

48, 1948

No. 90 of 1946.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT, SITTING AS A COURT OF APPEAL,
JERUSALEM.

UNIVERSITY OF LONDON
WEST
- 9 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

44474

CASE FOR APPELLANTS

BETWEEN

1. KEREN KAYEMETH LEISRAEL LIMITED
2. PALESTINE LAND DEVELOPMENT CO. LTD.
(Defendants Nos. 1 and 2) - - - *Appellants*

10

AND

1. MUHAMMAD MUSSA SALEH MANSOUR
(Plaintiff)
2. ISMAIL MUSSA SALEH MANSOUR
3. FATMEH MUSSA SALEH MANSOUR
4. HALIMA MUSSA SALEH MANSOUR
5. HASSAN MUSSA SALEH MANSOUR
6. MARIAM MUSSA SALEH MANSOUR
(Defendants Nos. 3 to 7) *Respondents.*

CASE FOR THE APPELLANTS.

RECORD.

20 1. This is an appeal from the Judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 29th January, 1945, p. 33. affirming (with certain variations) the Judgment of the Land Court of Jerusalem dated the 27th March, 1944, that had decreed that the first Respondent was entitled to exercise the right of Awlawiyeh and thereby p. 12. to be registered on terms stated in the Judgment (as varied by the Supreme Court) as owner of certain shares in four parcels of land in the village of Ein Karem.

2. For the purposes of this Appeal it is convenient to set out certain provisions of the Palestine land laws.

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THE OTTOMAN LAND CODE.

Art. 41.—The owner of an undivided share in State land cannot transfer his share, by way of gift or in consideration of payment, without the leave of the persons jointly interested. If he does so the latter have the right, within five years, to claim from the transferee the restitution of his share, on paying him its value at the time of the claim. The right of claiming back the land lapses at the expiration of the said term, even if there exist the excuses recognized by law, namely, minority, unsoundness of mind, or absence on a journey.

But if any person jointly interested at the time of the transfer has given his consent to it, or has refused to take the share in question although offered to him, he cannot afterwards maintain any claim.

Addition, 19 Sha'ban, 1291. In the event of the person jointly interested dying within the said period of five years his heirs, having the right of succession, shall have the right to claim possession of the property from the transferee or his heirs in the event of his death, and in the event of the death of both the person jointly interested and of the transferee the heirs of the former shall 10 have the right to claim possession from the heirs of the latter.

Art. 42.—If amongst three or more co-possessors there is one who wishes to transfer his share, he may not give preference to any one of those jointly interested. If the latter wish to acquire the share they can take it in common. If one co-possessor disposes of the whole of his share to one of the other co-possessors the others can take their proportionate shares in it. The provisions of the preceding Article are also applicable in this case.

OTTOMAN REGULATIONS AS TO TITLE-DEEDS.

Art. 1.—No one in future for any reason whatever shall be able 20 to possess State land without having a title-deed. Those who have not one will be obliged to procure one, and those who have old title-deeds, excepting always title-deeds (tapou seneds) bearing the Imperial Cypher, must exchange them for new ones. Governors-General (Valis), Mutessarifs, Qaimaqams, Members of Councils and Fiscal Officials, District Mudirs and Tapou Clerks having been charged with the duty of making the necessary enquiries and taking the necessary precautions will all be held responsible for any default or negligence. The most trustworthy and competent of the clerks of the census, or of the Courts, or of the District clerks shall be 30 chosen and employed as Tapou Clerk.

Art. 11.—If a person wishes to transfer to a third person a share of land possessed in common which has not been partitioned, it must first be offered to the co-possessor and if he declines to take it a declaration in writing must be taken from him.

This circumstance must be noted in the transfer column of the Schedule of Certificates. In case of partition of land possessed in common mention must be made in the transfer column of the same Schedule that the partition has been made in accordance with the law, in conformity with Article 15 of the Land Code, which provides 40 for partition being made equitably, and the title-deeds in their hands shall be changed.

THE OTTOMAN LAW OF EXECUTION.

