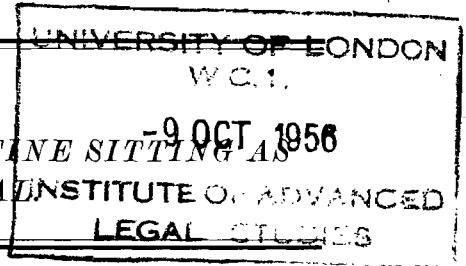


In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE SITTING AS
A COURT OF CIVIL APPEALS



44464

BETWEEN

RAPHAEL HABIB BEN SHALOM (Defendant) *Appellant*

AND

1. SADIQA BINT AS-SHEIKH KHALIL
AD-DASUKI (First Plaintiff)

10

2. SADKIEH BINT ASH-SHEIKH KHALIL
AD-DASUKI (Second Plaintiff)

Respondents.

Case for the Appellant.

RECORD.

1. This is an appeal by the Appellant (the Defendant in the action) from a judgment of the Supreme Court of Palestine sitting as a Court of Civil Appeal delivered on the 13th April 1945, dismissing an appeal by the Appellant from a judgment of the Land Court of Nablus ordering that, on payment within one month of LP.19.200 mils per dunum, the Respondents be entitled to registration in Tabu of certain shares in certain land in their names equally.

20

2. Article 41 of the Ottoman Land Code 1274 A.H. and the amendment thereof by 19 Sha'ban 1291, are in the following terms :—

Article 41. "The owner of an undivided share in State land cannot transfer his share, by way of gift or in consideration of payment, without the leave of the persons jointly interested. If he does so the latter have the right, within 5 years, to claim from the transferee the restitution of his share, on paying him its value at the time of the claim. The right of claiming back the land lapses at the expiration of the said term, even if there exist the excuses recognised by law, viz., minority, unsoundness of mind, or absence on a journey.

30

"But if any person jointly interested at the time of the transfer has given his consent to it, or has refused to take the share in question although offered to him, he cannot afterwards maintain any claim."

19 Sha'ban 1291. " In the event of the person jointly interested dying within the said period of 5 years his heirs, having the right of succession, shall have the right to claim possession of the property from the transferee, or his heirs in the event of his death, and in the event of the death of both the persons jointly interested and of the transferee the heirs of the former shall have the right to claim possession from the heirs of the latter."

Section 6 (1) (A) of the Land Law (Amendment) Ordinance Chapter 78 reduced the period of 5 years to 1 year.

3. The right of a co-owner of an undivided share in land who has not consented to its sale to re-purchase it from the purchaser on payment of its value is called in Arabic Awlawiyeh, commonly translated " priority " or " preference."

P/1, p. 18

4. The land in question in this appeal consists of 2 parcels of land of the Miri Category situated within the lands of Fardisiya Village and registered in the Land Registry of Natanya as Parcels 2 and 4 of Block 8003.

Statement of Claim,
p. 2, and P/1, p. 18.

5. Prior to the 3rd May 1942 in each of the said parcels of land out of 9 shares—

2 shares belonged to Adel—son of Sheikh Khalil Ad-Dasuki. 20

2 shares belonged to Yussef—another of his sons.

1 share belonged to Raqiyeh—his Wife.

P/3 p. 20.

6. The family of Sheikh Khalil Ad-Dasuki consisted of—

Raqiyeh his wife.

Adel

Yussef

Mohammad

Sadiqa

Sadkieh

} his sons.

} his daughters (the Respondents).

D/1, p. 21.

7. Sheikh Khalil Ad-Dasuki had a Power of Attorney from his wife Raqiyeh to sell her shares in the land on her behalf. 30

D/3, p. 22.

8. By an oral agreement confirmed by a Memorandum in writing dated the 1st May 1942 Sheikh Khalil Ad-Dasuki agreed to sell all the 9 shares in both of the said parcels of land to the Appellant at the price of LP.12 per dunum.

D/3, p. 22.

