24. 1948

No. 60 of 1946.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE SITTING AS A COURT OF APPEAL.

BETWEEN

HASSAN IBN OMAR EL ZEIDEH - - - *Appellant*

AND

ROSE and EDMUND ALEXANDER - - - *Respondents.*

CASE FOR THE RESPONDENTS.

RECORD.

1. This is an appeal from the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 28th July, 1944, reversing the judgment p. 52. of the Land Court, Haifa, dated the 15th September, 1943, and directing p. 43. that judgment be entered for the Respondents confirming their title to 14 out of 96 shares in a plot of land situated in the locality of Ballan in Haifa. The Land Court had dismissed the Respondents' claim to the said land.

2. The question in this appeal is whether the Appellant proved adverse possession for the prescriptive period to defeat the Respondents' registered title.

3. This action was commenced on the 3rd April, 1935. The land in p. 1. question is miri land, for which the period of prescription is ten years. To succeed in the action the Appellant would accordingly have to show that he had been in uninterrupted possession for ten years prior to the 3rd April, 1935. Time and time again orders have been made against the Appellant evicting him from the said land. He has been convicted for trespassing on it. Yet it is, nevertheless, the Appellant's contention that in spite of these orders and during the period covered by them he was quietly acquiring a prescriptive right to remain on the land. Another of his contentions is that as these orders were obtained at the instance of a co-owner of the Respondents' predecessor in title, and not at the instance of the Respondents themselves or of the person from whom they derived their title, neither the Respondents nor their predecessor in title could take advantage of them.

4. There is another matter on which it is submitted the Respondents are entitled to rely if necessary to defeat the Appellant's attempt by prescription to bar their title, namely, that which is usually known as

" Muddet Safar." Up to the year 1933 it was the law in Palestine that the time during which a person was " a long way off " did not count in estimating the period of time within which he was required to bring his action to prevent his title being barred by prescription. By " a long way off " (" Muddet Safar ") was meant a distance of three days' journey or eighteen hours at a moderate rate of travelling (Mejelle, Art. 1664). The Respondents derived their title from one Malakeh bint El Khoury Touma from whom they bought their shares—which were undivided shares—in the said land in the year 1933. The Touma family lived in Beirut, which town has already been held in proceedings concerning this very land between the Appellant and another co-owner, namely, Nazira Cook Touma, to be " Muddet Safar " so as to prevent prescription running. These proceedings are further referred to below. Nazira and Malakeh each derived their title from Elias Khoury Touma, Nazira's husband and Malakeh's brother. In the present proceedings the Supreme Court has held that no prescription could run while Malakeh was at a distance of " Muddet Safar." Malakeh would not come to Haifa to give evidence in the Land Court. The Respondents made several Applications to be allowed to take her evidence on commission in Beirut. These Applications were opposed by the Appellant, and refused—in the Respondents' submission wrongly—by the Land Court. It was one of the Respondents' Grounds of Appeal to the Supreme Court that they had not been allowed to take Malakeh's evidence on commission.

pp. 70–72.

p. 55, l. 32.

pp. 14, 15, 21, 34, 38–42.

p. 51, l. 15.

5. For some years prior to 1921 the Appellant had been making attempts to occupy the land in question. In 1921 Nazira commenced Proceedings in the Magistrate's Court, Haifa against the Appellant for trespass. On the 12th April, 1921 the Magistrate made against the Appellant an order for possession of the land. On the 8th March, 1922 following an application made to the Magistrate, Haifa, on behalf of Elias Koury Touma and Nazira, complaining that the Appellant had trespassed on the land, the Appellant gave an undertaking in the following terms :—

pp. 59, 60.

p. 65, l. 37.

> I, whose thumbprint appears hereunder, Hassan Ibn Omar el Zeideh, declare that as from today—following the order given me by the Police Department—I have no right to trespass upon the land situate at Billan locality, and that I accept to be punished in the event of my trespassing upon the said land.

p. 7, l. 27.

6. In 1923 the Appellant made an application to the Registrar of Lands, Haifa to register the said land in his own name. This application was refused, and in the present proceedings it was admitted, on behalf of the Appellant, that it was refused " because the land was claimed to be " registered in the names of others, including the Plaintiffs' predecessors " in title." In 1924 the Chief Execution Officer ordered the execution of the judgment referred to in the preceding paragraph, and on the 31st May, 1924 the Eviction Clerk who was deputed to carry out the order for the Appellant's eviction went to the land accompanied by a Police Officer, the Mukhtar and Nazira's Advocate and gave delivery thereof to the said Advocate as attorney for Nazira. The report of the Eviction Clerk goes on to say, " Owing to the absence of the Defendant, no eviction " was carried out of the room and kitchen built on the plot of land ; but

p. 8, l. 12.

p. 67.

p. 67, l. 15.

