of the Ottoman Law shall apply, subject to any testamentary disposition made by the deceased.

(iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, the following rules shall apply:—

(*a*) mulk land and movables of the deceased shall be distributed in accordance with the national law of the deceased;

(*c*) where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied:

Provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be the national law.

Section 11. In the administration and distribution of the estate of a deceased person who was a member of any of the religious communities and was not a foreigner, the civil courts shall apply the following rules to regulate the distribution of his mulk and movable property:—

(*d*) in default of testamentary dispositions, or in so far as such dispositions do not extend, the property shall be distributed in accordance with the provisions of the Ottoman Law contained in the Second Schedule to this Ordinance.

The first schedule to the ordinance enumerates the recognized religious communities, one of which is the Eastern (Orthodox) Community. The

Second Schedule sets out the Ottoman law relating to the inheritance of immovable property. It is sufficient to state that the effect of it is that upon the succession to a childless male leaving a widow and two brothers the widow's share is one-half and each of the brothers take one-quarter.

The deceased appears to have belonged to the Eastern Orthodox religion: but it was not shown that he belonged to the Eastern (Orthodox) Community in Palestine. Indeed the appellants in their case submitted that he plainly did not. Their Lordships feel no doubt that the phrase " Eastern (Orthodox) Community " appearing in the first Schedule to the Succession Ordinance, 1923, refers to the community in Palestine adhering to the Eastern (Orthodox) Church and that a person domiciled and resident outside Palestine does not fall within the description of a member of the Eastern (Orthodox) Community as used in the Ordinance merely because he is in fact an adherent of the Eastern (Orthodox) Church. That this is the correct view of the phrase is implied in the language used by Lord Tomlin in delivering their Lordships' judgment in the case of *Abdullah Bey Chedid* v. *Tenenbaum* on the 9th October, 1933 (Reported in Palestine L.R. 1920-1933, 831 at p. 843).

Before the District Court there was evidence as to the Lebanese law which, in the opinion of the Appellate Court (from which their Lordships see no reason to differ) showed that in the case of immovable property situated outside the Lebanon, the Lebanese Courts would apply the law of the country where the immovable property was situated, that is, in this case, the law of Palestine.

In the District Court the learned Judge held that the law to be applied to the succession not only to the movables but also to the immovables in question (viz., mulk land situated in Palestine) was the national law of the deceased, i.e., the Lebanese law. He treated the evidence as establishing that the national law in Lebanon is Moslem Sharia law, and he accordingly ordered a certificate of succession to issue giving six shares to the widow and nine shares to each of the brothers. In arriving at this decision the learned Judge appears (as pointed out by the Court of Appeal) to have ignored the evidence. It was argued at one time before their Lordships by Counsel for the appellants that they ought to have a further opportunity of questioning this evidence: but it does not appear that any application for leave to tender further evidence was made either to the District Judge or to the Appellate Court: and their Lordships must accordingly deal with the evidence as it stands.

Before the Appellate Court and again before their Lordships it was argued that, for the purposes of the application of the Succession Ordinance, the deceased must not be treated as a foreigner. It was suggested that he was excluded from the definition of foreigner in Article 59 of the Order in Council of 1922 since he was, it was said, a native inhabitant of a territory (scil. the Lebanon) administered under a mandate granted to a European State. Whether or not this might have been so had the Order in Council remained in its original form, their Lordships see no reason to differ from the view of the Appellate Court that since the amending Order in Council of 1935 came into force the term " foreigner " in the Succession Ordinance, 1923, must be read with reference to the new Article 59 substituted for the former Article 59 by the amending Order in Council. This question is, however, of no importance in view of the fact that the deceased was not, and was not suggested by either side to be, a Palestinian citizen. The effect of section 4 (iii) of the Ordinance is that where (as in the present case) the deceased was neither a Palestinian citizen nor a member of one of the religious communities his mulk land, whether he be a foreigner or not, is to be distributed in accordance with the national law of the deceased, and where the national law imports the law of the domicile or the law of the situation of the land the law so imported is to be applied. On the evidence the Appellate Court in their Lordships' opinion rightly held that the national law of the deceased (i.e., the Lebanese law) imported the law of the situation of the land. The Appellate Court stated the result to be that the law applicable is the law of Palestine and added that in accordance with that law it is not disputed that the widow is entitled to a half share.

Their Lordships agree in the conclusion thus reached by the Appellate Court: but, in view of the fact that counsel for the appellants in fact disputed before their Lordships that, in this particular case, the law of Palestine was the Ottoman law, which admittedly would give the widow a half share, it is desirable to explore the matter somewhat further. It was argued, and it is true, that the law of intestate succession to mulk land in Palestine is not uniform. The distribution is governed, in the case of mulk land owned by a Palestinian citizen who was not a member of one of the religious communities specified in the Ordinance, by Ottoman law by virtue of section 4 (ii) of the Ordinance. It is governed in the case of mulk land owned by a member of one of the religious communities, who was not a foreigner, by Ottoman law by virtue of section 11 (*d*) of the Ordinance. It is governed in the case of mulk land owned by a deceased person who neither is a Palestinian citizen nor a member of one of the communities by the national law of the deceased. It was then argued that the only reasonable construction to be placed upon the phrase " the national law of the deceased " in section 4 (iii) (*a*) of the Ordinance is " the law which the Courts of the nationality of the deceased would apply to the intestate succession to land of their own nationals in their own country ", scil., in the present case the Sharia Law which would give the widow only a quarter share: and that unless this construction is placed upon the Ordinance, there results a " circulus inextricabilis ", the Lebanese law referring the matter back to the local law, the local law referring the matter back to the law of nationality, and so on *ad infinitum*.