9. On the 3rd May 1942 Sheikh Khalil Ad-Dasuki conveyed to the Appellant 4 shares in each parcel of land but, in breach of the said contract of sale, he failed to convey to the Appellant any of the remaining 5 shares in each parcel, including apparently the 1 share in each parcel belonging to his wife. These shares, as was held in an action brought by the Appellant against him, he subsequently sold in bad faith to a third party at a higher price. 40

10. On the 24th December 1942 Raqiyeh Ad-Dasuki died and her legal inheritance was divisible among the following heirs :—

Sheikh Khalil Ad-Dasuki	— her husband	— 5 shares	
Adel	— her son	— 3 shares	
Yussef	— her son	— 3 shares	
Mohammad	— her son	— 3 shares	
Sadiqa	— her daughter	— 3 shares	} (the Respondents)
Sadkieh	— her daughter	— 3 shares	

10 11. On the 8th March 1943 the Respondents commenced this action against the Appellant claiming ownership of the 4 shares in each parcel, which had been bought by the Appellant in 1942 as aforesaid, by right of Awlawiyeh on payment to him of the value thereof. Statement of Claim, p. 1.

12. Five questions, or groups of questions, arise upon this appeal namely :—

(I) Whether there was any evidence upon which the Court could find that the Respondents had discharged the onus of proving that Raqiyeh Ad-Dasuki had not consented to the sale to the Appellant of the said 4 shares in each parcel.

20 (II) If so, whether some only of her heirs (that is to say the Respondents, entitled together to only 6 out of 20 shares of her 1/9th share in each parcel) were entitled to exercise the right of Awlawiyeh.

(III) If so, whether they were entitled to claim ownership of the whole of the 4 shares in each parcel bought by the Appellant as aforesaid or only of 6/20ths thereof.

30 (IV) Whether the Court ought to have ordered that the Respondents were entitled to be registered as owners of the said shares in the said land on payment of LP.19.200 mils per dunum in view of the fact that one member of the Court assessed the value of the land at LP.19.200 mils per dunum and the other members of the Court assessed the value at LP.22 per dunum.

(V) Certain questions as to the conduct of the proceedings.

13. Upon the first question it is submitted that :—

(A) The onus of proving that Raqiyeh Ad-Dasuki had not been a consenting party to the sale by her husband to the Appellant of the 4 shares in each parcel was clearly upon the Respondents.

(B) Such consent or leave need not be formal or in writing.

(C) There was no evidence of any such absence of consent.

40 (D) The basis of Awlawiyeh is the right of a co-owner not to have a stranger forced upon him by reason of the act of another co-owner, and the fact that her husband, acting under the Power of Attorney granted by her to him, agreed at the same time to sell her share shows that she did not in fact consent.

(E) She, having, by her husband, agreed to sell her share to the Appellant, and then in breach of the agreement and in bad faith sold it to a third party at a higher price, could not have had a right of Awlawiyeh against the Appellant and therefore her heirs cannot.

(F) Further, by the provisions of Articles 1647 to 1659 of the Mejelle both she and they are estopped from so claiming.

14. Upon the second question, it is submitted that :—

(A) The words “ his heirs ” in Article 41 should be given their ordinary meaning and should not be read as “ his heirs or any one or more of them.” 10

(B) Joint heirs of undivided parts can only act together.

15. Upon the third point it is submitted that if the words “ his heirs ” are to be read as “ his heirs or any one or more of them ” the heirs who claim can only claim in proportion to their own shares, in this case 6/20ths.

16. Upon the fourth point :—

(A) The effect of the Land Courts Ordinance Section 11, as amended by the Land Courts (Amendment) Ordinance 1939 and the Land Courts (Amendment) Ordinance 1942 is that such claims in Land Courts are to be heard by a Court consisting of a President, or a relieving President, or two Judges of a District Court. 20

(B) Regulation 6 of the Defence (Judicial) Regulations (No. 2) of 1942 provides that—

“ If in any criminal or civil cause or matter tried by any Court which is, under the provisions of any Enactment (including these Regulations) constituted of two Judges only, except an appeal heard by an Appellate Court constituted as aforesaid, there is a disagreement between two such Judges as to the final decision or verdict the cause or matter shall stand dismissed, or the accused shall be acquitted, as the case may be.” 30

(c) Further, if in any claim for Awlawiyeh the claimant does not satisfy the Court as to the value of the land the practice has been for the Court to dismiss the claim as not proven.

In a claim under Article 41 “ it has always been the tendency in this Court, in order to protect the liberty of the subject in disposing of his property in the way he likes, to stick to the letter of the law, giving it the most strict and narrow construction ” (Frumkin J. in C.A. No. 226 of 1944. 1945 P.L.R. 30 at p. 33). “ There can be no doubt that it rested with the Plaintiff to show the value . . . I am placed in no position on the evidence to arrive at the value with anything approaching to certainty . . . the Plaintiff has failed to prove the element of value and in my estimation he must accordingly be held to have failed in this claim ” (the President Judge Burke 1946 Selected Cases of the District Courts p. 279). 40

(D) In the alternative it is submitted that Rule 2 (2) of the Land Courts Rules 1921 apply and that accordingly the Court ought to have called in a third member.

