Privy Council Appeal No. 23 of 1945

Yehoshua Hankin (deceased), now represented by Mordecai Eliash - - - - - - - *Appellant*

v.

Zaki Rashid Esh Shanti and others - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1947

Present at the Hearing:

LORD SIMONDS
LORD UTHWATT
SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

This is formally an appeal from a judgment dated the 16th July, 1943, of the Supreme Court of Palestine (Gordon Smith, C.J., and Rose, J.) affirming an order of the Settlement Officer, Gaza Area, dated the 10th October, 1942. But, as will presently appear, in substance it raises the question whether the same Supreme Court (then consisting of Trusted, C.J., and Copland and Khayat, JJ.) on the 24th November, 1938, rightly affirmed an order made by the Land Court of Nablus on the 2nd March, 1938, referring back to the Settlement Officer, for his determination upon the lines indicated by that Court, the question whether the appellant or the respondents were entitled to be registered as the owners of a parcel of land in Qalqiliya village in the sub-district of Tulkarm.

The respondents, thirty-four in number, claim to be entitled to the land in question, which is an orange grove with an area of about 116 dunams, as heirs of Rashid esh Shanti, who died in February, 1925.

The appellant claims to be entitled to the same land as purchaser thereof at public auction from two of the respondents, Husein Rashid esh Shanti and Kamil Rashid esh Shanti, who will for brevity be called Husein and Kamil.

The following facts appear to be no longer in dispute.

On the 10th November, 1926, after the necessary enquiries had been made and the appropriate formalities complied with, Husein and Kamil, two of Rashid's sons, were registered in the Land Registry, Tulkarm (that is, in the old Tapu Register), as owners of the said land in equal shares. Their Lordships have had the advantage of perusing the Mukhtars' Certificate given upon the application for registration and a copy of the relevant extract from the Register of Deeds. From the certificate which is subscribed by a number of Mukhtars and Notables of Qalqiliya village it would appear that Husein and Kamil had been in possession of the property for 13 years and that the land had never previously been registered in the registers of the Land Registry. The extract from the Register shows that they were registered by virtue of a possessory title.

It further appears from the Register that on the 10th November, 1926, Husein and Kamil mortgaged their respective shares of the property to a Dr. Salah for L.P.920, that thereafter Kamil mortgaged his share to one Dalal for a further L.P.1,500 and Husein his share to one Sa'id ez Zeini for L.P.750, and that in 1928 Husein further mortgaged his share to Sa'id ez Zeini for L.P.1,300 and at the same time both Husein and Kamil mortgaged their shares to the appellant for L.P.6,391.

It is noteworthy that, though Rashid had died in February, 1925, section 13 (1) of the Land Transfer Ordinance was disregarded and no step was taken by any of his heirs to assert title to the property nor did any of the mortgagees question the title of Husein and Kamil.

In 1929 the mortgagee Sa'id ez Zeini sought to realise his security and on the 29th January, 1930, an order was made for the sale of Husein's share of the land. Before this sale was concluded, Farid Shanti, a brother of Husein and Kamil, on the 8th June, 1930, commenced an action against them in the Land Court at Nablus for cancellation of the registration of the property in their names in the Land Registry and for its registration in the names of all the heirs of Rashid.

Various attempts were made by Farid to get a postponement of the sale, but, upon a guarantee being given for all damages in connection therewith, the sale was ordered to proceed and Husein's share was bought by the appellant for L.P.3,000.

So also Kamil's share, after similar efforts to postpone the sale by Farid, was bought by the appellant for L.P.3,000.

It is clear, and it is a fact relied on by the respondents, that the appellant concluded the purchase of the property with knowledge of the adverse claim.

The appellant was at an early stage cited as a party in Farid's action, and, though these proceedings having dragged on for some years ultimately came to nothing, it is necessary to refer to a single event in the course of them which has assumed outstanding importance.

Husein and Kamil appeared in the proceedings in person and at a hearing on the 28th April, 1932, made unsworn statements which in the translation from the record in Arabic run as follows:—

> " Husein: originally the land was bought by my father Rashid esh Shanti, he dug a well and planted part on the eastern side, about one-half; afterwards he erected a shed; then he died. Then my brothers came to divide the estate, because he left lands and cash money; I and my brother Kamil took as our share the orange grove, and my other brothers took as their share the arable land and the cash money, and so we registered the orange grove in the name of myself and that of my brother Kamil, in 1926. My father died in 1925.
>
> Kamil: I repeat what my brother Husein said. I settled with my brothers. When my father died a settlement was reached between me and my brother, viz.: Aref, Husein, Rushdi and Mohammad who were majors. I have a deed of settlement. I will produce it at the next hearing. The Plaintiff Farid is my brother from the same father and mother, he was not one of the brother who made the settlement, because at the time he was in Egypt."

