

47, 1948

No. 86 of 1946.

In the Privy Council.

ON APPEAL

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

UNIVERSITY OF LONDON
W.C.1.
-9 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

44472

BETWEEN

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

AND

10 KEREN KAYEMETH LEISRAEL LIMITED *Respondents.*

CASE FOR THE RESPONDENTS

RECORD.

1. This is an appeal from the judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, Jerusalem, dated the 24th February, 1942, varying the decision of the Settlement Officer, Safad Settlement Area, dated the 25th May, 1941. p. 27. p. 18.

2. In this appeal the Appellant is appealing as acting Mutawalli of the Waqf Qotb ed Din el Khudairi. He was substituted for Zaki Bey Ricabi, the previous Mutawalli of the Waqf, whose name appears in the title of the proceedings below, by Order of the Supreme Court dated the 20th April, 1942. p. 35, l. 4.

3. The questions raised by this appeal are whether certain lands known as Khiyam el Walid situate in the Safad sub-area were of the class of lands known as " waqf Sahih," and whether the Respondents' interest in the lands known as " mashad el maska " was registrable.

4. The Settlement Officer held that the lands were " Waqf Sahih," that is, true Waqf. The Supreme Court held that the lands were " Waqf ghair Sahih," that is, untrue Waqf. The difference between the two kinds of Waqf is that in the true Waqf the land itself is dedicated by the owner to the Waqf, whereas in the case of the untrue Waqf all that is dedicated to the Waqf are the tithes or taxes normally payable to the State. Most of the mevqufe land in the Ottoman Empire was of the untrue kind (see Art. 4 Ottoman Land Code).

5. " Mashad el Maska " (literally, " to hold by ploughing ") is a very ancient form of Ottoman Land Tenure. Both the Settlement Officer and the Supreme Court have held that the right is a registrable, transferable

RESPONDENTS' CASE.

p. 14, l. 1.

and inheritable one. It was the Mutawalli's submission below that the right was merely one of cultivation, personal to the holder, inalienable and non-transmissible by inheritance, and as such was not registrable.

p. 68.

6. The Respondents derived their title as owners of the mashad el maska in the lands in suit by a transfer registered in the Land Registry at Safad on the 14th February, 1939, from certain members of the family of the former registered owner, one 'Ali Bey Mahmud Buzo, who was registered as owner by virtue of a Daimi registration dated the 21st Shawwal 1307. The Respondents paid LP.17,000 for the land and duly went into possession.

10

pp. 60, 61.
p. 69, l. 8.

pp. 1-11.

7. When the lands in suit came under settlement in the year 1940 claims were put in by the Mutawalli, by the Respondents, and by a number of members of the family of the late 'Ali Bey. These members claimed that they had been improperly excluded from the succession and that they were entitled to certain named shares in the lands. They were eventually made Third Parties in the proceedings, but the Settlement Officer directed that their position should be investigated later. No question accordingly arises in this appeal as to their position.

p. 12.

p. 15, l. 13.

p. 1, l. 30.

p. 11, l. 15.

The Mutawalli claimed the lands as "True Mulk dedicated by our ancestor Qotb ed Din el Khudairi." The Respondents claimed the lands "on the basis of a purchase from the rightful owners, implemented by a transfer at the Land Registry and by possession."

20

p. 12.

p. 20, l. 1.

pp. 18-22.

8. In the proceedings before the Settlement Officer the Mutawalli was made Plaintiff and the Respondents Defendant. The hearing before the Settlement Officer took place on the 14th May, 1941. No oral evidence was led by either side. Certain documents filed by the Plaintiff were, as the Settlement Officer pointed out in his decision given on the 25th May, 1941, strongly in favour of the Respondents' case that their interest in the lands was a registrable and transferable one:—

p. 20, l. 3.

p. 37.

p. 61.

"His document (D1) is a copy of a power of attorney dated 1298 A.H. by which the attorney was authorised to transfer to 'Ali Bey Mahmud Buzo the right of tassaruf in accordance with the tabu deeds in the mashad al maska of the lands in suit. The second document (D2) is the report of the Majlis Idara dated 29 sefer 1304 recording the transfer of the rights and interests mentioned in the power of attorney and with instructions to issue a provisional kushan pending receipt of the final kushan from the Daftar Khani in accordance with Article 11 of the Law as to Title Deeds for Waqfs 1293 A.H. The third document (D3) is a copy of the provisional kushan and the fourth (D4) is a copy of the final kushan and is the kushan of the Daimi registration of 21st Shawwal 1307 of which a true photostatic copy has been filed by the Defendant.

