26/1948

In the Privy Council.

No. 64 of 1945.

ON APPEAL FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL, JERUSALEM

BETWEEN

THE PALESTINE KUPAT AM BANK CO-OPERATIVE SOCIETY LIMITED ... ... APPELLANTS

AND

THE GOVERNMENT OF PALESTINE AND OTHERS ... RESPONDENTS

AND BETWEEN

THE GOVERNMENT OF PALESTINE... ... ... APPELLANTS

AND

THE PALESTINE KUPAT AM BANK CO-OPERATIVE SOCIETY LIMITED AND OTHERS ... ... RESPONDENTS.

(Consolidated Appeals).

CASE FOR THE GOVERNMENT OF PALESTINE

RECORD

1.—This is an Appeal by the Appellants and a Cross Appeal (by special leave) by the Government of Palestine from a Judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, Jerusalem, dated the 27th July, 1944, which allowed an Appeal by the Government of Palestine from a decision of the Settlement Officer, Haifa, dated the 15th March, 1943, concerning the ownership of a parcel of land in the village of Tira. The Government of Palestine are also appealing by special leave from an Order of the Supreme Court dated the 12th September, 1944, which held that the Supreme Court had no jurisdiction under the Palestine (Appeal to Privy Council) Order-in-Council 1924 to grant leave for a Cross Appeal.

pp. 121–128

p. 71, l. 37—p. 79, l. 17

p. 129

2.—The Government of Palestine submits that the Palestine (Appeal to Privy Council) Order-in-Council 1924 clearly contemplates the possibility

RECORD

of more than one party wishing to appeal from a Judgment, and that the Supreme Court is thereby empowered to grant leave to appeal to any party aggrieved by a Judgment of the Supreme Court, whether or not any other party is also aggrieved and seeks or has sought leave to appeal.

pp. 2-3

3.—Proceedings began on the 23rd November, 1941, by the Appellants submitting to the Settlement Officer, Haifa, a claim under the Land (Settlement of Title) Ordinance claiming a right to 11,294/17,280 shares in the land in dispute of an area of 3,296 dunams and 197 square metres. The claim was supported by an extract of registration of documents or transactions which showed an original grant in 1882 of an area of 34 dunams, a reference to certain boundaries, and a correction of area and boundaries on the 25th June, 1938. The corrected area showed the 3,296 dunams and 197 square metres claimed by the Appellants. The claim was also supported by a map.

p. 2, l. 13
p. 2, l. 13
p. 3, l. 5
p. 4
p. 140 A

4.—On the 28th November, 1941, the Government of Palestine claimed the whole of the land in dispute as unassigned State Lands and as part of Forest Reserve No. 195 under a proclamation of the High Commissioner dated the 2nd July, 1929. The Respondents 2 to 22 claimed the shares not claimed by the Appellants, and Respondent 23 was a party as judgment creditor of three of the other Respondents. The Settlement Officer ordered that the Government of Palestine should be the plaintiff in the proceedings.

p. 5
p. 6, ll. 8-31
p. 6, ll. 35-38
p. 7, l. 20

5.—The Settlement Officer heard evidence and argument and gave his decision on the 15th March, 1943. The facts as found by him may be summarised as follows :—

pp. 71-79

(a) The land to which the grant registered in 1882 related was before 1882 not miri land but mewat (or land fit for agriculture after development or improvement) and subject to Article 103 of the Ottoman Land Code.

p. 73, l. 22
p. 73, l. 40

(b) The boundaries mentioned in the registration do not describe an area of land as they are not a continuous line.

p. 74, l. 48

(c) The area actually under cultivation had never exceeded 200 dunams and no greater area shows any signs of ever having been cleared. The registration was confined to an area of 34 dunams which the transferees had cleared and opened.

p. 75, ll. 8-35

(d) By 1937 about 65 per cent. of the shares held by the heirs of the transferees were registered in the name of the Appellants, and the Appellants applied for a correction of area, but the other owners were not parties to the application. They remained registered as owners in 34 dunams, but the Appellants by virtue of their application being granted were registered as owners of shares in 3,296 dunams 197 square metres.

p. 75, l. 26—p. 76, l. 4

RECORD

(e) In view of the steps taken by Government officials before the correction of area was made, the Government of Palestine's claim that the correction was obtained by gross misrepresentation does not succeed; though the officers making enquiries into the application had been either negligent, timid or incompetent in not discovering the true facts. p. 76, l. 14—p. 77, l. 9 p. 78, ll. 16-28

(f) The plan filed by the Appellants with the application for correction of area showed the boundaries incorrectly but there was no actual proof that the Appellants knew that the boundaries shown were inaccurate. p. 77, ll. 10-26

(g) The correction of the area was not and did not purport to be a disposition of land, but was made in reliance on Article 47 of the Ottoman Land Code. p. 77, ll. 27-39

6.—Article 47 of the Ottoman Land Code provides that in land which has been transferred as so many dunams or ziras, the number of dunams or ziras shall be taken into account; but in land which has been transferred and the boundaries have been fixed and pointed out whether the number of dunams and ziras have been stated or not, the number of dunams and ziras shall not be taken into account, and attention shall only be paid to the boundaries.

