Privy Council Appeal No. 57 *of* 1938

Reuven Swatitzky - - - - - - - - - *Appellant*

v.

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

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1940

Present at the Hearing:
LORD THANKERTON
LORD JUSTICE LUXMOORE
SIR PHILIP MACDONELL
[*Delivered by* LORD THANKERTON]

This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 26th September, 1925, dismissing the appellant's appeal from a judgment of the Land Court of Jaffa, dated the 4th March, 1925, but varying the judgment of the Land Court, and limiting it to a declaration that the respondent is entitled to remain registered as owner of the lands in suit.

The lands in suit consist of an area of 1895 dunams and 461·95 square pics called the "Bassa", situated in the Jaffa District, at or near the village of Petah Tiqva. The suit arose out of the making of a contract of lease dated the 11th November, 1921, between the Chairman of the Land Commission of Palestine on behalf of the Government of Palestine and certain persons acting under a power of attorney from the inhabitants of the Colony of Petah Tiqva, under which the Government leased to the Colony the land in dispute for a term of 50 years, but under reservation of a portion of about 200 dunams of the said land, which portion might, at the option of the Government, be subsequently included in the land leased.

In the Land Registry Office of Jaffa Turkish Register the Government of Palestine has been registered as the owner of the land in suit as Miri land ever since 1897, and the said lease was duly registered on the 29th May, 1922.

The appellant, who was in possession of the area, obstructed the delivery of possession by the Government to the Colony, and the Colony applied to the Magistrate's Court of Jaffa for dispossession of the appellant, but the Magistrate,

on the 25th December, 1922, held that the question of ownership was involved, which placed the matter outside his jurisdiction, and dismissed the application. Thereafter a Local Council of Petah Tiqva was invested with juristic personality, and, as provided in the lease, the benefit of the lease was transferred to the Council, which instituted the present suit in November or December, 1923, against the appellant as defendant. In their statement of claim, which is undated, the Council " requests by virtue of the aforesaid official documents to restore its right as a lawful lessee in respect of this land, to order the Land Department of the Government of Palestine to prove its ownership on this land and after the Government produces proof of ownership that the Court may issue a judgment to the effect that the Government is the owner of the land that the defendant has no right of ownership thereon and that therefore the contract between the Government and the plaintiff stands good and the latter is entitled to cultivate the land in accordance with the provisions of the contract." The Council also asked that the Government should be summoned as a third party. On being so summoned, the Government decided to appear, and on the 6th December, 1923, filed a " statement of defence of third party ", in which a claim was made that judgment be given confirming the ownership of the Government to the land as per Tabu registration, and that the defendant should be ordered not to interfere with the use of the land by the tenants.

The appellant did not file a written defence, but, while admitting that the land was originally pasture land owned by the State, he claimed that he had been in possession since 1909, with the exception of a period of less than two years during 1918-1920 when he had been deported, that he had brought a considerable part of it into cultivation, and that he had acquired by haq qarar or prescription a right which entitled him to a tapou title from the Government. It is clear that he did make an application for a tapou grant to the Ottoman Government in 1911, and there is evidence that it was recommended, but no such title was given. He bases his claim to prescriptive right on Article 78 or Article 103 of the Ottoman Land Code, according as the land is Mirie or Mevat land. He accordingly challenges the right of the Government to grant a lease to any third party.

But the appellant is faced with a preliminary difficulty by reason of his actings in connection with the lease which he challenges, and both Courts have held that he is precluded by his actings from any challenge of the lease. Their Lordships, after an admirable argument by Counsel for the appellant, are also of opinion that he is so precluded. The evidence of these actings is contained in three documents.

By an agreement dated the 3rd October, 1920, between the appellant and the Colony of Petah Tiqva, the appellant " agrees to support the application of the Colony of Petah Tiqva to lease the bassa swamp lands for 99 years or such other long term as the Government may grant, this support being conditional on the sublease of 30 per cent. of the said

land being made by the Colony to Swatitzky, his heirs and assigns, and sanctioned by the Government. The specific area of the said 30 per cent. to be settled by the parties by agreement and in default of agreement by arbitration." It is unnecessary to refer to the further provisions except to add that the appellant was to get compensation from the Colony for reclamation and improvement of the bassa lands made by him from the year 1906 to the year 1918. The appellant admitted his signature and the validity of this agreement.