Art. 38.—The judgment debtor shall, by a special form of notice stamped with the seal of the Execution Office, be called upon to satisfy the judgment within a week in case of non-perishable articles, or within 24 hours in case of perishable articles and to

state in writing any objection, if any, why execution proceedings should not be carried out forthwith. The notice should contain the names of the judgment creditor and judgment debtor, their occupation and residence and the name of the Court issuing the judgment, etc. The time allowed to the debtor shall run from the date of his receiving the notice. Orders of provisional seizure shall not be treated as urgent matters.

LAND LAW (AMENDMENT) ORDINANCE.

10 *Section 6.*—(1) Notwithstanding anything in Articles 41 and 44 in the Ottoman Land Code contained,—

(a) no right to claim a transfer of land under any of the said Articles shall be exerciseable on the part of any person more than one year after the right first accrued ;

(b) where any period limited by the said Articles is running at the date of the commencement of this Ordinance, it shall expire at the termination of the period so limited, or on the expiration of one year from the date of the commencement of this Ordinance, whichever first arrives.

20 (2) In any judgment awarding to a plaintiff the right to claim a transfer of land under Articles 41, 44 and 45 of the Ottoman Land Code, the court may order that such transfer shall be effected within such period not exceeding three months as the court may deem fit, and, where any order has been so made for the transfer of any land and owing to any default of the person in whose favour such order has been made such transfer is not completed within the time specified therein, the right to such transfer, arising under judgment or otherwise, shall cease and determine.

LAND TRANSFER ORDINANCE.

30 *Section 13.*—(1) When any immovable property passes by operation of a will or by inheritance, the legatees or heirs, as the case may be, shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death.

(2) The registration shall be made upon the certificate of a competent court stating that the person or persons requiring registration are entitled as legatees or heirs or upon a certificate signed by the mukhtar or imam and two notables.

3. The principal questions raised by this Appeal are—

40 (1) Whether the right of awalawiyeh can be exercised in the case of mortgaged land without the consent of the mortgagee.

(2) If it can, whether the Court can make a decree in a suit for awlawiyeh in the absence of the mortgagee, and, if so, on what terms.

(3) In any event, can the right of awlawiyeh be exercised in the case of mortgaged land when the mortgage covers other land, and, if it can, on what principles the right is to be exercised.

(4) Is an unregistered owner entitled to claim awlawiyeh against a registered co-owner ?

(5) In deciding the rights of awlawiyeh between co-owners should the shares be allotted in proportion to the number of the co-owners or in proportion to their respective holdings ?

4. The Respondents are the children of one Musa Mansour who died some 20 years or so before the commencement of the suit giving rise to this appeal, leaving certain undivided shares in four parcels of land situate in the village of Ein Karem. Until after the commencement of the suit the first Respondent (the Plaintiff in the suit) was never entered on the Land Register as owning any shares or other interests in the lands. 10

pp. 53, et seq.
pp. 37-46.

5. From 1935 onwards the second Appellants from time to time acquired by purchase divers shares in the said lands. In June, 1942, these Appellants added to their interests in these lands by buying from Respondents Nos. 2-6 their shares therein derived by them by succession from their late father. All the second Appellants' purchases were duly registered in the Land Registry.

pp. 39-46.

pp. 55, et seq.

6. On the 2nd September, 1942 the second Appellants mortgaged to the first Appellants their interests in two of the said parcels and in divers other parcels of land to secure the sum of LP. 10,656.700 borrowed by them from the first Appellants. On the 4th September, 1942, they mortgaged to the first Appellants their interests in the other said two parcels and in divers other parcels of land to secure the sum of LP. 3,464.400 borrowed by them from the first Appellants. 20

7. On the 29th May, 1943, the first Respondent commenced

THE PRESENT SUIT

p. 1.

citing as Defendants both Appellants and Respondents Nos. 2-6. In his Statement of Claim he set out the sale by Respondents Nos. 2-6 of their said shares in the said four parcels of land to the second Appellants, and alleged that on the 2nd and 4th September, 1942, the first Appellants bought from the second Appellants all the said shares. He alleged that both these sales took place without his consent and knowledge and that as co-owner he had rights of awlawiyeh. 30

p. 2, l. 28.