30

pp. 60, 61.

These four connected documents show the history of the transaction and reveal certain facts. The first document states clearly all the particulars of the interest to be transferred and shows that in 1298 A.H. the tassaruf in the mashad al maska was registered in accordance with tabu deeds.

The second document shows that the competent authority to consider the transfer was the Majlis Idara and no exception was taken to the registration of the right in the Tabu. To the contrary, the Majlis instructed the tabu clerk to issue the provisional kushan which he did and the Daftar Khani sanctioned the issue of the final kushan and the transfer was recorded in the registers. 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.

10

I have now to consider the effect of the judgment of the Sharia Court dated 1334 and the admissions that 'Ali Bey was a lessee. I find there is no inconsistency between this admission and the claim of the defendant to be the holder of mashad al maska . . . I find that the four connected documents 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 registrable interest in land."

p. 63.

p. 21, l. 6.

9. The passages in the Settlement Officer's decision dealing with the nature of the waqf are, it is submitted, unsatisfactory. They afford, it is contended, no justification for his conclusion that the waqf was a waqf sahih. He said :—

20

" The Plaintiff has no documentary proof that the land is waqf sahih. He has a number of opinions from officers of the Waqf Administration but these are no more than opinions and founded on no quoted authority. 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 transactions connected with this land and in no one step do I find a 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 . . .

p. 21, l. 12.

30

I have therefore to decide the question on the evidence before me which consists of the kushan of the defendant which has been shown to be derived from the registration in favour of 'Ali Bey dated 1307 A.H. This earlier kushan states that the land is waqf and also declares it to be ushurlie. The attempt to show that 'Ushurlie means the land in 'Ushriya and therefore mulk is simply misleading and the only indication in the kushan as to the class of the land is the word ' waqf.' On the other hand, the defendant has not shown the class is miri mevqufe and relies upon the statement contained in Article 4 of the Land Code that most of the land in the Ottoman Empire is miri mevqufe.

p. 22, l. 7.

40

It not without some doubt that I come to the decision that the word waqf in the kushan means the land is waqf and that of the sahiha class and [sic] miri mevqufe as had it been the latter the fact would have been so stated.

50

I therefore find that the class of land is waqf sahih."

- p. 22, l. 21. 10. The Settlement Officer then went on to record formally his decision that the Respondents had a registrable and transferable right in mashad al maska, and concluded—
- p. 22, l. 22. “ 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.”
- p. 23. 11. Both parties appealed. By his Notice of Appeal the Mutawalli asked that the registration of the lands in the name of the Respondents should be set aside on the ground that they had no registrable interest in them and that the registration in the Land Registry in their name and in that of their predecessors in title had been “ obtained by fraud against the interests of Appellants.” Two main points were raised by the Respondents in their Notice of Appeal :—(1) It was urged that the Settlement Officer should have found that the lands were ghair sahih and not sahih, and (2) It was further urged that it was not within the jurisdiction of the Settlement Officer to decide whether the rent payable was fixed or variable, or if the latter who could vary it. 10
- p. 24, l. 10.
p. 25.
- p. 26. 12. By Notice of Motion dated the 30th October, 1941, the Respondents applied to the Supreme Court for leave on the hearing of the appeal to adduce two further documents, namely— 20
- p. 39. (A) An original copy of the proceedings of a Turkish Commission of Enquiry into the registration of the lands in question, together with the conclusions of that Commission.
- p. 77. (B) An official budget of the Imperial Awqaf Ministry for the year 1327 containing entries concerning the said lands.
- p. 29, l. 20. On the hearing of the appeal the Respondents were given leave to produce the two documents. It is submitted that these documents strongly support the Respondents' case.
- p. 27.
p. 31, l. 31. 13. The Supreme Court (Rose and Edwards, JJ.) gave judgment in the two appeals on the 24th February, 1942, dismissing the appeal of the Mutawalli and allowing that of the Respondents by varying the decision of the Land Settlement Officer and declaring that the land was of the category known as “ Takhsisat Waqf ” (that is, untrue waqf) and by further declaring that the question of the nature of the rent was not within the jurisdiction of the Land Settlement Officer. 30
- p. 29, l. 3. 14. The leading judgment in the Supreme Court was delivered by Mr. Justice Edwards who said :—
- The main point is whether the Land Settlement Officer was correct in holding that the respondents had acquired a registrable title . . . I 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 mevqufe 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 40

land. In support of this statement I quote from Messrs. Goadby and Doukhan's book at page 76—

