

46, 1948

Appeal No. 31 of 1947.

UNIVERSITY OF LONDON

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INSTITUTE OF LANCING
LEGAL STUDIES

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE.

44484

APPELLANT'S CASE

BETWEEN

MA'MUR AWQAF OF GAZA

Appellant,

AND

1. THE VILLAGE SETTLEMENT COMMITTEE OF BARBARA, and

10 2. THE GOVERNMENT OF PALESTINE

Respondents.

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from the judgment of the Supreme Court of Palestine, dated the 3rd July, 1945, dismissing the Appellant's appeal from the decision of the Settlement Officer, Gaza Settlement Area, dated the 7th December, 1944. p. 37. p. 28.

2. The question raised by this appeal is whether a tract of land some 4,000 dunums in extent at Barbara in the Gaza Sub-District is waqf sahih or waqf gheir sahih, that is whether it is a "true" or an "untrue" waqf. The difference between the two is that in the former case the land itself is dedicated to the religious purpose whereas in the latter case there is no dedication of the land, but some of the State imposts on it are appropriated by the Government for the benefit of the religious purpose. 20

3. Waqf is an institution of Moslem law and in its relation to religion is of great importance in Moslem Society. There is no code of waqf law. The question raised in this appeal is essentially one involving a knowledge and application of the waqf law. Where it is submitted the Settlement Officer and the Supreme Court went wrong in the present case, is that both rejected the views of the Qadi of Gaza who sat with the Settlement Officer expressly "for the purpose of advising him upon the law of Waqf involved." (Section 11 (3), Land (Settlement of Title) Ordinance.) The Qadi's opinion is set out at length in the Record. It was plainly in favour of the Appellant's contention that this was a case of a true Waqf. The evidence of the Qadi of Jerusalem, who was called as a witness by the Appellant, was to the same effect. No evidence was called by the Respondents to combat these views. Indeed it was apparently the view 30 p. 26. p. 21.

p. 21, l. 40.

of at any rate the Respondent Committee that as the Qadi of Gaza was sitting with the Settlement Officer it was not open to the parties to lead evidence on the religious legal questions involved.

4. The Settlement Officer, whose duties are manifold, cannot be omniscient. Unless he is to go astray he must, it is submitted, in such a case as this be guided by and follow the views of those who have peculiar knowledge of the religious law and questions involved. To act directly contrary to those views must inevitably, it is submitted, lead to a wrong decision.

p. 6, l. 3.

p. 29, l. 2.

p. 6.

p. 29, l. 6.

p. 12, l. 13.

5. At settlement the Appellant claimed the land as Waqf sahih. 10
The Respondent Committee claimed the ownership of the land on behalf of the large number of villagers who were actually, so they said, in possession of it, and admitted that "The tithes for this Block are paid to the Waqf." The Respondent Committee denied that the land was Waqf sahih, but made it clear that they would not challenge any decision that the land was "miri mawqufa." The Government originally claimed all the land as unregistered miri. By letter dated the 1st October, 1937, however, the Director of Land Settlement limited the claim to the reqaba of the land. When the case was actually before the Settlement Officer it was admitted by the Government that the 20
land was miri mawqufa and that the tithes (or the equivalent of the tithes) are paid to the department of Awqaf.

pp. 1—7.

6. The Memoranda of Claim were lodged by the parties in the year 1936. The proceedings before the Settlement Officer did not take place until some eight years later.

pp. 10—25.

p. 37, l. 33.

7. The evidence in places is difficult to follow particularly for those unfamiliar with Waqf law. The documents produced showed clearly that the Waqf was a very ancient one. In giving judgment the Supreme Court said: "It can be traced through documents as far back as 650 years." The Qadi of Jerusalem whose evidence, as mentioned above, was 30
objected to by the Respondent Committee, said explicitly:—

p. 22, l. 5.

"Before the Ottoman Land Code and the Tabu, all the waqfs were waqfs sahih. This is according to Sharia Law. . . . I understand from the contents of Exhibit LL that the land itself is waqf—not merely the income."