" the wife of the Defendant with the guarantee of the Mukhtar, undertook " to vacate the place and deliver the keys on Monday 2nd June 1924 " at 8 a.m."

7. In 1924 the Appellant brought an action in the Land Court, Haifa against Nazira (through her agent) claiming the ownership of the said land and registration of it in his name in the Land Registry. This action was eventually dismissed (and the dismissal was confirmed in the Supreme Court), on the ground that prescription did not run owing to Nazira's absence in Beirut. pp. 70–72.

10 8. On the 1st March, 1929 the Chief Execution Officer made another order for the eviction of the Appellant from the said land. This order was executed on the 8th April, 1929, when " the whole land was delivered to " the aforenamed judgment creditor (that is Nazira): and the necessary " warning was given . . . to the wife of the . . . absent, judgment debtor, " Hassan el Zeideh, that whoever trespasses upon the said land as from " this date, will be liable to legal action." pp. 74, 75. p. 75, l. 4.

9. In the year 1930 the Appellant applied to the Supreme Court, sitting as a High Court of Justice, for an Order to issue to the Chief Execution Officer, Haifa directing a stay of execution of the Magistrate's
20 judgments " [*sic*] against him. This application was dismissed on the 3rd April, 1930. On the 29th May, 1930 the Appellant was sentenced under Art. 130 of the Ottoman Criminal Code to one month's imprisonment for resuming possession of the land after having been judicially dispossessed therefrom. On appeal the conviction was confirmed but the penalty was reduced to a fine of LP.5 or one month's imprisonment in default. p. 75. p. 76. p. 77.

10. On the 25th February, 1932 the Supreme Court, sitting as a High Court of Justice, made on the application of the Appellant an Order in the following terms :— p. 78.

> The Chief Execution Officer in the District Court of Haifa
> 30 is hereby restrained from ordering or causing the judgment of the Magistrate's Court of Haifa No. 270 dated 12th April, 1921, to be executed in respect of the whole land, but execution should be confined to such share or shares of the said land as the said Nazira Cook may be entitled to under the Kushan upon which her claim in the Magistrate's Court of Haifa was based.

As to this Order the Supreme Court in the present proceedings said

> Recovery of the whole land has been ordered and confirmed on appeal, and although the High Court subsequently made an order to a return in 1930 that the execution should proceed only in respect
> 40 of shares of Nazira Cook, I do not consider that this order invalidates or repeals any of the previous proceedings . . . p. 53, l. 47.
>
> I must say here that I cannot agree with the order made by the High Court and I feel that it is based rather on the assumption that the joint owner was injuring the land, not as in this case protecting it. Such an order in my opinion could only be made when the subject to be executed is possibly a judgment against one of the p. 55, l. 17.

co-owners personally, whereas in this case the judgment was in favour of the joint-owner against a trespasser and in respect of the whole undivided property. In any case this order cannot have any effect upon the previous judgments in the case.

The Respondents respectfully submit that the said Order of the High Court dated the 25th February, 1932 was wrong. In any event it is submitted that the said Order was nugatory. The land was owned in common and in undivided shares. Nazira owned nine out of 24 shares in every particle of the land. The only way in which the Appellant could be prevented from encroaching on Nazira's shares was by excluding him from the whole of the land.

11. In 1933 the Respondents bought from Malakeh her said shares in the land, and on the 28th September, 1933 they were duly registered in the Land Registry, Haifa as owners thereof. As the Appellant contended that he could ignore this registration in favour of the Respondents, on the 3rd April 1935 they commenced

p. 81.

p. 1.

THE PRESENT SUIT

in the Land Court, Haifa, claiming by their Statement of Claim that "judgment be given to the effect that the Plaintiffs are entitled to "14 shares out of 96 shares in the land in dispute and that the Defendant "is not entitled to contest their ownership in respect thereof."

p. 2, l. 4.

p. 83.

12. On the 2nd December, 1936 the Appellant signed a declaration in the presence of the Registrar of Lands, Haifa admitting that he had no interest in the shares in the land of one Mikhail Esh-Shaghouri who was another of the co-owners of the land deriving title from the said Elias Khoury Touma. This declaration, it is submitted, is of importance. The land in question was undivided Mesha land. A person who admits that he has no rights in the shares of one of the co-owners and who himself is not one of the other co-owners commits a trespass against all the co-owners if he attempts to take possession of any part of the land.

p. 2.