The Statement of Claim concluded by asking that the sales and registrations above referred to should be cancelled and "that an order be given for the registration of the said lands in the name of the Plaintiff on payment of Bedl el Misl."

The claim was based on Article 41 of the Ottoman Land Code.

p. 7.

8. The Appellants filed a joint Defence submitting—

(I) That there was no cause of action disclosed against the first Appellants who were mortgagees and not purchasers. 40

(II) That as the Plaintiff was not registered as a co-owner he was not entitled to claim awlawiyeh.

(III) That as the second Appellants had been co-owners since 1935 the Plaintiff was not entitled to the relief claimed.

9. On the 17th October, 1943, Issues were framed in the suit as follows :—

ISSUES.

(1) Are the facts as outlined in the Statement of Claim correct ? p. 8.

(2) Are the contentions of the Defendants correct ?

(A) That there is no cause of action against any of the Defendants 1 or 2.

(B) That the transactions referred to in the action in regard to Defendant No. 1 were mortgages not sales.

10 (C) That Plaintiff is not personally a registered co-owner and hence has not a right of awlawiyeh.

(D) That the bedl misl as stated by Plaintiff is incorrect and so is the material date mentioned by Plaintiff for the assessment thereof.

(E) That Defendant No. 2 have been registered co-owners of the land in question since 1935, and that Plaintiff therefore cannot have against them the relief sought.

10. On the hearing of an interlocutory application the advocate for the Plaintiff expressly stated that he accepted the position that the first Appellants were mortgagees and not purchasers and that he accordingly claimed no relief against them and confined his claim to a claim against the second Appellants. In his own words " I will dispense with Defendant No. 1." This position he confirmed subsequently, with the result that the first Appellants were not represented at the trial and took no part in it. On the 27th December, 1943, the Plaintiff was registered in the Land Registry as the owner of shares in the said lands on succession from his father. p. 4, l. 43. p. 8, l. 31. pp. 47-51.

11. At the hearing in the Land Court (Judges Ali Hasna and Bardaky) the second Appellants relied on the points taken in the Defence, and submitted that in any event the Plaintiff's rights were regulated by Article 42 of the Land Code, and that no claim had been made under this Article, and that in any event under Article 42 his only right would be to claim " according to his share in proportion to the shares owned by the Company." p. 8-12. p. 11, l. 34. p. 11, l. 35.

12. On the 27th March, 1944, the Land Court delivered Judgment. After pointing out that the Plaintiff had at the hearing dispensed with all the Defendants except the second Appellants and that he had limited his claim to a claim against them alone, the judgment continued— p. 12. p. 12, l. 38.

40 We find that the Plaintiff is an owner by way of inheritance from his late father who died long ago, even though he obtained his kushan after the said sale, and this fact does not show that he is not a co-owner with his brothers from whom the defendant company had bought the shares in dispute, and even though his brothers registered their shares in the Tabu and he did not register his shares except recently . . . Section 13 of the Land Transfer Ordinance . . . does not mean that the heir who fails to register his share shall be deprived of it . . . p. 13, l. 26.

p. 13, l. 39.

The Plaintiff therefore in his capacity as owner to certain shares in the said lands sold has the right to claim awlawiyeh as a partner and co-owner in the said lands sold, in accordance with Article 41.

That as the second Appellants were co-owners before they bought shares from the Plaintiff's brothers they were also entitled to claim the right of awlawiyeh equally with the Plaintiff in accordance with Article 42 of the Ottoman Land Law and not in proportion to the shares which each party owned.

p. 14, l. 13.

That registration should be made in the Plaintiff's name of 10 half the shares bought by the second Appellants from the Plaintiff's brothers in the Tabu after cancellation of the registration in the name of the Defendant Company and after he will pay the amount of the mortgage to the mortgagee in proportion with these shares in the mortgaged capital on the land, and the Plaintiff should pay the sum of L.P.375 within one week from to-day to the Court, and after payment of the amount of the mortgage this amount will be paid on account of the amount of the mortgage.

Judgment was accordingly given for the Plaintiff against the second Appellants with costs. The Judgment did not prescribe the method of 20 calculation of the proportionate share of the mortgages nor did it state whether for that purpose all the lands mortgaged were to be assumed of equal value or otherwise.

p. 16, l. 30.

