Privy Council Appeal No. 56 *of* 1938

Mamur Awqaf of Jaffa - - - - - - *Appellant*

v.

Government of Palestine - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1939

Present at the Hearing :

VISCOUNT MAUGHAM.
LORD PORTER.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN]

By the Land (Settlement of Title) Ordinance No. 9 of 1928 provision was made to effect a settlement of the rights in land in any area in Palestine and for the registration thereof in a register of title. The settlement was to be based upon a survey after demarkation of boundaries, every claimant to land in a village within a settlement area being required to submit his claim to the settlement officer, who had to draw up a schedule of claims and to investigate all claims publicly. The settlement officer was given power to hear and determine conflicting claims and was required to set forth the results of his investigation in a schedule of rights to be transmitted to the Registrar together with a signed plan of the parcels comprised therein. After the publication of the schedule of claims no fresh entries were to be made in the existing land registers, but a new register was to be opened for each village and the land was to be entered therein in accordance with the schedule of rights and plan transmitted by the settlement officer, and in accordance with his decisions in the case of rights shown in the schedule as disputed. The Ordinance provided (section 43) that registration of land in the new register should invalidate any right conflicting with such registration: also (section 44) that no disposition of land registered in the new register other than a lease for not more than three years and no transmission of land on death should be valid until registered.

The law to be applied by the settlement officer in the decision of disputes is defined by sub-section (3) of section 10:—

> " (3) A Settlement Officer shall apply the land law in force at the date of the hearing of the action:

> " Provided that he shall have regard to equitable as well as legal rights to land and shall not be bound by any rule of the Ottoman Law or by any enactment issued by the British Military Administration prohibiting the courts from hearing actions based on unregistered documents or by the rules of evidence contained in the Ottoman Code of Civil Procedure or the Ottoman Civil Code."

This mention of equitable and legal rights is to be read with reference to the provisions of article 46 of the Palestine Order in Council 1922, which as observed by Lord Atkin delivering the judgment of this Board (11th October, 1935), in the case of *Sheikh Suleiman Iaji Faruqi* v. *Michel Habib Aijub* (P.C. Appeal No. 1 of 1935) " enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity. . . ."

In November, 1931, the appellant who is Mamur Awqaf (Registrar of Waqfs) at Jaffa brought before the Settlement Officer for the Jaffa area a claim in respect of certain land in two villages Yahudiya and Petach Tiqva. The claim as regards Yahudiya was numbered Case No. 210/31 and the Petach Tiqva claim was Case 189/31 but the two cases were joined and treated as identical. The claim of the appellant was that the lands in question (certain numbered " blocks " or units of survey and registration) should be entered in the schedule of rights, for the purposes of the new register under Ordinance No. 9 of 1928 above-mentioned, as land in respect of which the waqf Khaski Sultani was entitled to the whole of the tithe and half of the land registry fees. The Settlement Officer (23rd March, 1932), and on appeal from him the Land Court (19th October, 1933), and the Supreme Court (22nd April, 1937), have dismissed the appellant's claim on the ground of limitation having regard to Article 20 of the Ottoman Land Code of 1858.

This Code was originally applicable not to Palestine only but to the old Ottoman Empire generally. By its first six articles it defines and distinguishes five kinds of land which range from " mulk "—that which is in the full ownership of private persons—to " mevat "—that which is waste in the sense of being used by no one. Between these extremes lie three classes. First, " mirie " or State land: this is land of which the ownership (raqaba) is in the Treasury but the enjoyment or possession (tassaruf) is granted to an occupier whose interest is heritable and (with permission) transferable. The interest of this occupier is in some respects analogous to a perpetual leasehold and the object of the grant to him is in general that the land may be cultivated and that the State may derive a tithe therefrom. This interest is described in Article 20 of the Land Code by the Turkish word " tapoulé " which characterises it as of the kind that is held by tapou [*Ibrahim Mehmet* v. *Hadji Panyioti Kosmo* (1884) 1 Cyprus Law Reports 12]. A fee called the tapou fee was payable to the State upon the grant of the right, and upon registration in the tapou register a title deed was given in respect of it.

