Privy Council Appeal No. 21 of 1940

The Heirs of Prince Mohamed Selim – – – – *Appellant*

v.

The Attorney General of Palestine – – – – – *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1941

Present at the Hearing
VISCOUNT SANKEY
LORD ATKIN
LORD THANKERTON
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* LORD ATKIN]

This is an appeal from a judgment of the Supreme Court of Palestine setting aside a judgment of the Land Court at Jaffa in favour of the appellants and directing a new trial. Special leave to appeal was given by His Majesty in Council, but in the order it was provided that the appeal was to be confined to the grounds of the judgment of the Supreme Court. Within this limited scope it will be possible to deal shortly with this appeal. The suit was brought by the plaintiffs, the heirs of Prince Mohammed Selim, himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, to recover lands said to have been the private property of the late Sultan, and to have the Land Registry at Gaza rectified by inserting the names of the plaintiffs in respect of their share of the property in place of the High Commissioner for the time being in trust for the Government of Palestine. It would appear that the land in question was registered in the land register for Gaza in the name of the late Sultan from about the year 1886. The respondent's case is that after the deportation of the late Sultan the Ottoman Government by various decrees took the property in this land, and that following the Treaty of Peace made in Lausanne in 1923 the Government of Palestine acquired the land. The Government by various ordinances proceeded to a settlement of this and other lands in Palestine, and this land was eventually entered in the new register as in the proprietorship of the High Commissioner in trust for the Government of Palestine. The suit of the plaintiffs was heard in May, 1937, before the two Judges of the Land Court of Jaffa, Cressall and Daoudi JJ., who first proceeded to determine upon whom lay the onus of proof. They both agreed that the onus was upon the defendant, the representative of the Government, to support his title. Having so determined, they then proceeded to hear the case, and after a hearing of six or seven days proceeded to deliver considered judgments, Cressall J., holding that the defendants had failed to discharge the onus upon them, Daoudi J. holding that they had succeeded. Having arrived at this unfortunate position, the two Judges proceeded after argument to decide what the result should be. They were referred to rule 2 of the Land Court rules, 1921, which provided:

> "(1) The Land Court shall, save as hereinafter provided, consist of a British Judge as President and a Palestinian member. (2) In case of disagreement the Court may call in any magistrate or member of the District Court or a Cadi as a third member."

They refused to act on this rule, holding that it had been impliedly repealed by the Establishment of Courts Orders, 1924-1931, which provided without any saving that the Land Court of Jaffa should be constituted by the President of the District Court of Jaffa or a relieving President and one or more Judges of the District Court of Jaffa. Such an ordinance they considered was inconsistent with a rule which provided that in the case of disagreement the Court might be constituted by two Judges and a magistrate or Cadi. In any case they held that the rule was facultative only and not imperative, and in this particular case they would not have followed it. They proceeded therefore to determine the case, and agreed that as the defendant had to satisfy the Court, and had only succeeded in satisfying one member of the Court, he had failed in the suit, and they proceeded to pass a decree in favour of the plaintiffs.

On appeal the Supreme Court disagreed with the views expressed as to rule 2. They held that the rule was still in force and was imperative. The Land Court therefore had not passed a valid judgment, and there must be a new trial. They also held that the Land Court were in error in placing the onus upon the defendant. The grounds of the judgment therefore, which emerge as being those with which alone this Board are empowered to deal on the terms of the order giving leave to appeal are:

1. Is Rule 2 of the Land Rules, 1921, still operative?

2. Was the onus of proof rightly placed upon the defendant?

Their Lordships will be careful to decide nothing more.

1. On the first point their Lordships accept the reasoning of the Land Court. When an ordinance has prescribed without reserve that the Court shall consist of two or more Judges it seems impossible that a rule should survive which prescribes that in a certain event the Court shall consist of two Judges and a non-Judge, whether magistrate or Cadi. At the time of the decision no provision had been made for the event of disagreement, and it was thus impossible to rule that there was an imperative obligation to call in a third Judge. Fortunately this position has now been remedied, first by the Court Amendment Ordinance No. 2, 1939, s. 6 (*a*), which expressly provides for the event of disagreement in a civil Court, and further by the Land Courts Amendment Ordinance, 1939, by which Land Courts are constituted of a president or relieving president of a District Court or of a British Magistrate's Court, or of a Magistrate's Court dependent upon the value of the subject matter in dispute. The interesting question as to what judgment should be given where the party upon whom the onus of proof rests satisfies one of two Judges composing a Court and fails to satisfy the other, does not form one of the grounds of the judgment of the Supreme Court and therefore is not now discussed.

2. But on the second question their Lordships are clearly of opinion that the Supreme Court are right. The matter can be disposed of by reference to two sections of the Land (Settlement of Title) Ordinance, 1928/1939, under which a new register of title was opened.

> "S. 43. Save as provided in this ordinance, the registration of land in the new Register shall invalidate any right conflicting with such registration."
>
> "S. 66. After the completion of the settlement, rectification of the Register may be ordered by the Land Court, subject to the law as to limitation of actions, either by annulling the registration or in such other manner as the Court thinks fit where the Court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the Register, provided that where a person has since the settlement acquired land in good faith and for value from a registered owner the Court shall not order a rectification of the Register."

The argument of the plaintiffs was, shortly: "Our title is on the existing register; that constitutes a presumption in our favour; our title was "omitted" from the new register, therefore there is a presumption in favour of our right to rectification." It can only be said that so to hold would be to eliminate for practical purposes the effect of s. 43, which, as in most provisions for the registration of title, is the keystone of the whole structure. Until the register is rectified the old title fails; and the register

can only be rectified by showing that the entries on it are wrongly on it by fraud or mistake. "Omitted" in s. 66 means wrongly omitted, and the onus is quite plainly upon the party seeking rectification to show that the entry which is prima facie right ought not to be there. In the result the Land Court were wrong in placing the onus on the defendant, who was entitled to rely on his registered title until displaced. The only possible remedy appears to be the new trial ordered by the Supreme Court. The decision of the Judges of the Land Court was obviously vitiated by their misdirection of themselves as regards onus, and in view of the fact that there is only an appeal on a question of law and that the determination of the dispute appears to involve questions of fact as well as law, no other decision could be adopted. It is, of course, unfortunate that several days of the former trial should prove wasted. Possibly the parties may succeed in arranging that some at least of the evidence already given should be read at the new trial. But in any case a new trial appears inevitable. For the above reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

[11619] Wt. 8194—7 30 5/41 D.L. G. 338

In the Privy Council

THE HEIRS OF PRINCE MOHAMED SELIM

v.

THE ATTORNEY GENERAL OF PALESTINE

DELIVERED BY LORD ATKIN

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