Before the conclusion of these proceedings the area in which the property in dispute is situate became a Land Settlement Area within the Land (Settlement of Title) Ordinance and on the 28th January, 1935, the case was referred to the Settlement Officer by an agreement between the parties in the following terms:—

> " As the case will have to be started *de novo* and as the land in question is now within a Land Settlement Area both parties apply under section 6 of the Land Settlement Ordinance for leave of the Court that the action may be withdrawn and the dispute between the parties decided by the Land Settlement Officer."

In fact both parties had already formulated their claims before the Settlement Officer as early as August, 1933, and it may be noted that the rival claimants were on the one hand the appellant claiming as pro-

prietor by virtue of an acquisition by way of purchase through public auction and as the person registered in the Land Registry (i.e., the old Tapu Register) and on the other hand Mohammad Amin esh Shanti claiming on behalf of all the heirs of Rashid, including Husein and Kamil, and alleging that those two had taken advantage of the absence of some of the heirs and the minority of others of them to get the property registered in their names alone.

Again there was considerable delay and it was not until September, 1937, that the case was heard by the Settlement Officer, the heirs of Rashid being treated as plaintiffs and the appellant as defendant. A perusal of the proceedings shows that the main effort of the plaintiffs was directed to proving that the land in question had been registered in the names of Ahmad el Hasan and Ibrahim el Hasan before it had been registered in the names of Husein and Kamil. Thus the validity of the original registration in the names of the latter would have been displaced and the appellant's title defeated. This question was carefully investigated by the Settlement Officer and the conclusion to which he came, viz., that the land had not been previously registered, cannot in their Lordships' opinion be challenged. It does not appear that at this stage of the proceedings the plaintiffs relied on the so-called admissions made by Husein and Kamil in the original action in the Land Court, to which reference has been made. No mention is made of them in the decision of the Settlement Officer, who after an exhaustive examination of the attack made on the appellant's registered title concluded that it could not be successfully impeached. He declined to hear " verbal evidence in support of a claim by purchase by the plaintiff's father who did not register the transaction against documents of registration produced by the defence in the obtaining of which all the requirements of the law have been fulfilled ".

From this decision certain of the plaintiffs appealed to the Land Court. A subsidiary question has arisen whether, if the view taken by the appellate Courts in Palestine is upheld, their judgment should enure for the benefit of all the heirs of Rashid or only of those who appealed. But in the view which their Lordships take of the case that question is no longer relevant and their opinion proceeds upon the footing that all the same parties have been interested throughout.

Before the Land Court, as appears from the written Statement of Appeal, the plaintiffs, then appellants, while maintaining their original plea, relied also on the admissions of Husein and Kamil as evidence in support of their case, and they prayed that the judgment of the Settlement Officer might be set aside and that the case might be remitted to him for hearing verbal evidence in order that they might prove that the land was the property of Rashid, that he bought and planted and built upon it and that Husein and Kamil registered it into their names while it belonged to all the heirs. The Statement of Appeal read as a whole makes it plain that this claim for the admission of verbal evidence is linked up with the plea that the land was not for the first time registered in the names of Husein and Kamil but had been previously registered in the name of Hasan.

On the 2nd March, 1938, the Land Court gave judgment and it seems that the learned Judges of that Court were decisively influenced by the so-called admissions of Husein and Kamil. Thus they say " The Settlement Officer relies on the point in his judgment that ' registration had been legally carried out in 1926 '. The plaintiffs against this allege that the property originally belonged to Rashid esh Shanti and that in 1928 it was illegally registered in the name of two heirs only. The other heirs, as it is clear from their admission in the Land Court, do not seem to deny this. Yet they have not given sufficient account of the allegation that it devolved on them to the exclusion of the plaintiffs. With this admission and the evidence of the plaintiffs that they have not parted with their interest, the plaintiffs have given prima facie proof that the

registration was obtained in defraud of their rights." The matter was accordingly referred back to the Settlement Officer for him " to determine on the lines suggested ".