13. On the 26th December, 1937 the Appellant filed his defence to the present suit in which he raised three defences. The first two defences were technical. The third, which was his main defence, was that he had been in possession of the land in question for a time exceeding the period of prescription.

pp. 3–33.

p. 5, l. 4.

14. Hearings began in the Land Court on the 9th December, 1937. They were not concluded until the 31st July, 1943. On the 3rd January, 1938 issues were framed as follows :—

(1) Had the Plaintiffs a good legal title to the land ? (Onus on Defendant).

(2) Has that title become barred by the possession of the Defendant for the prescriptive period ? (Onus on Defendant).

pp. 5–10.
pp. 10–12.
pp. 12, 13.

15. Evidence was led by the Appellant on the first issue on the 14th February, 1938 and on the 5th April, 1938. Arguments were then heard on this issue and on the 11th April, 1938 the Court found for the Respondents thereon,

p. 13, l. 22.

"subject to their establishing that the kushan on which they "rely includes the land which they are claiming."

The following issue was accordingly added :—

(3) Does the Plaintiff's kushan include the land claimed by him in this case. p. 13, l. 26.

16. The further hearing of the action was adjourned to a date to be arranged by the Registrar, who fixed it for the 9th May, 1938. In fact the further hearing did not take place until the 15th March, 1940 when, instead of Judges Shaw and Shems who had previously taken the case, it came before Judges Edwards and Atalla. At the suggestion of the Appellant's Advocate the Chief Clerk was appointed under Rule 221 of the Civil Procedure Rules to report on the questions of fact involved in Issue 3. With their Statement of Claim the Respondents had lodged a plan showing the land which they alleged to be included in their kushan. This plan is divided into two portions marked respectively "A" and "B." The Appellant did not dispute that "A" was included in the kushan. The inquiry that the Chief Clerk was directed to make was accordingly limited to the portion marked "B." p. 13, l. 32. p. 13, l. 39. p. 14, l. 4. p. 14, l. 7. p. 82. p. 10, l. 47.

17. On the 5th May, 1940 the Chief Clerk made his report to the effect that the part of "B" lying to the West and North-West of the line marked A–B on the plan was included in the Respondent's kushan. This report was accepted by the parties and in due course adopted by the Court. pp. 35–38. p. 38, l. 5. p. 44, l. 22.

18. On the 29th May, 1940 the Respondents applied to the Court to be allowed to take the evidence of Malakeh and three other witnesses on commission. In fact an application to this effect had been filed on the 14th April, 1938, but had never been heard. The Court on the said 29th May 1940 refused the application. p. 14, l. 21. p. 38. p. 14, l. 46.

19. On the 25th April, 1941 the hearing of the action, that is, of Issue 2, was continued. The onus on this issue had been put—quite properly, it is submitted—on the Appellant. Yet on his behalf it was submitted that by applying to take evidence on commission the Respondents had shifted the onus on to themselves. This, it is urged, remarkable submission appears to have been sympathetically received by the Court, and the Respondents accordingly led their evidence. This was mainly directed to proving the earlier proceedings against the Appellant referred to above, to showing that the Appellant's connection with the land was much more tenuous than he would have the Court believe, and to establishing that the home of the Toumas was in Beirut where Malakeh permanently lived. p. 15, l. 21. p. 5, l. 7. p. 15, l. 42. p. 16, l. 10. p. 16, l. 16, to p. 24, l. 3.

20. At the hearing on the 28th May, 1942—Judge Weldon had now taken the place of Judge Edwards—another application was made to take Malakeh's evidence on commission. The application was again refused. p. 21, l. 37. p. 22, l. 12.

21. Further hearings took place on the 18th January, 1943, the 11th March, 1943, the 16th June, 1943, the 23rd, 30th and 31st July, 1943. The Appellant's evidence was called at the hearings of the 16th June, 1943 and the 23rd and 30th July, 1943, and was mainly directed to showing that he had been on the land for a long time. It is noticeable that neither the Appellant nor his wife ever gave evidence. No explanation was ever pp. 24–32.

given as to their absence from the witness box. His absence from the witness box is, it is submitted, as significant as his absence from the land whenever the Eviction Clerk came to evict him.

p. 43. 22. On the 25th August, 1943 the Land Court, Haifa delivered judgment in favour of the Appellant. The Judges pointed out that in
p. 44, ll. 1–16. view of the decision that had been given on the 11th April, 1938 on the first issue in favour of the Respondents, and the report of the Chief Clerk which they accepted, they were concerned only with the second issue, namely, whether the Respondent's title had been barred by prescription. On this issue, in spite of the Court and execution proceedings previously referred to, which they dealt with at length, they held that since about
p. 45, ll. 4–6. 1914 the Appellant had " continued to live on the land without " interruption," and went on to say

p. 45, l. 47. " We are satisfied that Hassan Zeideh was never removed from the physical possession of the land or from the huts, but continued to remain therein in physical possession. The handing over was merely a formal paper transaction . . .