On the 8th October, 1921, the appellant, along with 240 other inhabitants of Petah Tiqva signed a power of attorney in favour of five members of the committee of the Colony empowering them to negotiate in their names with the Government *inter alia* for the lease in question. While the appellant was doubtful as to his signature on this document, his pleader in the Supreme Court admitted his signature. It is also clear beyond dispute that the lands claimed by the appellant are included in the agreement and the lease.

The appellant sought to get some help from the third document, viz., an undated letter by the appellant to the Government (Exhibit 5), in which he objects to the application of the Colony for a lease, and claims a right to the land. It was suggested by the appellant's counsel that this is the letter dated the 19th April, 1921, filed by his counsel as Exhibit 4 on the 27th October, 1924. If that be the true date, it follows that the appellant signed the power of attorney on a subsequent date. In any event, the letter must have been written prior to the grant of the lease on the 11th November, 1921.

In their judgment dated the 4th March, 1925, the Land Court decided that the Colony of Petah Tiqva, never having been in possession, was not a proper party to the proceedings, and dealt with the case as between the Government as third party and the defendant (the appellant) only. While it is not of material importance in the present case, their Lordships desire to express some doubt as to the propriety of not retaining the plaintiffs as a party. Such a conclusion does not seem to be supported by the last part of Article 1637 of the Mejelle, to which the Land Court refers. It held that the appellant could not claim possession and haq qarar of the property owing to the fact that he and others applied in the years 1921 and 1922 for the lease of all the property from the Government, as shewn by the agreement and the undated letter respectively, the validity of which was acknowledged by defendant himself. It further held that the evidence shewed that he was but a tenant of the land, and therefore could not be entitled to the right of haq qarar. Accordingly the Court ordered the appellant to refrain from interference with the land, with a reservation as to his claim for the 30 per cent. The Government had expressed its willingness to lease to him the 200 dunams reserved in the lease upon the same terms as had been agreed with the Colony.

On the appellant's appeal to the Supreme Court, the Court, by a judgment dated the 26th September, 1925, dismissed the appeal, and varied the judgment of the Land Court by limiting it to a declaration that the Government is entitled to remain registered as owner of the lands in claim.

The appellant maintained, in the first place, that the Government, as a third party, was in the position of a defendant, and that the Court was not entitled to grant a substantive judgment in their favour. In their Lordships' opinion, this contention is ill-founded, in view of section 117 of the Civil Procedure Code of Palestine, which is made applicable to the proceedings of the Land Court by section 3 of the Lands Court Ordinance, 1921. Section 117 is not limited to joinder as a defendant, and it clearly contemplates a statement of claim by the third party which can be upheld as against either or both of the parties to the suit. There is no reason for limiting it to a defence.

As already indicated, their Lordships agree with both the Courts below that the appellant is precluded from challenging the power of the Government to grant the lease to the Colony, the rights of which are now vested in the Local Council of Petah Tiqva. This conclusion may be based on either of two grounds:—Under the agreement of 3rd October, 1920, any equitable claim that the appellant had to the lands in question became vested in the Colony, the appellant, in place thereof, becoming entitled to the consideration which he derived under the agreement; the Government, on notice of the agreement, was bound to refuse to grant to the appellant any right in the lands which would be inconsistent with the agreement, and the appellant's undated letter could not affect this position. Alternatively, it is equally clear that the appellant is precluded by the admission necessarily implicit in the power of attorney of the right of the Government to grant the lease to the Colony. The power of attorney was coupled with an interest and the appellant was not entitled to revoke his part in it; *Frith* v. *Frith*, [1906] A.C. 254, per Lord Atkinson at p. 259. His letter could not revoke it.

Accordingly, their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the Supreme Court should be affirmed. The appellant will pay the respondent's costs of this appeal.

