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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

ON APPEAL

44471

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

BETWEEN—

ABDALLAH MUKHLES, as acting Mutawalli
of Waqf Qotb ed Din el Khudairi *Appellant*

— AND —

KAREN KAYEMETH LEISRAEL LIMITED
Respondents.

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CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from a judgment of the Supreme Court of Palestine in its appellate jurisdiction delivered by Mr. Justice Edwards on the 24th of February, 1942, dismissing an appeal from that part of a judgment of the Settlement Officer of the Safad Area dated the 25th of May, 1941, which decided that the present Respondents have a registerable title in the land in question and allowing the appeal of the present Respondents from that part of the said judgment which decided that the land in question was of the category of true Waqf. p. 27. p. 18.

2. The proceedings the subject of this Appeal are concerned with the question of what entries should be made in the Register in pursuance of the Palestine Land Settlement Ordances 1925-33 in respect of a certain area of land known as Khiyam el Walid.

3. It is claimed on behalf of the Waqf Qotb ed Din el Khudairi that the land is of the nature of Waqf Sahiha (true Waqf) and that the Respondents have no registerable interest therein.

4. It is claimed on behalf of the Respondents that the land is of the nature of Waqf Tahsisat (untrue Waqf) or alternatively (whatever the category of the land) that they have a registerable interest by virtue of a tenure known as Mashad el Maska.

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APPELLANT'S CASE.

5. The Respondents claim their title by virtue of certain transactions which took place in the year 1887. On behalf of the Waqf it is claimed that if these transactions purported to create an interest in the property of a registerable character the transactions must be void because true Waqf is of its nature inalienable.

p. 37.

6. The evidence of the 1887 transaction is contained in four documents

(a) a power of attorney dated 1298 A.H. (1882) given by certain persons described as members of the Ricabi family (who the Appellant claims to have been in possession of the property as mutawallis of the Waqf) to an agent to transfer their rights of possession by virtue of Tabu documents in the Mashad Maska of the land in question. 10

p. 38.

(b) a temporary certificate issued by the Daftar Khakani (Deeds Registry) recording a transfer in 1303 (1887) of the possession of the property by the said attorney to one Ali Bey Ibn Mahmud Bey Buzo.

p. 60.

(c) a provisional Kushan (Title Deed) recording the same transfer of possession.

p. 61.

(d) a final Kushan recording the same transfer. The certificate and the Kushans all describe the property as "Waqf Sidna (dedicated by) Qotb Ed din el Khudairi". 20

p. 63.

7. Thereafter until the year 1918 Ali Bey Buzo and his relations appear to have occupied or cultivated the land paying rent to the Waqf authorities and, in that year certain proceedings took place in relation to the property in the Sharia Court of Damascus. The object of these proceedings appears to have been to ascertain the respective rights of the Waqf and of the persons in possession of the property. The matter was brought to the Court upon an application by a third party to take possession for a higher rent. This application was refused and the Court declared that the persons in possession held a lease from the Waqf for a period of nine years at a rent of 400 piastres a year. The possessors also declared their respective shares in the leasehold interest as between themselves. It is submitted that these proceedings involve a clear recognition by the Respondents' predecessors in title that the land was true Waqf and that the interest of such predecessors was terminable by the Waqf authorities at the end of a term of nine years or in the event of a better rent being offered by a third party. 30

8. In the year 1921 certain persons claiming to be the heirs of those declared in the last-mentioned proceedings to be entitled to the possessory interest therein described obtained a registration in the local Register of Ownership and these persons in 1939 purported 40

to sell the property to the Respondents. There is a certificate of registration in respect of the second transaction but with regard to the first transaction the only record is a certificate given in view of loss of original documents. The circumstances leading to the first transaction are obscure but it is submitted that as no documents of title were apparently produced to secure this registration neither it nor any subsequent registration can prejudice the present Appellants particularly as the Waqf authorities were not a party to and had no notice of these registrations. Moreover the validity of these transactions is disputed in other proceedings brought by other persons claiming to be the heirs of the original possessors and the claim of these persons was also brought before the Settlement Officer in these proceedings but ordered to stand over until determination of the present question. For the purpose of the present proceedings it is material to point out that in the Respondents' Certificate of Registration the land is described as of the Class:—"Waqf Qotb ed Din el Khudairi-Mulhaq".

9. Before the Settlement Officer an application was made on behalf of the Appellant to put in evidence two letters from Zaki er Ricabi as Mutawalli of the Waqf Qotb ed Din to the Waqf authorities at Damascus inquiring for information as to the nature of the Waqf and otherwise and the replies thereto. The Settlement Officer admitted statements in the replies that "the Treasury of the Government of Syria paid and still pays through our Department the tithes of the village Khiyam el Walid" and that "Mr. Khalid Buzo and his partners have paid the rent of the said land till the year 1357 (1938)", but refused to admit statements in the replies that the land in question was true Waqf being dedicated by the late Qotb ed Din el Khudairi the Founder of a School at Damascus. It is submitted that these replies being letters written by an official body, ought to have been admitted as evidence that the land was so treated and recorded by the Waqf authorities.