The present appellant appealed from this decision to the Supreme Court sitting as a Court of Appeal in Jerusalem and on the 24th November, 1938, that Court dismissed his appeal. The most material passage in the judgment of Copland, J., who delivered the judgment of the Court was as follows: ". . . I think that the Land Court was right. The admissions by Husein and Kamil during the hearing of the previous Land case that their father had purchased the land before his death, coupled with their statements that they had obtained this parcel as their share of the inheritance by reason of a settlement with the other heirs, the Respondents, undoubtedly shifted the burden of proof, and since the Appellant was claiming through the title of Husein and Kamil, his immediate predecessors, the onus of proving that Husein's and Kamil's title was a valid one was on him ". But later he said " The alleged settlement by Husein and Kamil with the Respondents must be proved by the Appellant."

Before considering the correctness of these observations their Lordships will pursue the case to the end.

The appellant applied for leave to appeal from the judgment of the Supreme Court to His Majesty in Council but was refused it on the ground that the judgment was not a final judgment.

The case, having been thus remitted to the Settlement Officer, was reheard by him. The proceedings were protracted and it was not until the 21st February, 1942, that he gave his decision, in which he re-affirmed his judgment in favour of the appellant. Their Lordships do not think it necessary to determine whether in doing so he followed the directions of the Supreme Court. It is possible that he did not, for his observation that it seemed to him that " it would be the acme of inequity now to bind the defendant by what I must construe as an allegation made by parties who have all through settlement operations been entered as opposing him " is not consistent with the view of the Appellate Court that the burden of proof had shifted to the appellant. But, however this may be, the rehearing had at least this value, that the Settlement Officer once again examined the title and thus expressed himself: " If I did not make it plain in my first judgment, I do so now, that the registration in the names of Husein and Kamil was a first registration and was entirely unconnected with any other Tapu record ".

From this decision appeal was brought to the Supreme Court, the intermediate appeal to the Land Court being no longer necessary. On the 4th June, 1942, the appeal was allowed and the matter referred back once more to the Settlement Officer for determination in accordance with the terms of the original judgment of the Court. This time it came before a different Settlement Officer who after a second rehearing on the 10th October, 1942, decided in favour of the respondents and directed that they (with the exception of Husein and Kamil) should be registered as the owners of shares of the land in dispute according to their inheritance from Rashid esh Shanti as shown in the Certificate of Inheritance and that the shares of Husein and Kamil according to that certificate should be registered in the name of the appellant. He took the view that, as the appellant's advocate had stated that he could not call evidence to prove the alleged settlement between Husein and Kamil on the one hand and their coheirs on the other, it was clear from the judgment of the Supreme Court that no other decision was possible.

It was the turn of the appellant to appeal from this decision to the Supreme Court. He did so and that Court dismissed his appeal in a long and careful judgment in which decisive effect was properly given to the earlier judgment of the Court. At last the appellant has preferred his appeal to His Majesty in Council and it is necessary for their Lordships now to consider after so long an interval whether the views expressed in 1938 by the Land Court and Supreme Court should be upheld. In

particular, since upon this everything that happened afterwards turned, it must be determined whether those Courts were right in holding that the burden of proving that Husein and Kamil had been lawfully registered as owners of the land in dispute had been cast on the appellant.

The duty of a Settlement Officer in deciding disputes as to the ownership of land is thus defined in section 10 (3) of the Land Settlement Ordinance:—

" A Settlement Officer shall apply the Land Law in force at the date of the hearing of the action, provided that he shall have regard to equitable as well as legal rights to land and shall not be bound by any rule of the Ottoman Law or by any enactment issued by the British Military Administration prohibiting the Courts from hearing actions based on unregistered documents or by the rules of evidence contained in the Code of Civil Procedure or the Civil Code."

This provision which is an echo of section 8 of the Land Courts Ordinance appears to leave the Settlement Officer a free hand in dealing with a dispute, and it was contended by counsel for the respondents that " within the basic rules of natural justice " he could do what he thought fit in regard to evidence. But their Lordships would repeat what was said by them in the case of *Mamur Awqat of Jaffa* v. *Government of Palestine*, 1940, A.C. 503 at 511, ". . . the latest tapu register is competent evidence as to the character of the land in question and . . . the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect: otherwise the provisions for a new register would be made to unsettle titles in disregard of the land law."