8. The opinion of the Qadi of Gaza which he gave to the Settlement Officer was summarised by the latter as follows:—●

(A) It is quite impossible for the tithes or produce to have been dedicated as Moslem law does not allow of anything being dedicated until it exists. Therefore the tithe alone could not 40
have been dedicated, as and as it is admitted that the land is waqf, it can only be waqf sahih.

- (B) All the Moslem waqfs are waqf sahih, and if any lands are now treated as miri mawqufa, it must be that through some failure of the administration the cultivators took possession. RECORD. —
- (C) In addition, the fact that a tawliya was issued; that entries about the waqfs appear in the Daftar Khaqani and other registers; that the land is not registered in the Land Registry; that the tithes were paid to the waqfs; and that the Defendants did not prove that the land was not waqf sahih, prove that the land is waqf sahih.
- 10 (D) The period of prescription is thirty-six years, but as tithes were paid to the waqfs no prescription could have run.

9. On the 7th December, 1944, the Settlement Officer gave his decision dismissing the claim of the Appellant that the land was waqf sahih and ordering it to be registered in the names of the Claimants represented by the Respondent Committee as miri mauqufa (Waqf al Haramain ash Sharifein and Waqf ash Sheikh Yusef al Barbawi). He rejected the views of the Qadi of Gaza saying, "With all respect to the Qadi, I cannot agree with him and I cannot take his advice." p. 28. p. 29, l. 34.

10. The Appellant appealed to the Supreme Court of Palestine sitting as a Court of Civil Appeal. On the 3rd July, 1945, the Supreme Court (the Chief Justice, Frumkin and Abdul Hadi, JJ.) delivered judgment dismissing the appeal. The judgment, which is very short, begins by stating what is the point in issue and goes on as follows:— p. 35. p. 37.

"The Settlement Officer came to the conclusion that it was miri mawqufa and not waqf sahih. It is of course regrettable that in arriving at that conclusion the Settlement Officer was forced to disagree with the opinion of the Qadi, whom he invited to act as an assessor. . . . p. 37, l. 28.

30 "The Settlement Officer examined all the documents which were produced by the plaintiff, and for the reasons which he stated in his judgment he came to the conclusion that they did not lead inevitably to the inference that the property was waqf land, which is not denied, but there was nothing in them to preclude the Settlement Officer from coming to the conclusion that it was waqf gheir sahih.

40 "Apart from this finding of the Settlement Officer, which is based on the documents and which we cannot say was unreasonable, there is other evidence, which in our opinion is conclusively against the appellant. It was proved that for at least 74 years the Government collected the tithes on this land and paid them over to the waqf. If it were waqf sahih the Supreme Moslem Council would have collected their share of this waqf direct from the village and the taxes would have been paid direct to the Government from the Awqaf Department. The procedure in regard to the collection of the tithes by the Government, which we are satisfied has been followed for 74 years is inconsistent with the waqf being waqf sahih."

RECORD.
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II. The Appellant submits that the judgment of the Supreme Court of Palestine dated the 3rd July, 1945, is wrong and should be reversed for the following, among other,

REASONS:—

1. Because the opinion of the Qadi of Gaza should have been followed.
2. Because the Settlement Officer disregarded the records of the Daftar Khaqani, Istanbul, and the Daftar Khaqani of Palestine, which records support the Appellant's claim that the land was waqf sahih. 10
3. Because the Settlement Officer misdirected himself in holding that the register "Quued Amlak Daftari" was not sufficient evidence that the land in question was waqf sahih.
4. Because the Al Hamdwoundoukariya decree issued by the Sultan Murad the Ottoman Hamda-woundoukar is issued only in respect of properties dedicated as waqf sahih.
5. Because the Settlement Officer misdirected himself in holding that the fact that the waqf authorities had discontinued receiving one-quarter of the produce affected the nature of the waqf so as to make it waqf gheir sahih instead of waqf sahih. 20
6. Because no evidence was led by the Respondent in answer to the evidence given by the Qadi of Jerusalem or at variance with the views of the Qadi of Gaza.
7. Because the judgment of the Supreme Court is wrong and should be reversed.

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