Privy Council Appeal No. 86 *of* 1946

Abdallah Mukhles - - - - - - - - *Appellant*

v.

Karen Kayemeth Leisrael Limited - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1948

Present at the Hearing:

LORD UTHWATT
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* LORD MACDERMOTT]

This appeal relates to certain lands at Khiyam el Walid in the sub-district of Safad which became subject to settlement under the Palestine Land (Settlement of Title) Ordinance in or about the year 1940. In the course of proceedings under that Ordinance conflicting claims were advanced in respect of these lands. The mutawalli of the Waqf Qotb ed Din el Khudairi (for whom the present appellant, as acting mutawalli, has since been substituted) claimed that the lands were of the character known as waqf sahih, or true waqf, and that the respondent, Karen Kayemeth Leisrael Limited, had no registrable interest therein. The respondent claimed that its interest in the lands, which had been acquired by purchase in 1939, was registrable, and that the waqf was takhsisat, or untrue. In addition to these claimants there appeared before the Settlement Officer several third parties who disputed the respondent's title to certain shares in the lands. These third parties supported the claim of the mutawalli as to the character of the waqf but were apparently content, from an early stage in the proceedings, that this issue should be settled as between him and the respondent. They took no active part in the hearing and did not appeal.

On the 25th May, 1941, the Settlement Officer held that the waqf was true and that the respondent had a registrable interest. He also held that that interest was of a tenure known as mashad el maska. His conclusions are thus expressed at the end of his judgment:—

> "I therefore find the class of land is waqf sahih and that the defendant has a registrable and transferable right in mashad el 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 decide the mashad el maska is inheritable but without prejudice to the third party to show the rules of succession to be followed and that the succession is within the jurisdiction of the Settlement Officer to decide."

Against this decision both parties appealed to the Supreme Court (Edwards and Rose JJ.) sitting as a Court of Appeal. It delivered judgment on the 24th February, 1942, affirming the view that the respondent had a registrable title but holding, contrary to the opinion of the Settlement Officer, that the waqf was untrue. The conclusions of the Supreme Court are summarised in the judgment of Edwards J. as follows:—

" For all the foregoing reasons I am of the opinion that the contention of Dr. Eliash that the land is of the category known as Takhsisat Waqf is sound. As regards the question of the nature of the rent, I hold that this was not within the jurisdiction of the Land Settlement Officer.

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."

It is from this judgment that the appellant now appeals.

The evidence adduced before the Settlement Officer was entirely documentary. Before the Supreme Court two additional documents—a copy of the proceedings of a Turkish commission of enquiry into the registration of the lands in question and an official budget of the Ottoman Awqaf Ministry containing entries concerning these lands—were admitted on the application of the respondent. But even with this amplification the evidence remains meagre and unsatisfactory. The available documents form but a fragmentary record and many of them are ambiguous in expression or equivocal as respects the issues for determination. In existing circumstances, however, a remission of the case is impracticable and unlikely to secure any further relevant facts or findings of value, and their Lordships must therefore proceed to deal with the appeal on the material before them.

This material has been the subject of close examination in the course of the litigation in Palestine and it is unnecessary to detail it again. It was common ground that the tithes payable in respect of the lands had been dedicated to the objects of the waqf and were applied accordingly. And it was not disputed that if the lands were of the nature of true waqf they must be *mulk* and completely dedicated in respect of the full ownership which that category of land implies.

The interest claimed by the respondent was that sold to its predecessors in title in 1303 A.H. by members of the Ricabi family who were, apparently, descendents of Qotb ed Din el Khudairi and mutawallis of the waqf associated with his name. What was then sold was the mashad el maska in the lands in question. The vendors appear to have held kushans and the whole tenor of the documents relating to the sale indicates that they sold as beneficiaries and not on behalf of the waqf, and that they did so in a manner which would have been inappropriate had the interest sold been dedicated to the objects of the waqf. The sale was effected by an agent under an " unrestricted " power of attorney made before the Sharia Court of Damascus and there is nothing to indicate that any consent on the part of the waqf authorities was sought or given. The vendors received the purchase money but the fact is recorded without hint that they did so as mutawallis. So far as the evidence goes there is no suggestion that, throughout the somewhat protracted course of this sale, the characteristic inalienability of waqf land caused concern to the purchaser or raised any question in the minds of the Turkish registering authorities who examined the transaction closely before sanctioning a final entry in the tapu register. It was during this examination that the enquiry by a Turkish commission, to which reference has already been made, was held. The object of that enquiry was to ascertain, in the interests of the Government, if the lands were mahlul and the nature of the waqf was not in question.