10. The Settlement Officer gave judgment on the 25th of May, 1941. He stated that the Plaintiff as Mutawalli of Waqf Qotb ed Din claimed the lands to be of the Waqf Sahiha class and dedicated by his ancestor for the Waqf which is reputed to have been created in the year 878 A.H. or more than 470 years ago. He said that the differences between the Plaintiff and the Defendant resolved themselves into the question whether the holder of the right of Mashad ed Maska has a registerable interest in land and to what extent the full title of the owner is affected. He continued "Before examining the claim of the plaintiff it is as well to state the defendant's claim. The defendant claims the land is of the ghairi sahiha class and that his kushan which describes the class of land as 'Waqf Qotb ed Din el Khudairi-Mulhaq' and states that it is registered

p. 68.

p. 66.

p. 68.

p. 14.

pp. 74, 75.

p. 15.

pp. 14, 15.

p. 18.

p. 19.

“in his name, gives him the ownership of the tassaruf of the land
 “and it follows that the raqaba remains vested in the State. The
 “Government of Palestine was invited to join these proceedings,
 “since the raqaba of the land was in question, but it has not seen it
 “necessary to intervene. The defendant claims he purchased a
 “registerable, heritable and transferable interest and that the tenure
 “of mashad al maska imposes on him the burden of paying a fixed
 “annual rent which he has undertaken to pay, and that so long as
 “that condition is fulfilled he is entitled to possession of the land
 “and cannot be dispossessed.” After summarising the defendant’s 10
 p. 20. title he concluded “Whatever may be the theories of the various
 “schools of Moslem law, the fact is that since 1298 A.H. at the latest,
 “the holder of the mashad al maska has been registered in the tabu
 “and granted a kushan confirming his right”. In regard to the
 judgment of the Sharia Court he said “I find there is no incon-
 “sistency between this admission and the claim of the defendant to
 “be the holder of the mashad al maska since at all times Ali Bey
 “knew he was the holder of the right and was aware that one of the
 “incidents of that tenure was the payment of an annual rent”.
 p. 21. He therefore concluded “I find that the four connected documents 20
 “of the plaintiff and the true photostatic copy of the registration of
 “1307 and the judgment of the Sharia Court of Damascus contain
 “sufficient evidence for me to give a decision on the point whether
 “the defendant has a registerable interest in the land”.

He then proceeded to consider the question whether the Waqf
 was true or untrue. He said “Though the antiquity of the Waqf is
 “not disputed, there is no evidence that the lands in suit were ever
 “dedicated in Waqf Sahih either when the Waqf was created or at
 “any time since. I have examined every step in the various trans-
 “actions connected with this land and in no one step do I find a 30
 “clear indication that the land is either Sahiha or Ghairi Sahiha for
 “every transaction could, with equal probability, have been made
 “in land of either class”.

His conclusions were as follows:—“I therefore find the class of
 “land is Waqf Sahih and that the defendant has a registerable and
 “transferable right in mashad al maska but I do not find the annual
 “rent is fixed but is one to be decided by agreement between the
 “parties or by the competent court. On the question of inheritance,
 “I think the mashad al maska is inheritable but without prejudice
 “to the third party to shew the rules of succession to be followed and 40
 “that the succession is within the jurisdiction of the Settlement
 “Officer to decide”.

11. Both parties appealed, and judgment was given by the
 Supreme Court of Palestine (Mr. Justice Edwards and Mr. Justice

Rose) on the 24th of February, 1942, the judgment being delivered by Mr. Justice Edwards. The Court held that the Respondents' interest was registerable and that the Waqf was an untrue Waqf. On the first point he said "The main point is whether the L.S.O. was correct in holding that the respondents had acquired a registerable title. If he was wrong, then the matter would at once seem to be concluded in favour of the present appellants. I, however, consider that he was correct for the following reasons, viz.: all the evidence goes to show that the family of Ricabis, i.e., the predecessors in title of the person from whom the respondents purchased the land, were the owners of Mewqufa land which they sold to the Buzo family. The Ricabis, in addition to being the owners of the land as individuals, were also administrators of charitable funds which they received from the Treasury. The mere fact that this family were administrators of those charitable funds did not alter the fact that they, as individuals, owned the land". On the second point he appears to have been induced to differ from the Settlement Officer largely by reason of certain additional evidence which the Court allowed to be admitted.

12. The Supreme Court allowed the Respondents' representative to produce this evidence although not produced or tendered to the Court below. The judgment states "This we allowed by virtue of the provisions of Rule 341 (344) (1) (b) Civil Procedure Rules 1938", but no reason, as required by the Rule, for the admission of the evidence is set out in the judgment. It is submitted that, in the absence of a conclusive reason why the evidence was not available in the Court below, the evidence should not have been admitted.

