Privy Council Appeal No. 60 of 1946

Hassan Ibn Omar El Zeideh – – – – – *Appellant*

v.

Rose Alexander and another – – – – – *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1948

Present at the Hearing :

LORD NORMAND
LORD MACDERMOTT
SIR JOHN BEAUMONT
[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the Supreme Court of Palestine allowing an appeal from a judgment of the Land Court of Haifa. The plaintiffs, the respondents in the appeal, began the action on 3rd April 1935. They claimed a declaration that they were entitled to 14 out of 96 shares in a plot of Miri land at Haifa and that the appellant was not entitled to contest their ownership. The defence was that the claim could not be entertained because of the appellant's long possession. That defence is founded on Article 20 of the Ottoman Land Code and the decision of the appeal will turn mainly on the construction of its provisions. The Article, as translated in Fisher's Ottoman Land Law, is in these terms:—

" In the absence of a valid excuse according to the Sacred Law, duly proved, such as minority, unsoundness of mind, duress, or absence on a journey (muddet-i-sefer) actions concerning land of the kind that is possessed by title-deed the occupation of which has continued without dispute for a period of ten years shall not be maintainable. The period of ten years begins to run from the time when the excuses above-mentioned have ceased to exist. Provided that if the Defendant admits and confesses that he has arbitrarily (fouzoili) taken possession of and cultivated the land no account is taken of the lapse of time and possession and the land is given back to its proper possessor."

The Land Court held that the appellant had proved continuous and undisputed occupation during the ten years immediately preceding the commencement of the action and that the respondents had failed to prove the " valid excuse " which they attempted to set up that their predecessor in title, Malakeh Touma, had been absent from Palestine at a distance of ' Mudat Safar ' in Beirut so as to prevent the years before 1933, when the respondents purchased her shares in the land, from running against them. The Land Court therefore dismissed the action. The learned judge of the Supreme Court assumed that the appellant was entitled to reckon the ten years from the beginning of his occupation, but he found that his occupation began in 1917 and that the running of the years had been interrupted by legal proceedings affecting the appellant's occupation which were set afoot in 1920 or 1921 by one of the joint owners of the property named Nazira Cook.

The judgments of the Courts below did not discuss the vital question of construction which was argued in this appeal. The Land Court merely assumed one construction and the Supreme Court another. Now, however, it is necessary to decide whether the only period of ten years that is relevant under Article 20 is the period of ten years immediately preceding the commencement of the action against the occupier, as the respondents maintain. The alternative construction is that the period of continuous occupation required may be any period of ten years between the date when the plaintiff or his predecessor in title could first have asserted a right to recover the land and the date of the beginning the action.

Before entering on the consideration of the meaning of Article 20, it will be convenient to resume the material facts and to dispose of some preliminary and subsidiary points.

The Land Court found that the appellant first began to occupy the plot of land at some time between 1903 and 1905 and the judgment refers to evidence which supports this conclusion. As has been said, the learned judge in the Supreme Court found that the occupation began in 1917, but he purported to be agreeing with the finding of the Land Court and he referred to no evidence. It is apparent that some mistake has occurred and their Lordships have no doubt that the occupation began not later than 1905. The respondents obtained a complete legal title to their shares in 1933. Their predecessor in title, who normally resides in Beirut, was at Haifa in 1909 when she accepted a transfer of her shares, and according to evidence which the Land Court believed she was at Haifa in 1917, 1921, 1923 and 1933. There is no sufficient evidence to show that she was not at Haifa at other times also. She did not give evidence at the trial and a request for leave to examine her on commission was refused. In 1920 or 1921 there began the proceedings of which Nazira Cook was the initiator. They start with criminal proceedings at her instance in the magistrate's court at Haifa. She charged the appellant with taking possession of a plot of land (the same plot as is concerned in this appeal) belonging to her. She did not disclose that she was not the exclusive owner but only one of several joint owners. On 12th April 1921 the magistrate disposed of the case by holding that it ought to have been a civil rather a criminal case, and that the appellant was not liable for what had been alleged against him. But he warned the appellant to take his hands off the land, not to interfere with the complainant and to deliver the land to her. Though the action was a criminal proceeding and though it resulted in nothing resembling a civil decree it was subsequently and repeatedly used as the warrant for civil execution to dispossess the appellant. One of the executions achieved the desired result of dispossessing the appellant but only for a short time, for he was convicted in May 1930 of " resuming possession from which he had been dispossessed ". The appellant was pertinacious and in July 1930 he is found still in possession and applying for a stay of execution on the ground that Nazira Cook was claiming delivery of the whole land in his possession whereas she only owned certain shares in it. This application came before the Supreme Court which on 25th February 1932 ordered that the execution should be confined to such shares as Nazira Cook might be entitled to. There was in addition to these proceedings an action brought by the appellant against Nazira Cook. It seems to have been begun about 1923 and it was finally disposed of in 1927. In this action the appellant alleged that he had been in possession of the land for more than ten years and claimed registration as owner in the Land Registry. The final decision was against his claim on the ground that Nazira Cook had established a valid excuse which prevented the running of the years against her.