The findings of this commission and the statements it recorded cannot, therefore, be regarded as directly in point, but it is to be observed that they in no way conflict with the deduction which might fairly be drawn from the evidence regarding the sale by the Ricabi family in 1303 A.H., namely, that the full ownership in the lands had not been dedicated and that the waqf was therefore takhsisat or untrue. Indeed they support that deduction for they undoubtedly led the Mejles Idara, Quneitra, to conclude that a title under Section 78 of the Ottoman Land Code had been proved and that conclusion, if correct, meant that the land was *miri* and not *mulk*.

The remainder of the evidence contains much which is obscure and indefinite but which, in itself and on certain assumptions, may be regarded as affording some indication that the dedication covered more than the taxation payable to the State. After a full consideration of this material

and of the careful arguments presented by counsel on either side their Lordships are, however, unable to accept the view that the evidence as a whole establishes a waqf which by attaching to the entire ownership in the lands is therefore sahih or true.

It was urged that the description " waqf—Sidna Qotb ed Din Khudairi " to be found in several of the Turkish registration documents justified the implication of a complete dedication. Their Lordships cannot accede to this submission. The description is compatible with both of the opposing contentions and has no real significance. More reliance was placed by counsel for the appellant on what was alleged to be a rent payable out of the lands and dedicated, in addition to the taxes, to the objects of the waqf. This rent was said to have been paid for over 50 years prior to the purchase by the respondent in 1939, but the evidence regarding its amount and nature and the interest in respect of which it was payable was scant and vague. In support of the view that a rent issuing out of these lands had been dedicated the appellant relied mainly upon the record of certain proceedings in the Sharia Court of Damascus which took place in the year 1334 A.H. The true nature and meaning of those proceedings must remain doubtful in the absence of any reliable clue to the surrounding facts and circumstances, though from the record itself their Lordships would incline to the view that the procedure followed was, in part at least, of a fictional character. But even on the assumption that a dedicated rent, distinct from State taxation, issued out of the lands their Lordships are of opinion that it cannot be regarded as satisfactorily established that the mashad el maska interest was itself dedicated or that the dedication of that interest would necessarily mean the dedication of the full ownership.

Their Lordships appreciate that this waqf is ancient and that the absence of any evidence as to the act or acts of dedication was bound to create difficulties of proof. But for the reasons mentioned they are in agreement with the Supreme Court that the land is o the category of takhsisat or untrue waqf.

Nor can their Lordships see any ground for differing from the conclusion reached both by the Settlement Officer and the Supreme Court that the interest purchased by the respondent is registrable. It would seem that the tenure known as mashad el maska is unusual in Palestine and the material available is insufficient to enable the Board to define with any exactitude its particular characteristics. But it clearly gives a right to possession and in fact the interest purchased by the respondent has been long enjoyed and long registered in the pre-settlement registers. For these reasons their Lordships are not disposed to doubt that it comes within the expression: " any interest in land which requires, or is capable of registration under this Ordinance " which is contained in the definition of " land " in Section 2 of the Land (Settlement of Title) Ordinance.

It remains to consider whether the Supreme Court was right in declaring that " the question of the nature of the rent is not within the jurisdiction of the Land Settlement Officer ". Their Lordships think this declaration goes too far. It was the duty of the Land Settlement Officer to investigate and settle (with the help of the Land Court under Section 30 of the Ordinance, where desirable) disputes relating to the land under settlement. If he found that the nature of a rent was not apparent from a description of the category or tenure of the lands out of which it arose it was, in the opinion of the Board, within his province to decide the nature of such rent in order to settle the dispute and prepare a schedule of rights capable of leading to an effectual registration. This view does not mean that the conclusions of the Settlement Officer as to the rent in this case will necessarily remain as they are. The whole matter must go back so that the rights of the rival claimants may be finally settled. When that stage is reached it will be open to the Settlement Officer to affirm or modify his previous ruling on this point in the light of the proceedings on appeal.

Their Lordships will, accordingly, humbly advise His Majesty that the judgment of the Supreme Court be varied to the extent aforesaid and that subject thereto the appeal be dismissed. The appellant will pay the costs of the appeal.

(60063) Wt. 8062—31 90 5/48 D.L. G. 338

In the Privy Council

ABDALLAH MUKHLES

v.

KAREN KAYEMETH LEISRAEL LIMITED

DELIVERED BY LORD MACDERMOTT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1948