13. This evidence consists of certain proceedings and conclusions of a Turkish commission of inquiry held in 1889. It appears that when the transfer of the property by the Ricabi family referred to in paragraph 5 of this Case was brought to the Tabu Registrar for registration he could find no earlier Tabu registration and therefore raised the objection that the land might be mahlul (vacant). After a prolonged inquiry in which a number of witnesses testified that the land had long been occupied by members of the Ricabi family it was concluded that the land was not mahlul and registration was allowed. It is submitted that these circumstances in fact support the Appellant's case that this was true Waqf and that the reason why there were no earlier tabu registrations was that the land was in fact inalienable.

14. Another piece of evidence admitted in the same way was an excerpt from the printed budget of the Ottoman Awqaf Ministry for the year 1327 (1908) in which the Waqf of Khiyam el Walid is referred to. It does not appear that any reliance was placed on this

document by the Supreme Court and it is submitted that it does not assist the Respondents.

p. 31, l. 31. 15. The judgment of the Supreme Court was therefore as follows:—“The appeal will therefore be dismissed and the cross-appeal allowed to the extent that the decision of the Land Settlement Officer be varied by declaring that the land is of the category known as ‘Takhsisat Waqf’ and by declaring also that the question of the nature of the rent is not within the jurisdiction of the Land Settlement Officer”.

pp. 38, 60, 61. 16. In addition to the grounds dealt with in the Courts below the Appellant desires to submit that the expression “Sidna Qotb ed Din Khudairi” meaning “the dedication of Qotb ed Din of Khudairi” appearing on the registration certificates is in itself conclusive that the Waqf is of the true character because “miri” or “state” land could not be dedicated by an individual but only by the State.

17. If the Appellant is right in concluding that the Waqf is Waqf Sahiha the Appellant has, it is submitted, an inalienable title to the land and should be entered in the register as owners whatever registerable right, if any, the Respondents may have therein. 20

18. So far as the Respondents’ interest is concerned the Appellant contends (a) that the right which was acquired by their predecessors was a mere right of cultivation which is inalienable without the consent on each occasion of the Mutawalli of the Waqf and subject to determination and to the conclusive jurisdiction of the religious Courts as provided by Clause 7 of the Ottoman Law of Procedure or (b) that if any greater right was purported to be granted in 1887 it was void and so recognised by the possessor in the proceedings in the Sharia Court in 1915. In either event the Respondents have no registerable interest. 30

p. 35. 19. By an Order of the Supreme Court of Palestine dated the 20th of April, 1942, the present Appellant, who was duly elected and appointed acting Mutawalli of the Waqf of Qotb ed Din by the Sharia Court of Jerusalem, was ordered to be substituted for Zaki Bey Ricabi in whose name the proceedings had theretofore been prosecuted and by order of the Supreme Court of Palestine dated the 24th June, 1942, final leave was given to the Appellant to appeal to His Majesty in Council.

20. The Appellant submits that the appeal should be allowed and that the judgment of the Settlement Officer, so far as he held that the class of land is Waqf Sahiha, should be restored and that it should be held that the Respondents have no registerable interest in the land and that any registration in the name of the Respondents be ordered to be cancelled and that the Respondents be ordered to 40

pay the Appellant's costs here and below and to repay any costs in any of the Courts below paid by the Appellant for the following among other

REASONS.

1. BECAUSE the judgment of the Settlement Officer was right in holding that the land is Waqf Sahiha.
2. BECAUSE this land forms part of a large area now comprised partly in Palestine and partly in Syria which has for many years to common knowledge formed part of the dedication of Qotb ed Din el Khudairi.
- 10 3. BECAUSE all entries, documents and facts taken together are consistent only with the land being Waqf Sahiha.
4. BECAUSE the Respondents failed to show that they have acquired any registerable interest in the land.
5. BECAUSE a tenure of mashad el masha when subsisting is Waqf Sahiha is not a registerable interest.
6. BECAUSE in the alternative, the Respondents' interest is void as being in excess of an interest which is capable of being lawfully created in Waqf Sahiha.
- 20 7. BECAUSE the Respondents interest, if registrable in its nature, was acquired by their predecessors unlawfully or without the knowledge or approval of the Waqf authorities.
8. BECAUSE the Respondents acquired their interest with notice that the property was Waqf and was put upon inquiry by the nature of the registrations.
9. BECAUSE the Settlement Officer was wrong in failing to admit as evidence the whole of replies received by Zaki er Ricabi from the Waqf authorities.
- 30 10. BECAUSE the Supreme Court of Palestine was wrong in admitting as evidence documents tendered for the first time in that Court.
11. BECAUSE the judgment of the Supreme Court and of the Settlement Officer (except in so far as he held that the land was Waqf Sahiha and that the rent was not fixed) was wrong and ought to be reversed.

(Sgd.) F. E. SKONE JAMES.

(Sgd.) JAMAL NASIR.

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CASE FOR THE APPELLANT.

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