p. 46, l. 13. Dr. Weinshall contends that the two reports of the Execution
pp. 67, 74. Clerk, L.H.1 and L.H.2 dated respectively the 31st May 1924 and the 8th of April 1929 operate as an interruption of Defendant's possession. We do not agree with this contention, in the first place, because, as we have already stated, the Defendant was never divested of his physical possession of the property by eviction or ejectment, and secondly, because in the particular circumstances of this case, the eviction, if eviction was ordered, could only apply to the shares owned by Nazira Cook and not to all the shares owned by the other co-owners of this property who were not parties to those proceedings, i.e. Criminal Case 270 of 1921. This is quite clear from
p. 78. the judgment of the High Court, exhibit D.22. It is true that the Defendant was convicted and sentenced in 1930 by the Magistrate's Court for trespass upon the land of Nazira Cook and that this conviction was upheld on appeal to the District Court, but in our opinion these proceedings cannot constitute an interruption of Defendant's actual possession of the land concerned in the present action, for there is nothing to show that any further action was taken except to fine the Defendant the sum of L.P.5 and there is no further evidence of any other action being taken against him.

Dr. Weinshall next submits that the predecessor in title to the present Plaintiff, Malakeh Touma was absent from Haifa at a distance of ' Muddet Safar,' namely, in Beirut, and that therefore prescription does not run against her. It was the Plaintiff's duty to show that in fact this person Touma Malakeh was absent at all material times from Haifa. Dr. Weinshall in fact led no evidence as to this with the exception of that of George Farazli who stated that he never saw Touma Malakeh in Palestine. This is evidence
p. 46, l. 43. of a purely negative character . . . On the other hand Defendant
p. 47, l. 4. called several witnesses who testified that Malakeh had been in Palestine in 1917, in 1921, in 1923 or 1924 and in 1933 . . . The evidence of these witnesses was not in any way shaken in cross-examination. We therefore find as a fact that Art. 1664 which

Dr. Weinshall invokes, even assuming Beirut is at a distance of Muddet Safar does not in any way help the Plaintiffs in their contention that their predecessor in title was absent from Haifa 'Muddet Safar.' Therefore the plea of prescription raised as an issue by the Defendant succeeds and is a good defence in the present action."

23. It is clear from the above quotations from the judgment of the Land Court that the Judges took the view that a squatter can acquire a prescriptive right by acting in defiance of a Court's Orders and treating them with contempt. It is also clear that the Judges took the view that an owner of undivided shares in land cannot take any advantage of an action commenced against a squatter by a co-owner. The Respondents submit that on both these matters the Land Court was wrong. The Respondents submit also that if the absence of Malakeh in Beirut was material the Land Court was not entitled to come to a decision on this point adverse to them and to dismiss such evidence as they could call as " of a purely negative character " without giving them an opportunity to call on commission evidence that would have been of a positive character, namely, that of Malakeh and the other residents there whose evidence they had applied to have taken on commission. The Respondents would further point out that if any relevance is to be attached to the Appellant's alleged occupation of the land during the 1914–1918 war the Land Court should have had regard to the provisions of Art. 16 of the Proclamation No. 42 of the 24th June, 1918 and to Art. 79 of the Treaty of Lausanne brought into force in Palestine by the Treaty of Peace (Turkey) Ordinance 1925.

24. The Respondents appealed to the Supreme Court, Jerusalem. p. 48.
The appeal was heard by Mr. A/Justice Plunkett, who, on the 28th July, p. 52.
1944 delivered judgment allowing the Respondent's appeal set aside the p. 55, l. 37.
judgment of the Land Court, and directed that judgment be entered for the Respondents confirming their title to the 14 of the 96 shares claimed in the land and precluding the Appellant from contesting their ownership. Having shortly recited the facts and referred to the rival contentions of the parties the Judge said :—

" I have to consider first of all what is the legal effect of the p. 53, l. 18.
various actions taken by Nazira Cook in respect of the co-owned property as regards the defence of prescription. These actions were taken admittedly in her own name but for the whole property. The Appellants maintain that a suit brought by a co-owner against a trespasser or person claiming possession of the whole land is a perfectly good action, and judgment should be given for recovery of the whole land. Malakeh Touma was away in Beirut, and Nazira Cook, being a co-owner brought many proceedings against the Respondent for the recovery of the whole land . . .