Their Lordships would hesitate long before construing the words " the national law of the deceased " as meaning " the law which the Courts of the nationality of the deceased would apply to the intestate succession to land belonging to their own nationals situate in their own country ". Such a construction would construe the Ordinance as deliberately cutting across the principle recognized by Scrutton L.J. in *Casdagli* v. *Casdagli*, [1918] P. 89 at page 106 (a dissenting judgment which was however approved by the House of Lords upon appeal in the same case, [1919] A.C. 145 at page 151) by Luxmoore J. *In re Ross*, [1930] 1 Ch. 377, and by Maugham J. *In re Askew*, [1930] 2 Ch. 259, which their Lordships venture to state as follows:—that in the English Courts phrases which refer to the national law of a propositus are *prima facie* to be construed not as referring to the law which the Courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the Courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant). Their Lordships accordingly approach the question of the construction of section 4 of the Ordinance on the footing that this view of the *prima facie* meaning of the phrase " the national law of the deceased " is (as in their Lordships' opinion it is) the correct one. On examining the whole of the section their Lordships, so far from finding grounds for modifying their *prima facie* view, find confirmation of it in the wording of clause (*c*) of the section which clearly contemplates that the national law to which reference is made may import the law of the domicile or the law of the situation of an immovable. If the phrase " the national law of the deceased " is to be construed (contrary to their Lordships' view) to mean " the law which the Courts of the deceased's nation would apply in the case of its own national domiciled in its own country in relation to land in its own country " it is not easy to account for the reference to the possible importation of the law of the domicile or the law of the situation of an immovable.

As regards the suggestion made by counsel for the appellants that it was an objection to the construction of the section which their Lordships prefer that it would result in a " circulus inextricabilis " their Lordships feel no difficulty. It must be borne in mind that the primary question for their Lordships is, what is the law of Palestine as to the devolution on the death of the deceased intestate of this particular piece of land: to this, as their

Lordships have pointed out above, the answer is that the enacted law of Palestine provides, on its true construction, that the devolution of this particular piece of land, in the circumstances stated, is to be such as the Courts of the nationality of the deceased (viz. the Lebanese Courts) would determine it to be if this question were before them. (It may be observed that in the present case there is no question of the presence in the Lebanese law of any provision of a character which the Palestinian Court might properly consider itself precluded from applying. Examples of such possible provisions are given by Maugham J. *In re Askew*, [1930] 2 Ch. 275, but need not be considered for the purposes of the present case.) The second question is one of fact, namely, what would the Lebanese Courts determine to be the devolution of this particular piece of land in the circumstances stated? The evidence shows that the Lebanese Court would determine that the Palestine law, being the law of the situation, governs the matter. In other words the law of Palestine as applied to this particular case, is found to be that although the deceased is a national of the Lebanese State, there is nothing in the law of the Lebanese State to interfere with the application to the case of the law of Palestine, being the law of the situation of the property in question. The Palestine Court must (in accordance with the views expressed by Scrutton L.J. in *Casdagli* v. *Casdagli*) be taken to accept the renvoi and applies its own law, as applicable to the case of a Palestinian citizen, which, whether the case falls within s.s. (i) or s.s. (ii) of section 4 of the Succession Ordinance, 1923 (and it must fall within one or the other) provides for the application of the provisions of the Ottoman law.

One further point remains. It was urged by Counsel for the appellants that there cannot be said to be any law of the situation of the property. It was said that the Succession Ordinance, 1923, provides such a law for mulk land belonging to a member of one of the specified religious communities, and for like land belonging to a Palestinian citizen: but that as regards land belonging to any one else, whether a foreigner, or, not being a foreigner, a person who was neither a Palestinian citizen nor a member of one of the specified religious communities there is only the law enacted by section 4 (iii) and that the words " the law of the situation " of an immovable, as used in that sub-section cannot be construed as repeating the section over again, but must refer either to something else or to something which does not exist. In view of the opinion expressed above it follows that the alleged gap does not exist; but in any event it appears to their Lordships, as at present advised, but without deciding the point, that any such gap as is alleged would be filled by the operation of section 46 of the Palestine Order in Council, 1922.

In the result their Lordships are of opinion that the decision under appeal correctly ordered a certificate of succession to be issued giving to the widow of the deceased twelve shares out of twenty-four in the mulk property in Jaffa.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants will be ordered to pay the respondent's costs of the appeal.

(12820) Wt. 8194—7 90 7/41 D.L. G. 338

In the Privy Council

JABER ELIAS KOTIA and another

v.

KATR BINT JIRYES NAHAS

DELIVERED BY LORD JUSTICE CLAUSON

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