Another class of land is " mevqufe " or dedicated land: which may be either mulk which has been dedicated by the full owner, or State land which has been dedicated by the Sultan or others with his sanction. With reference to such State land it is explained in Article 4 of the Land Code: " The dedication of this land consists in the fact that some of the State imposts such as the tithe and other taxes on the land . . . have been appropriated by the Government for the benefit of some object. Mevqufe land of this kind is not true waqf. Most of the mevqufe land in the Ottoman Empire is of this kind. The legal ownership of land which has been so dedicated (of the takhsisat category) belongs as in the case of purely State land to the Treasury, and the provisions and enactments hereinafter contained apply to it in their entirety. Provided that, whereas in the case of purely State land the fees for transfer succession and the price for acquiring vacant land are paid into the Public Treasury, for this kind of mevqufe land such fees shall be paid to the waqf concerned."

Yet another class of land is " metrouke "—that is land devoted to use by the public such as public roads. This class of land is the subject matter of the second book of the Land Code which in Article 102 contains a provision that no period of limitation applies to actions relating to such land (cf. Art. 1675 of the Mejelle).

The claim of the appellant is that the lands in question are mevqufe land in the sense described by Article 4. The only basis of the claim and the only evidence of it which has been put forward lie in the fact that in the tapou register between the fiscal years 1309 and 1326 (A.D. 1893-1910) the entries in respect of these lands contain in a column headed " reference to waqf " the name " waqf Khaski Sultani " with or without the addition of the word " mazbuta." In or about 1893 certain lands in Yahudiya came to be held by one Isidore Brown a French subject and in 1905 they were entered for convenience as belonging to another village called Mulabes or Petach Tiqva: in 1907 Isidore Brown died and the lands were entered as belonging to his heirs in various shares. The entries made on each of these occasions contain a reference to the wakf Khaski Sultani. In 1910 when the lands were transferred to one Henry Frank Alphonso a French subject they were entered in the tapou register as mirie land without mention of the waqf Kaski Sultani. From that date 1910 until 1931 they stood in the register as mirie lands. The entries of 1910 appear to be certified by members of the waqf administration and it is not open to dispute that they came at the time to their knowledge. It was suggested by the appellant that the change in the form of entry was due to inadvertence, and that the waqf had received monies from the lands now in question after 1910 and until " the occupation ", but no evidence was given to that effect and the Courts in Palestine have had little difficulty in holding that no such payments

were made after 1910. No evidence was adduced to prove the nature and character of the waqf Khaski Sultani; the properties dedicated to it or acquired by it; or the sums received, if any, from the lands now in question before 1910. No tapou title deed was produced to throw light upon any of the entries in the register.

It appears that a waqf mazbuta is one which was administered directly by the Ministry of Waqf. It was suggested in argument by learned counsel for the respondent that a waqf of the takhsisat kind could not be described as a mazbuta waqf but this has not been shown to their Lordships' satisfaction. It is somewhat disconcerting however to find that the appellant, whose case consists entirely in reliance upon the entries in the tapou register from 1309 to 1326, began before the Settlement Officer by denying that the lands in question were waqf of the takhsisat kind and claiming that they were true waqf (sahih waqf)—that is, the subject of dedication by a dedicator entitled to the full ownership as of mulk.

The first question for decision is whether the appellant's claim is barred by Article 20 of the Land Code. The original is in Turkish and the translations hereunder given are taken from Fisher's "Ottoman Land Laws" (1919), Young's "Corps de Droit Ottoman" (1906) and Ongley's "Ottoman Land Code" ed. Miller (1892).

"ARTICLE 20. (Fisher.)

"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 (fouzouli) 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.

"ARTICLE 20. (Young.)

Lorsqu'une personne ayant droit à la possession d'une terre miri l'aura laissé occuper par une autre pendant dix ans sans la revendiquer en justice, et sans pouvoir invoquer aucune excuse valable telle que la violence exercée par l'occupant, la minorité, la démence, l'absence pour cause de voyage, les procès tendant à la restitution de la possession de cette terre ne pourront pas être accueillis. Le délai de dix ans court à partir du moment où les excuses ci-dessus auraient cessé d'exister. Mais, si le défendeur reconnaît qu'il a pris possession de la terre et qu'il l'a cultivée sans droit (fouzouli), il n'est pas tenu compte due délai qui s'est écoulé et la terre est remise au légitime possesseur."

"ARTICLE 20. (Ongley.)

Actions concerning Tapu land which has been held for ten years without opposition will not be heard without one of the legal disabilities, such as minority, madness, force, and being absent in a distant country, having been proved according to the Sheri. They will be heard up to ten years from the date of the cessation of such valid excuses, and after that time has passed they will not be heard. But if the defendant admits having unlawfully seised and cultivated the land, attention will not be paid to the lapse of time and possession, and the land will be taken and given to the owner."