The Land Court however does not consider these various p. 53, l. 34.
proceedings as interrupting prescription, but based its decision upon (1) Respondent was not physically rejected and (2) ejectment could only apply to the share of Nazira Cook and not to that of the other co-owner. What happened was that the Respondent was officially dispossessed but resumed possession . . .

I consider that the action taken by Nazira Cook and subsequent formal delivery made by the Execution Officer although Respondent resumed possession on each occasion are sufficient to interrupt the
p. 54, l. 2. running of the period of prescription . . . I am satisfied, moreover, that the judgment of the Land Court which is confirmed by the Court of Appeal in Land Appeal 29/29, P.L.R. Vol. 1 pp. 422–423 sets out the correct interpretation of the law as applicable to this case :—

> 'Can one of several co-owners sue alone for ejectment? When trespass occurs on jointly owned land, a part-owner is not prevented by any clear provision of the law from suing for the recovery of the whole. The share of such a partner is not separated, and relates to each and every part of the land. If it be held that such a suit must be confined to the undivided share owned by the Plaintiff, it becomes impossible to execute a decree for ejectment by delivery. If as a result of the suit the whole property is delivered to the Plaintiff, temporary possession of a partner is preferable to the illegal possession of a stranger, since the partner has defined interests, which is not the case with a trespassing stranger . . .
>
> We consider that in such a case a suit brought by one of the partners for the recovery of the whole area, in the case in which the trespass is recent, is admissible both in law and justice.'

The above decision is supported by the law and references as set out in Goadby and Doukhan in Chapter XIII on co-ownership, and Chapter XVI, Limitation of Action, Prescription. The period of prescription is interrupted by presentation of a claim before a judge, in other words, institution of action in Court, Article 1666 Mejelle. Possession must be adverse for the whole period . . .

p. 55, l. 1. It may be safely assumed that in the absence of any specific provision as to Miri, the principles of the Mulk law as laid down in the Mejelle, would be deemed applicable also to Miri interests . . .

p. 55, l. 7. I am in complete agreement with the views expressed in the judgment of the lower Court in Land Appeal 29/29, and in my opinion a joint owner is in the position of a trustee for an absent joint owner, and may sue to preserve the rights of the joint owners in the whole property, and that any such action is sufficient to prevent and interrupt the period of prescription running against the absent joint owner. The period of prescription could not, therefore start to run in this case until possibly 1930, when the High Court ordered execution to be made only in respect of the share of Nazira Cook. Since the present action was instituted in 1935 the question of prescription cannot arise from the period after 1930.

I must say here that I cannot agree with the order made by the High Court . . . In any case this order cannot have any effect upon the previous judgments in the case.

For the above reasons I hold that when a trespass occurs on jointly owned land, one joint owner is entitled to sue and obtain judgment for the recovery of the whole; that the proceedings

taken by Nazira Cook against the Respondent do interrupt the period of prescription against the joint owners and their predecessor in title, Malakeh Touma ; that the Respondent was dispossessed on several occasions, although he subsequently renewed possession ; that the claim by the Appellants that no prescription could run while she was at a distance of ' Muddet Safar ' is established."

25. The Respondents submit that the judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 28th July, 1944 is right and should be affirmed for the following among other

REASONS.

(1) Because the Appellant was not in adverse possession of the land in question for the prescriptive period.

(2) Because when a trespass occurs on jointly owned land one joint owner is entitled to sue and obtain judgment for the recovery of the whole.

(3) Because the Respondents' lawful title to the said land as found by the answer of the Land Court to the first issue was not challenged.

(4) Because there was no evidence that the Appellant's possession (if any) of the land in question during the relevant period had not been interrupted.

(5) Because the Appellant's admission that he had wrongfully entered on the land disentitled him under the provisions of Art. 20 of the land Code from relying on prescription.

(6) Because of the Appellant's declaration of the 2nd December, 1936.

(7) Because prescription could not run while Malakeh Touma was at a distance of " Muddet Safar."

(8) Because it was a denial of justice for the Land Court to find against the Respondents on the points on which the evidence of Malakeh Touma was material without allowing her evidence to be taken on commission.

(9) Because the judgments of the Land Court dated the 15th September, 1943 and of the High Court dated the 25th February, 1932 were wrong.

(10) Because the judgment of the Supreme Court dated the 28th July 1944 is, having regard to the facts and the law applicable, right and should be affirmed.

PHINEAS QUASS.

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No. 60 of 1946.

In the Privy Council.

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BETWEEN

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