13. On the 25th April, 1944 the Land Court ordered that "in accordance with Section 6 of the Land Law (Amendment) Ordinance 1933 the transfer of the shares awarded to Plaintiff, Muhammad Mansour, shall be effected within three months from the date of Judgment, 27.3.44."

p. 17.

14. On the said 25th April, 1944 the second Appellants lodged notice of Appeal to the Supreme Court from the said Judgment of the 27th March, 1944, of the Land Court, citing in the original instance the Plaintiff as 30 Respondent. The other parties to this Appeal were subsequently added by Order of the Supreme Court.

p. 21.

15. On the 22nd June, 1944 a copy of the said judgment of the Land Court dated the 27th March, 1944, was served on the first Appellants, and on the 25th June, 1944, they were served with a notice from the Execution Office, Jerusalem, stating that the said Judgment had been given against them and calling upon them to carry it out "and to register 30½ out of 61 shares in each plot of El Bassa and Mahjarah and 30½ out of 576 shares in each of Jusar el Miseh and Khanuk of Ein Karem lands in the name of the Judgment Creditor within seven days of this notice 40 in accordance with the said Judgment."

p. 75.

16. The first Respondent prepared an account computing the amount he estimated that should be paid by him in partial discharge of the first Appellant's mortgages with a view to the shares in question of the lands being transferred to him free of the mortgages.

17. On the 26th June 1944, both Appellants appeared before Judge Ali Hasna sitting as Execution Officer when the account in the previous paragraph referred to was considered. The first Appellants made the following submissions :—

(A) That not being a party to the Judgment they should be given an opportunity to oppose it if their rights were to be in any way affected thereby. cf. p. 19, l. 22.

(B) That the figures in the account were wrong as shown by the objections made by the second Appellants. cf. p. 76.

10 (C) That each parcel of land must be valued separately and that the proportions cannot be computed arithmetically as set out in the account.

(D) That the first Appellants could not be forced to divide up their security and be partially paid off.

18. In spite of the submissions of the Appellants Judge Ali Hasna on the said 26th June 1944 made an Order that the said Judgment of the Land Court should be sent to the Registrar of Lands for the transfer of the said shares to be effected into the name of the first Respondent “ after payment by him of the amount due on the share adjudged to him from the value of the mortgage in the Cash Office of this Court,” and that he “ should pay the amount which he declared is due on the shares adjudged to him, provided that should it appear that this amount is short, the difference should be collected from the Bank . . . The attorney for the judgment creditor consented that the said shares should remain under attachment after the transfer to the name of his client pending the determination of the account.” p. 21.
p. 21, l. 40.
p. 22, l. 16.

Judge Ali Hasna granted a stay of his said Order for 24 hours to enable an application to be made to the High Court to stay and set aside his said Order. p. 23, l. 8.

30 19. On the said 26th June, 1944 the first Appellants presented a Petition to the Supreme Court sitting as a High Court of Justice, citing as Respondents Judge Ali Hasna as Execution Officer and the first Respondent, and asking for an Order to issue to Judge Ali Hasna to cancel his said Order of that date, to abstain from executing the Judgment of the Land Court so far as it affected the first Appellants, or alternatively for an Order that the said mortgages should be discharged only on payment in full by the first Respondents or on payment of a proportionate share on proper valuation and survey. p. 18.
p. 20, l. 26.

40 20. On the 27th June, 1944 the Supreme Court sitting as aforesaid ordered that a rule *nisi* should issue in the terms of the Order asked. p. 23.

21. On the 9th July, 1944 the first Respondent filed an affidavit in response to the said Petition in which he raised a number of points, *inter alia* attacking the mortgages which he alleged were “ fictitious and collusive ” and averring that the first Appellants “ must take the risk for advancing money on a security which was defeasible in law of which he had constructive notice.” The affidavit, it is submitted, is inconsistent with the first Respondent’s attitude when he was before the Land Court, namely, that he was asking for no relief against the first Appellants. p. 24.
p. 24, l. 18.
p. 25, l. 34.

p. 30.