The first of the preliminary or subsidiary matters which will be disposed of at this stage, is the respondents' attempt to show that the appellant had confessed that he had no right to the occupation of the land. Such a confession if proved would render further enquiry unnecessary. But the respondents failed to prove the only statement alleged to have been made by the appellant which is capable of being construed as a con-

fession. Next it may here be mentioned that in the pleadings the appellant does not claim that under Article 20 he has obtained by his undisputed occupation a legal title to the land or any higher right than the right to have the action for his dispossession dismissed as unmaintainable. Their Lordships therefore do not entertain the question whether the appellant could claim to have a right to obtain a legal title by virtue of ten years undisputed occupation. The respondents invoked a clause of the treaty of Lausanne as adopted into the law of Palestine, whereby the period beginning 29th October 1914 and ending three months after the coming into force of the treaty falls to be disregarded in reckoning years of limitation " so far as regards relations between enemies ". This, however, has no application to the present case, the parties to which were subjects of the Turkish Empire till Palestine was separated from Turkey.

What are the relevant ten years under Article 20 of the Ottoman Land Code is not an easy question, but if the terms of the Article itself are insufficiently specific it is permissible to clarify them by the aid of the rules laid down in the Mejelle. There is in the article nothing that is of any assistance in answering the question except the clause that the period of ten years begins to run from the time when the excuses have ceased to exist. This clause is, if not inconsistent with the reckoning of the ten years backwards from the commencement of the action, at least suggestive of an intention that any period of ten consecutive years may be taken provided that it begins to run after any valid excuse has ceased to operate. The chapter in the Mejelle on Lapse of Time contains a series of Articles, numbered 1660, 1661 and 1662, dealing with limitations of actions, and they provide that actions for the enforcement of certain rights and obligations are not to be heard after a specified period. In Article 1663 excuses are dealt with, and the article declares that " the beginning of the time which elapses is considered to be from the removal of the excuse ". These words closely resemble the words of Article 20 of the Ottoman Land Code, but from their association with the other articles of the Mejelle cited above they leave a more definite impression that the relevant years are not necessarily the ten years immediately preceding the beginning of the action. There follows Article 1667 which provides that " the time elapsed is considered from the date when the right accrued to the plaintiff to claim the subject matter of the action ". This finally turns the scale against the respondents' construction. Their Lordships are therefore of opinion (laying aside meantime the effect of the legal proceedings in which Nazira Cook was concerned) that the appellant's continuous, adverse and undisputed possession for ten years from 1905 onwards affords a defence to the action in the absence of proof by the respondents of a valid excuse. The respondents attempted to set up the residence in Beirut of Malakeh Touma as a valid excuse but their Lordships agree with the Land Court in holding that the evidence of residence is insufficient.

It remains to consider whether the respondents can take advantage of the proceedings to which Nazira Cook was a party. It is first necessary in view of the arguments addressed to their Lordships to observe that any action brought against the appellant by the respondents themselves in 1920 or 1921 would *ex hypothesi* have been unmaintainable and it follows that they could not in 1920 or 1921 have given a mandate to Nazira Cook to sue on their behalf. They therefore cannot successfully assert that she as a joint owner with them was suing not only on her own behalf but also as agent for them. Possibly if Nazira Cook had obtained a judgment *in rem* against the appellant they might have taken advantage of that. But the judgment of the magistrate in the original criminal proceedings cannot be represented as a judgment *in rem*, nor is it even a determination of a civil right. The respondents, however, maintained that from one of the execution proceedings which followed upon it a dispossession of the appellant resulted and that the period of limitation must *de novo* be reckoned to run from the resumption of possession. If there had been no resumption of possession the action would not have been necessary and the respondents therefore argued that it is the resumption of possession that is the real cause of the present action. It is accordingly necessary to enquire whether there

was in reality any effective dispossession such as the respondents' argument postulates. It is not easy to understand and appreciate the various execution proceedings which took place, but taken as they stand they lead to the conclusion that the dispossession was no more than transitory, that it was far from being effectual, and that it was brought about by an Eviction order which had been irregularly obtained. Nazira Cook found it necessary to renew her attempt to evict the appellant by a new execution, and was foiled on this final occasion because the appellant had by then discovered that she was only a joint owner; he was content to deliver to her the nine shares in the land which she owned but he was not willing to deliver to her the land itself, and he obtained an order from the Supreme Court restricting the execution accordingly. Thus Nazira Cook was, after the truth about her interest in the land was discovered, unable to use the judgment in the original criminal proceedings as a warrant for an execution to evict the appellant from anything more than her share in the land, and no order evicting the appellant from the land itself would have been granted in the first instance if the true facts had been disclosed in her application. There was therefore no real, effective and lawful dispossession: equally there was no real re-entry into possession and no new cause of action of which the respondents can take advantage. Their Lordships reserve their opinion upon the effect of a real, though brief, dispossession lawfully brought about by an order granted on a due disclosure of relevant facts.

The judgment in the action raised by the appellant against Nazira Cook merely sustained a defence personal to her and it is impossible for the respondents to take advantage of a defence of that kind or of a judgment giving effect to it.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court should be set aside, that the judgment of the Land Court should be restored, and that the appellant should be found entitled to costs in the Supreme Court on the higher scale and to LP.15 as advocate's attendance fee for appearing therein. The respondents must also pay the appellant's costs of this appeal.

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In the Privy Council

HASSAN IBN OMAR EL ZEIDEH

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ROSE ALEXANDER AND ANOTHER

DELIVERED BY LORD NORMAND

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