“ It (i.e. an untrue waqf or ghair sahiha waqf) is merely a dedication of the interests which the State has in the produce of the land and in the fees arising therefrom.”

At the hearing of this appeal we allowed Dr. Eliash to produce an original copy of the Minutes (Record) of proceedings of a Turkish Commission of Enquiry into the registration of the land in question together with the conclusions of that Commission and also a copy of the official budget of the Imperial Awqaf Ministry for the year 1327 (Fiscal Year) which contains entries concerning the land in question . . . A perusal of the former clearly reveals that the Ricabi family were the original owners and used annually to pay to the Finance Office tithe and werko amounting to 188 piastres and that then these lands were transferred to Mahmud Bey Buzo who later transferred them to his son, 'Ali Bey. The subsequent history of the transaction, so far as the Respondents' title is concerned, is fully set out in paragraphs 4 and 5 of the Land Settlement Officer's decision. From the whole history of this land and from a perusal of all the documents produced I am satisfied that the Land Settlement Officer was correct in holding that the Respondents had a registrable interest in the land and I generally agree with his conclusions as set out at the end of paragraph 7 of his decision. I am, however, of opinion that he erred in concluding that the waqf was of the waqf sahiha category. As he himself pointed out in the first sentence of paragraph 8 of his decision, the appellant had no documentary proof that the land was waqf sahiha. According to Messrs. Goadby and Doukhan (see page 75 of their “ Land Law of Palestine ”)—“ The only true waqf (waqf sahiha) is that land which, at the time of dedication was the mulk of the dedicator.” Now, there is no evidence at all as to the dedication, and it follows therefore none as to the time of dedication.

The main argument advanced on behalf of the appellant at the hearing of the appeal was that the four members of the Ricabi family were Mutawallis of the Waqf and that they improperly disposed of the Waqf interest. There is, however, no evidence of the establishment of a waqf as a true waqf and it is therefore impossible for us to hold that the waqf was a true waqf—still less to hold that anything that the Ricabi family did was unlawful.

The learned Judge then went on to give ten further reasons for confirming the view that the waqf was not waqf sahiha, and concluded his judgment by holding that the question of the nature of the rent was not within the jurisdiction of the Land Settlement Officer.

15. The Respondents submit that the judgment of the Supreme Court of Palestine dated the 24th February, 1942, is right and should be affirmed for the following among other

REASONS.

- (1) Because the determination of the nature of the tenure “ mashad el maska ” involves questions of fact on which there are concurrent findings below.

- (2) Because the previous transfers of the lands showed that the waqf was not waqf sahih.
- (3) Because it was for the Mutawalli to prove if he could that the waqf was waqf sahih and this he failed to do.
- (4) Because there was no material for singling out the waqf in question as differing from the majority of the waqfs in the Ottoman Empire.
- (5) Because the material before the Settlement Officer and the Supreme Court supported the view that the waqf was waqf ghair sahih. 10
- (6) Because the Respondents had a registrable, transferable and inheritable interest in the lands in suit.
- (7) Because the Settlement Officer had no jurisdiction to deal with the question of the nature of the rent.
- (8) Because the fact that the Waqf Qotb ed Din el Khudairi was an old charitable foundation afforded no guidance as to whether any part of its property was true waqf.
- (9) Because the Respondents derived their title from the duly registered owner.
- (10) Because of the reasons given by Mr. Justice Edwards 20 in his judgment.

PHINEAS QUASS.

T. L. WILSON & Co.,
 6 Westminster Palace Gardens,
 London, S.W.1,
Solicitors for the Respondents.

In the Privy Council.

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

BETWEEN

ABDALLAH MUKHLES - *Appellant*

AND

KEREN KAYEMETH
LEISRAEL LIMITED - *Respondents*

CASE FOR THE RESPONDENTS

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Appellant.