Therefore, while the general discretion of the Settlement Officer must remain unimpaired, their Lordships would express the opinion that it is only in exceptional circumstances that he should depart from the well-established rule that a registered title is not to be set aside except by some evidence in writing sufficient to support an adverse title or corroborate evidence in support of such adverse title: see *Goadby* and *Doukhan*, " The Land Law of Palestine ", pp. 309-10 and cases there cited.

In the present case the view originally expressed by the Appellate Court, which determined the whole subsequent course of the proceedings, was in effect that the registered title of Husein and Kamil was displaced by their so-called admissions in the action by Farid in the Land Court. For no less than this is the result of saying that the burden of proof was shifted by those admissions. But it appears to their Lordships that, if the statements made by Husein and Kamil are examined as a whole and due regard is paid to the circumstances in which they were made, neither a reference to the relevant procedural law (if the Settlement Officer does not think fit to disregard it) nor an appeal to some wider and vaguer principle of natural justice can avail the respondents.

The statements in question were made by Husein and Kamil, not on oath but as part of their speeches in the earlier litigation. Their Lordships are content to assume that the translation from the Arabic which appears in the Record is accurate and sufficient. It seems then that at one and the same time they stated first a fact upon which the respondents rely as establishing their case, viz.: that the property had been purchased by Rashid, and, secondly, a fact which would be fatal to the respondents, viz., that they had taken the property as their share of the inheritance. The statement taken as a whole is a justification of their registered title by the allegation, that they had become entitled to the property as their share of the family inheritance. It does not appear to their Lordships that this could properly be regarded as an admission which would justify any Court in throwing upon the appellant the burden of proving that one part of the statement was true, and, in the absence of such proof, holding that the registered title had been displaced.

Nor can the circumstances in which the statement was made be disregarded. Already at the time it was made Husein and Kamil had parted with their interest. Their mortgagees were proceeding to a sale of the property, and, whether or not the appellant had notice of any adverse

claim, it is not suggested that the mortgagees had had any notice that the registered title was not in order. A statement, adverse alike to the interest of the mortgagees and of a purchaser from them, made in such circumstances, even if it could be dignified by the name of an admission, could properly be regarded by the Settlement Officer as of little weight. Their Lordships are therefore of opinion that the Land Court and the Supreme Court were initially wrong in referring the matter back to the Settlement Officer upon the footing that it was for the appellant to prove an agreement between Husein and Kamil and their co-heirs.

They have felt some difficulty as to the course which should be taken. The respondents upon their original appeal from the first decision of the Settlement Officer asked that the matter should be remitted to him for rehearing upon verbal evidence. The Land Court and the Supreme Court not only remitted it but did so with directions, which were necessarily fatal to the appellant and which, as their Lordships have held, were wrongly given. It was natural that the respondents should stand upon this decision and they cannot be criticised for doing so. But at the last moment before their Lordships it was contended by counsel for the respondents that, if the appeal was not dismissed, at least the case should once more be remitted to the Settlement Officer for rehearing with liberty to the parties to adduce all proper evidence. This plea was based on the fact that the Settlement Officer had declined to hear certain verbal evidence in support of a claim of purchase by Rashid, as appeared from almost the last lines of his judgment.

Upon a careful consideration of the whole case, which the detailed record of the proceedings has made possible, their Lordships have come to the conclusion that the proper course for them to take is to allow the appeal and to direct the original decision of the Settlement Officer to be restored. In their opinion that is the course which should have been taken by the Supreme Court in November, 1938, and must be taken now. In coming to this conclusion their Lordships do not intend to cast any doubt upon the decisions which indicate that, as an exception to the general rule, oral evidence may in the case of a dispute between heirs be admitted against a registered title. But it is clear that the Settlement Officer has a wide discretion in the matter under the section that has been cited and he was in the circumstances fully justified in rejecting the verbal evidence that was tendered.

The view which their Lordships have formed upon the main point on the appeal makes it unnecessary for them to express any opinion upon the many subsidiary points that have been raised. For the reasons already stated they will humbly advise His Majesty that this appeal should be allowed and the decision of the Settlement Officer given on the 30th April, 1937, restored.

The respondents must pay the costs of the appellant of this appeal and of the proceedings up to and including the judgment of the Supreme Court of the 24th November, 1938. Each party must pay his own costs of the proceedings between that date and the presentation of this appeal to His Majesty in Council.

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In the Privy Council

YEHOSHUA HANKIN (deceased),
now represented by
MORDECAI ELIASH

v.

ZAKI RASHID ESH SHANTI
AND OTHERS

DELIVERED BY LORD SIMONDS

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