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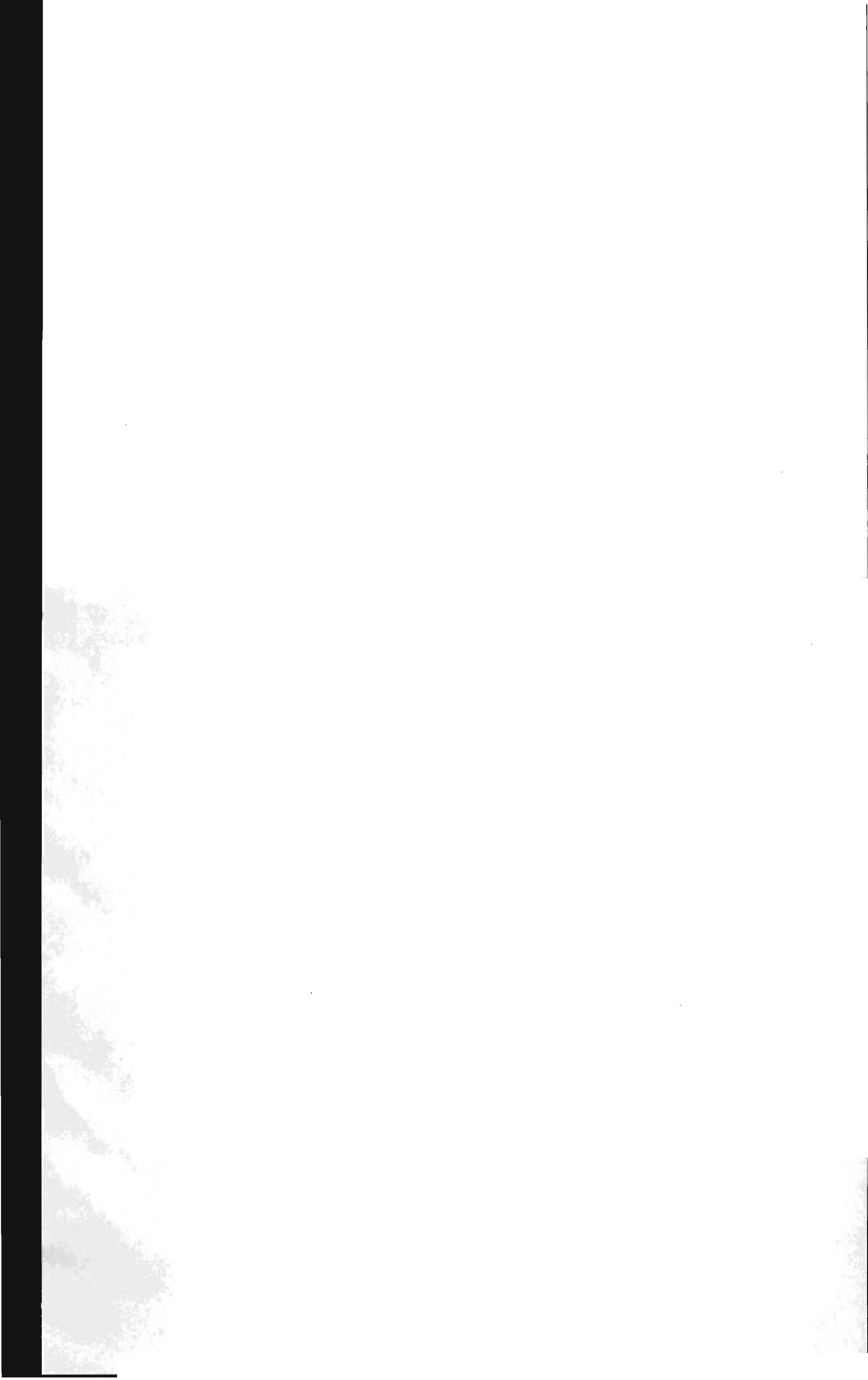

In the Privy Council

REUVEN SWATITZKY

v.

THE GOVERNMENT OF PALESTINE

DELIVERED BY LORD THANKERTON

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