10 (E) Upon this question the Court of Appeal in their judgment said "Both" (that is to say both Judges) "agreed that the valuation should be not less than LP.19.200 mils, and only one of them thought that the valuation ought to be higher." It is respectfully submitted that the Court might with equal validity have said "Both agreed that the valuation should be not more than LP.22 and only one of them thought that the valuation ought to be lower."

17. On the fifth point :—

(A) Rule 189 of the Civil Procedure Rules 1938 provides as follows :—

(I) The party having the right to begin may state his case and shall produce his evidence (including documentary evidence) in support of the issues which he is bound to prove.

20 (II) The other party may then state his case and shall produce his evidence (including documentary evidence) if any, and may then address the Court generally on the whole case: Provided that the Court may in its discretion permit the party beginning to call rebutting evidence before the other party addresses the Court generally on the whole case.

(III) The party beginning may then reply generally on the whole case: Provided that where evidence is tendered by the party beginning only, and no evidence is tendered by the other party, the party beginning shall have no right to reply.

30 (B) In the present case the trial opened by the Court calling upon Counsel for the Appellant (the Defendant) to show cause why Judgment should not be given against the Appellant.

(C) No opportunity was given to the Appellant to call his witnesses.

(D) The Appellant was refused any opportunity to amend his Defence.

40 (E) As the Appellant's Counsel's Affidavit states "It was I p. 11. who started the oral pleadings at the request of the Court that I should explain the defences of renunciation and estoppel. The Court proceeded to give its Ruling, without hearing my witnesses, arguments and legal authorities and references. I objected very strongly to this summary procedure and requested that my arguments and objections be recorded. All my witnesses were summoned to appear and give evidence before the Court on that date but the Court refused to hear them."

(F) The Court of Appeal has held that, by agreeing, after the Court had decided the issue of liability in favour of the Respondents, that the value of the land should be assessed by experts, Counsel for the Appellant acquiesced in the course which was

followed. It is respectfully submitted that a Defendant who, after the issue of liability has been determined, takes part in an assessment of quantum does not thereby preclude himself in any way from appealing against the finding of liability.

18. The Court of Appeal wholly failed to determine any of the grounds of appeal set forth in paragraphs 3, 4 and 5 of the Notice of Appeal to that Court.

19. The Appellant respectfully submits that the judgment of the Supreme Court of Palestine sitting as a Court of Civil Appeal dated the 13th April 1945 is wrong and ought to be reversed, or in the alternative 10 that the case should be remitted to the Land Court for the Appellant's evidence to be heard, for the following, among other,

REASONS.

- (1) BECAUSE there was no evidence upon which the Court could find that the Respondents' Mother had not consented to the sale of the shares in the land in question.
- (2) BECAUSE the Respondents, being some only of her heirs, were not entitled to make any claim herein in their own names alone.
- (3) BECAUSE if they were so entitled they were only entitled 20 to claim 6/20ths of the shares in the land in question.
- (4) BECAUSE, as the Court was divided in opinion, the Respondents' claim failed.
- (5) BECAUSE there was no reason why the opinion of the one Judge should have been taken as the Judgment of the Court rather than that of the other Judge.
- (6) BECAUSE the trial was unsatisfactory and contrary to natural justice and to the Civil Procedure Rules and a new trial ought therefore to have been ordered.
- (7) BECAUSE the Court of Appeal omitted to hear the appeal 30 or to determine the questions raised thereby.
- (8) BECAUSE the Court of Appeal was wrong in holding that the Appellant had "acquiesced" in a finding of liability against him.

GERALD GARDINER.

WYLIE PATTERSON & HERRING,
61/63 St. Paul's Churchyard,
London, E.C.4.
Solicitors for the Appellant.

In the Privy Council.

ON APPEAL

*from the Supreme Court of Palestine sitting
as a Court of Civil Appeal.*

BETWEEN

**RAPHAEL HABIB BEN
SHALOM** - *Appellant*

AND

**SADIQA BINT AS-SHEIKH
KHALIL AD-DASUKI
and SADKIEH BINT
ASH-SHEIKH KHALIL
AD-DASUKI** - *Respondents*

Case for the Appellant.

WYLIE PATTERSON & HERRING,
61/63 St. Paul's Churchyard,
London, E.C.4,

Solicitors for the Appellant