

Maurice Litwinsky and others - - - - - *Appellants*

v.

Osman Khamra Saghir and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 30TH APRIL, 1945

Present at the Hearing :

LORD WRIGHT

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a Judgment dated 27th January, 1936, of the Supreme Court of Palestine, sitting in its appellate capacity, dismissing an appeal against a Judgment of the Land Court of Haifa, which declared that certain lands formerly held in common by one Hassan Es-Saghir (deceased) and one Ahmad Mansour (deceased) and registered in their joint names (or those of their respective successors in title), as co-owners had been partitioned by the said Hassan Es-Saghir and the said Ahmad Mansour, and made an order confirming the partition and directing the registration in the Land Registry of the share of Hassan Es-Saghir in the name of his heirs.

Appellants 1 to 3 appeared as " third parties " in the action, as persons having an interest in the said lands by reason of their having agreed to purchase the interests of the heirs of Ahmad Mansour, the defendants in the action, who are the last named appellants before the Board—Appellants No. 4.

The first respondent is the plaintiff, one of the heirs of Hassan Es-Saghir. The other respondents are the co-heirs of the first respondent.

The main question for decision before the Board is whether the partition alleged by the respondents has been legally proved, or whether the lands are still held in common. The Courts in Palestine came to the conclusion that the alleged partition did in fact take place and there was sufficient evidence of such a nature as would justify them in granting the declaration asked for.

The main argument before the Board was whether, since there was no registered document endorsing the partition as required by the Ottoman Law, the Courts below erred in their decision that the partition was sufficiently proved.

The facts of the case may be briefly stated. The land to which the appeal relates forms part of a larger area which was admittedly registered in the joint names of Hassan Es-Saghir and Ahmad Mansour. As mentioned in the judgment of the Court of Appeal the portion in dispute is the western part marked A.B.C.G. of the larger area shown on the plan, marked A,B,C,D,E,F,G. The case of the respondents is that about 40 years ago, a partition had been made between the co-owners and the portion marked A,B,C,G, was allotted to Hassan and the remainder to Ahmad Mansour.

In proof of the partition the following evidence was given by the respondents:—In or about June, 1921, Ahmad Mansour made a statement before a commission consisting of officials in certain proceedings taken with a view to correction of the area included in the registered title, that a partition of the nature now alleged had been made between him and Hassan Es-Saghir and that he and his co-owner had since then occupied and enjoyed the portions allotted to them. The evidence shows that the areas assigned to each which according to the statement consisted of unequal parts were registered in the Werko (Landtax) and Tithe registers, that each co-owner paid his tax to the government, one independently of the other, and Hassan and his heirs dealt with the part situated in the western portion independently while Mansour and his heirs after him dealt independently with their part on the eastern side. It is not denied that there was no document to show that there was a partition.

Against the above evidence it was urged that the admission made by Ahmad should not be acted upon in the absence of a document evidencing the partition, that the respondents are estopped from raising the question of partition as they themselves when dealing with their portion dealt with it as Musha (undivided) and that the evidence adduced was not sufficient to set aside a title registered in the Land registry. The last which is of a general nature was the main argument which was urged before the Appellate Court.

As already stated the Courts below held that the evidence was sufficient to prove partition and that none of the facts alleged by the appellants negatived it. They also pointed out with respect to what was alleged regarding the transactions entered into by the heirs of Hassan Es-Saghir, that they could not have made them in any other way because the land in the "Tabu" was still registered as Musha and that the conduct on their part did not estop them from raising their present contention.

Before the Board it was raised as a ground of appeal that the admission made by Ahmad Mansour was inadmissible in evidence, but it was not argued by the learned counsel, his main argument being that partition was not proved in the manner required by law. He also contended that the conduct of the respondents in their dealings with their alleged portion of the land estopped them from raising their present contention. It is true that there is no document evidencing the alleged partition, but the admission of Ahmad Mansour and the whole trend of the evidence given by the respondents unmistakably show that their case must be a true one. Their Lordships are very much impressed with the evidentiary value of the Werko and the Tithe registers. They are official documents and the inference from them is clear. Would such registration as shown in the Werko and the Tithe departments have been made unless the officers concerned were satisfied that a valid partition had been made between the co-owners which they have to recognise and act upon? It may be that they have not to decide whether the co-owners are divided or not when making the registration of the shares in the Werko and Tithe registers, but the fact remains that the land in question was registered in two parts. No satisfactory explanation of this significant piece of evidence has been given. Indeed, the whole conduct of both the parties during the past so many years with reference to this property is inexplicable except on the basis of a partition recognised as legally binding by them and those who dealt with them. Their Lordships find that the materials before them are not, in their judgment, sufficient for them to hold that the Courts in Palestine have come to a wrong conclusion in this case.

In support of his argument, Mr. Comyns Carr the learned counsel drew their Lordships' attention to Art. 17 of the Ottoman Laws which (translated from the French into English) says that:—" Partition of land cannot take place without the leave and knowledge of the official, nor in the absence of a possessor or his agent. Every partition which has so taken place is invalid." It is said that this means that the partition is null and void. Some other provisions having a bearing on the point were also referred to by the learned counsel; but it is clear from the judgments of the Courts below that the point in this form was never urged before them. In the Land Court of Haifa the absence of a document—which was not disputed—is referred to in the course of the judgment, and the main argument in the Supreme Court as already noticed was the general one " that the Land Court had not before it evidence of such a nature as would justify it in setting aside a title registered in the Land Registry," which may include the present argument also but there is no reference to it anywhere in the judgment. The questions of law argued in the Supreme Court were whether the admission made by Ahmad Mansour was acceptable in evidence and whether the Land Court had jurisdiction to deal with the case. Neither of those points is now before the Board and it is another point though related to the main question but one on which the Courts below have not expressed their opinion, that is now pressed before the Board. In the circumstances, after careful consideration their Lordships have decided that on the material before them they should accept the conclusion arrived at by the Courts in Palestine. As regards the question of estoppel urged by the learned counsel, their Lordships agree with the view that the land being registered as Musha, the respondents had to treat it as such in their transactions. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but with no costs as the respondents have not appeared before the Board.

In the Privy Council

MAURICE LITWINSKY AND OTHERS

v.

OSMAN KHAMRA SAGHIR AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

Printed by His Majesty's STATIONERY OFFICE PRESS,
DRURY LANE, W. C. 2.

1945