7.—By implication the Settlement Officer accepted as a fact that with the exception of 34 dunams, and a further 7 dunams in the possession of a cultivator who was not party to the proceedings, the land in dispute had been unassigned state land and part of forest reserve No. 135. p. 72, ll. 31-41

8.—The Settlement Officer held that Article 47 applies as between a purchaser and vendor of a miri title and not to a case like the present of a government grant. Even if the article applied there was a registration of 34 dunams for which "badl misl" had been paid. There was no legal warrant for taking "badl misl" for mewat land, or for taking it under Article 47, nor did that article authorise the correction of an error by a registrar of lands. On the correction of area "badl misl" had been taken in respect of the increase in area. This, however, could not be "badl misl" as known in land law, which connotes the perfecting of a right and not correction of an area. p. 77, l. 36—p. 78, l. 5

9.—The Settlement Officer was further of opinion that there had been no valid authority for correcting the error, and that the purported correction was bad in law and for want of proof of any error. p. 78, ll. 6-15

10.—The Government of Palestine could have refused to approve the correction, but after examination and reference to different offices the correction had been approved and the fact that it should not have been p. 78, ll. 16-32

RECORD

approved was no reason, in the Settlement Officer's opinion, for withdrawing an approval granted in good faith and not obtained by fraud. He considered the magnitude of the difference in area no bar to holding the Government of Palestine to the approval which they had granted.

p. 78, ll. 33-44
p. 78, l. 45—p. 79, l. 11

11.—Accordingly, though holding that the correction should not have been made, the Settlement Officer held the Appellants entitled to the shares claimed by them because the Government was bound by its conduct. The title of the Respondents 2 to 22, however, was to shares in 34 dunams only, and there was no evidence entitling them to an interest in any larger area. They could not benefit from the Government's mistake in correcting the Appellant's title deeds.

pp. 121-128

12.—The Government of Palestine appealed to the Supreme Court (Rose and Edwards JJ.) who by Judgment dated the 27th July, 1944, allowed the appeal in part, and held that the land in dispute should be registered in the name of the Government of Palestine with the exception of the area which the court held to be within the boundaries of the original grant, that is, 625 dunams.

p.122, l. 1—p.123, l.4
p. 123, ll. 5-20
p. 123, ll. 22-42
p. 123, l. 43—p. 124, l. 29

13.—In his Judgment, Edwards J. summarised the facts and contentions of the parties. He pointed out that apart from the question of gross misrepresentation the Settlement Officer had found all the facts in favour of the Government of Palestine and had only given Judgment against the Government because he considered the Government bound by the conduct of their officers in correcting the area. While upholding the finding that the land was mewat, Edwards J. was not prepared to say that Article 47 of the Ottoman Land Code did not apply. The point was a difficult one, but he thought that the article did apply. The findings of the Settlement Officer about the boundaries of the area were findings with which the Supreme Court could not interfere, and the criticisms of them were unfounded.

p. 124, ll. 30-46
p. 124, l. 47—p. 125, l. 49
p. 125, l. 50—p. 127, l. 27
p. 127, ll. 36-43
p. 127, ll. 44-48

14.—Applying Article 47, Edwards J. considered the only question to be whether the Appellants were entitled to more land than was within the original boundaries, an area (as had been ascertained by the Assistant Superintendent of Surveys) of 625 dunams and no more. In his opinion the correction of area could not give the Appellants a title to any larger area. The issuing of a new " kushan " was not, and was not intended to be, a grant of land, and only the High Commissioner had power to make a grant of public land. Edwards J. decided the matter on the footing that, whatever Government officials did, they could not and did not purport to grant any fresh or additional land, and if they exceeded their powers the Appellants could not benefit. Accordingly, the Land Settlement Officer was directed to order registration of the land in the name of the Government

of Palestine except 625 dunams of which 63 per cent. should be registered in the Appellants' name. RECORD

15.—Rose J. agreed with Edwards J. and held that a correction of area was not conclusive, and it was for the Settlement Officer to determine the area within the boundaries. p. 128

16.—The Government of Palestine submits that the Supreme Court were wrong in applying to the case Article 47 of the Ottoman Land Code, and that the Court ought to have held that the Appellants are entitled only to their share of the 34 dunams mentioned in the original grant.

17.—The Government of Palestine therefore submits that the Judgment of the Supreme Court should be varied by reducing from 625 to 34 dunams the land ordered to be excepted from the land registered in the name of the Government of Palestine, and this submission is based on the following amongst other

REASONS.

1. Because the area granted in 1882 was an area of 34 dunams and no more.
2. Because Article 47 of the Ottoman Land Code has no application to land such as that in dispute.
3. Because if Article 47 has any application to land such as that in dispute Article 47 does not operate to entitle the Appellants to an area larger than 34 dunams.
4. Because the purported correction of area was made without lawful authority and is a nullity.
5. Because the purported correction was made under a mistake, and the circumstances in which it was made cannot operate to entitle the Appellants to any land additional to the 34 dunams originally granted.
6. Because the land in dispute is part of a public forest reserve lawfully set apart as such in 1929 and therefore cannot be privately owned.

FRANK GAHAN.

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