The Settlement Officer arrived at the conclusion that "there exist no definite provisions of law or judicial precedents defining the period of prescription in regard to claims to revenue by a takhsis waqf." But he thought that "in the absence of any better authority" it was open to him to apply the period of ten years prescribed by Articles 20 and 78 which regulate prescription as regards possession of mirie land. The Land Court would appear to have accepted this view. The Supreme Court held that the provisions of Article 20 covered the present claim; saying "it is to be noted that the article does not deal with an action for the possession of land but with an action relating to land so possessed (*s.c.* by tapou deed)."

As a matter of construction their Lordships cannot but hold in accordance with the appellant's contention that Article 20 deals with conflicting claims to the tassaruf or possession of mirie land, and that it is not so expressed as to apply to claims made on behalf of a takhsisat waqf against the Treasury to a share of tithe and registration fees. The phrase "actions concerning land of the kind that is possessed by title deed" must be taken in its context. Whichever of the translations above set out be preferred it is required by the structure of Article 20 that it be read as a whole. The article finds place in the first chapter of the first book—viz. the chapter headed "Concerning the nature of possession." It is one of a set of provisions intended to apply to cases in which land has been taken and cultivated by a person other than the holder by tapou title deed. The reference to valid excuses and the examples of disability given in the article point to the same conclusion. It is difficult to hold a confident opinion upon the question whether from the standpoint of 1858 the suggestion of a ten year limitation could be regarded as reasonable or proper for the purpose of bringing to an end a dedication of the takhsisat kind. The right in question though concerned with mirie land is very different from the right of an occupier of land. In any case their Lordships cannot regard the language of Article 20 as covering the claim of a waqf to its share of the State imposts, and they have not been shown any basis in the law of Palestine for the view that the Settlement Officer in the absence of any enactment applicable to the case had a discretion to apply a ten years' period of limitation.

It is manifest, however, that the claim put forward in 1931 was a stale claim and one which should have been made only upon the basis of carefully ascertained facts laid fully before the Courts so as to show the true nature and character of the dedication alleged and the objects thereof; the facts as to the abandonment of the claim of waqf by the representatives of the waqf administration; and the facts as to receipt or non-receipt of income both before and after 1910. Merely to file the entries in the tapou register is not to prove that the entries for the last twenty-one years are incorrect because they differ from previous entries. It would seem from the facts above stated to be quite untrue

that the change was made by inadvertence or that the consequences of the change were not immediately apparent. The Settlement Officer is not to be asked to embark upon speculation as to the cause of the change in the absence of evidence produced in support of a definite case. The terms of the original endowment of the waqf Khaski Sultani or the conditions of dedication of the land now in question may or may not have a bearing upon the conduct of the waqf's representatives in 1910. Their Lordships are not disposed to place reliance on the suggestion made by the Land Court to explain the entry made in 1910—a suggestion of which the probability is difficult to discover—that it is accounted for by new arrangements taking effect between the Ministry of Waqfs and the Ministry of Finance. After twenty-one years it is not for the Government to explain and justify their claim to the State imposts but for the appellant to establish the rights of the waqf therein. He has done no more than give proof of the entries in the tapou register and these for the last twenty-one years are against him. Their Lordships are of opinion that the latest tapou register is competent evidence as to the character of the land in question, and that the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect: otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law. The appellant has adduced no evidence of any right to have these lands recorded as mevqufe in the schedule of rights which was in course of preparation for the purposes of the new register.

Section 64 of Ordinance 9 of 1928 gives to the Land Court on appeal from the Settlement Officer a discretion to rehear the evidence or to hear fresh evidence, and their Lordships have considered whether it would be right that this case should be remitted to the Land Court with or without a direction that the appellant should have an opportunity in that Court to adduce evidence afresh in support of his case. They think, however, that the claim is a stale claim insufficiently considered and put forward with the utmost economy of information, and that as the evidence adduced does not amount to prima facie proof of the title which has been put in issue the appellant's claim ought now to be dismissed. Nothing is here said as to the effect in such a case as the present of the provisions of Articles 1660 or 1661 of the Mejelle; but their Lordships think it plain that Articles 78 and 102 of the Land Code have no application to the present case, the former being directed solely to the rights of a cultivator against the State and the latter to land which is metrouke in the sense already explained.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondent's costs.

(22433—3A) Wt. 8075—41 100 3/40 St. G. 33

In The Privy Council.

MAMUR AWQAF OF JAFFA

v.

GOVERNMENT OF PALESTINE

DELIVERED BY SIR GEORGE RANKIN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS
POCOCK STREET, S.E.1.

1940