22. On the 26th September, 1944, the Supreme Court sitting as aforesaid (Edwards, J.) gave Judgment on the said Petition in favour of the first Appellant and made the order *nisi* absolute. Edwards, J., said :—

p. 32, l. 26.

p. 32, l. 35.

p. 32, l. 40.

The petitioners were not parties to the Judgment of the Land Court and no Judgment can be given which may affect their rights . . . The present petitioners were not parties to the action in the Land Court and the Execution Officer when he made his order of the 26th June, 1944, clearly purported to affect the rights of the present petitioners to their prejudice . . . I consider that the other argument of Dr. Eliash also helps him in showing that the order of the Execution Officer is bad, this argument being that Article 38 of the Execution Law was not complied with, in that notice was served on the present petitioners only on the 25th June, 1944, and that the petitioners then had seven days within which to act and that these seven days did not expire until the 2nd July whereas the order now complained of was made on the 26th June. 10

I agree that the purpose of Article 38 seems to be to give the present petitioners an opportunity of objecting if so advised. I prefer to express no opinion on the merits of the account submitted by the second Respondent to the Asst. Chief Execution Officer on which the latter seems to have acted when making his order of 26th June, or on the other matter raised by Dr. Eliash, namely, that the period of three months given by the judgment of the 27th March, 1944, had expired by the 26th June, 1944, Vol. 1 (1944) A.E.R. pp. 640 and 641. Nothing that I have said in this judgment is intended in any way to affect the proceedings in Civil Appeal No. 153/44 now pending before this Court sitting as a Court of Civil Appeal. 20

p. 33.

23. On the 29th January, 1945, the Supreme Court, sitting as a Court of Appeal, gave Judgment in the appeal from the judgment of the Land Court dated the 27th March, 1944. The leading Judgment was delivered by Mr. A./Justice Plunkett. In the main he agreed with the findings of the Court below, but said, referring to the first Appellants, that "the judgment cannot be executed against them". He concluded :— 30

p. 34, l. 7.

p. 34, l. 21.

The judgment of the Land Court is confirmed, but varied in respect of the mortgage, and the Land Registrar will be informed to alter the registration in favour of the first respondent, as ordered by Land Court for his now declared share, and to register this share free of the mortgage. The Respondent will pay the sum ordered by the Land Court into the Court to enable due settlement to be made between the mortgagor and the mortgagee of that portion of the land released from the mortgage. The appeal is dismissed with costs. 40

Mr. Justice Rose said—

I agree that the appeal should be dismissed, with the usual consequences.

It is assumed that Mr. Justice Rose agreed with the suggested variations in the judgment of the Land Court.

24. The Appellants submit that the Judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 29th January, 1945, is wrong for the following among other

REASONS.

- 10
- (1) Because the said Judgment is at variance with the Judgment of the Supreme Court sitting as a High Court dated the 26th September, 1944, a final Judgment against which no appeal has been brought.
- (2) Because though the Judgment now under appeal is correct in stating that no Judgment of the Land Court can properly be given that can be executed against the first Appellants, the Judgment of the Land Court both in its original form and as varied by the Land Court cannot be executed at all without affecting their rights.
- (3) Because the right of awlawiyeh cannot be exercised in the case of mortgaged land without the consent of the mortgagee and the first Appellants had not so consented.
- (4) Because the first Appellants cannot be forced to accept part discharge of their security.
- 20
- (5) Because the Judgment of the Land Court was made in the absence of the first Appellants and affects their rights.
- (6) Because the first Respondent had not put himself on the Register on the death of his father or prior to action brought as the owner of the shares he claimed by right of succession.
- (7) Because in deciding the rights of awlawiyeh between co-owners the shares should be allotted in proportion to the holdings and not in proportion to the number of co-owners.
- 30
- (8) Because the judgment of the Land Court provided no way of calculating the amount payable by the first Respondent to obtain transfer of the shares awarded.
- (9) Because Article 38 of the Execution Law had not been complied with, and the Land Court Judgment lapsed.
- (10) Because the said Judgment is having regard to the facts and the law applicable wrong.

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