[ZEKIA, P., VASSILIADES, JOSEPHIDES, JJ.]

MICHAEL PANAYI KIZOUROU,
Appellant-Defendant,

v.

MICHAEL YIANNI KARAOLI & ANOTHER,
Respondents-Plaintiffs.

(*Civil Appeal No.* 4487)

Immovable property—" Arazi Mevat " category—Acquisition of a prescriptive title over such land—Ottoman Land Code, Articles 20, 47, 78 *and* 103*—Government Lands Law, Cap.* 221 *and the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224, *section* 9*—Land Registry Departmental Instructions regarding registration of land opened from " Khali ".*

Immovable property—Adverse possession—Acquisitive prescription in " Arazi Mevat " land—Conversion of " Arazi Mevat " land into " Arazi Mirie " by opening and cultivating such land.

The present appeal concerns a dispute as to the ownership of a piece of land 1 donum in extent situated in the village of Palekhori at the locality " Vrissi-tis-Adhia " which piece forms part of a bigger area of land bearing registration No. 5623 of 17.11.1936, Plot No. 548. The registered owner is the appellant-defendant No. 2, who in 1936 by way of gift had this property transferred to him by his grandfather Michael Constanti of the same village. The latter obtained registration in his name in the year 1935 and the land in question became registered land for the first time that year.

Michael Constanti had acquired this land as khali land by undisputedly possessing it for 50 years prior to 1935. The said land appears originally to belong to the category of " Arazi Mevat ". The property included in the registration is described as " Mulk " on " Arazi Mirie ".

The adjoining land bearing Registration No. 4863 of 2.7.1942 and Plot No. 549 is registered in the name of respondent No. 2–plaintiff No. 2, who by way of gift obtained the same from his father Michael Yianni Karaoli, respondent No. 1–plaintiff No. 1. The said Karaoli became the registered owner of the land in question in the year 1933 on account of 20 years undisputed possession and inheritance. The disputed land falls within the boundaries given in the Certificates of Registration of both of the appellant and of the second respondent.

The trial Court found as a fact that the disputed piece of land was never possessed by the appellant or his predecessor-in-title but it was undisputedly possessed by respondent No. 1 up to the year 1939 and thereafter by respondent No. 2 up to the year 1961. In 1952 respondent No. 2 by means of a trax-cavator uprooted the vines standing on the disputed land and levelled up the soil and started sowing it with cereals until May, 1961, when appellant interfered by cutting the barley crop growing on this land. It was in 1960 when for the first time appellant, after the holding of local inquiry by Lands Registry Office, discovered that the disputed portion of the land was included in the plot given in his title deed.

Counsel of the appellant did not contest the findings of the trial Court but argued that the Court was wrong in applying the law to the facts.

Plaintiffs simply sought a declaration of the Court that the property in dispute belongs to the plaintiffs or to either of them by virtue of continuous free adverse and lawful possession for over 30 years.

The Court of Appeal found themselves constrained to examine the case of the plaintiffs on this ground alone.

The Court of Appeal in dismissing the appeal :—

Held, (*1*) on the factual aspect :

(1) In our view the main point which governs the case is the fact that the land in dispute before 1935—when it was registered in the name of the grandfather of the appellant, his predecessor-in-title—for 20 years and over and after that date up to the year 1939 it was continually possessed without any dispute by respondent No. 1 and after that year up to 1961 in the same way by respondent No. 2.

(2) It is clear from the evidence that by mistake committed at the provisional survey held on the occasion the title deeds of the litigants were to be issued the disputed area was excluded from plot 549 and included in plot 548. The interested parties were not aware of this error until the local inquiry was held in 1960. Regardless of the error however respondents went on possessing the land in question until 1961 undisturbed.

(3) Respondent No. 1 by the year 1939 when he handed over possession to his son respondent No. 2 he had undisputed continuous possession of the land in dispute for a period of 26 years and his son continued to possess adversely the same piece up to the year 1961 that is for a period of 20 years and over.

(II) on the legal aspect :

(1) A prescriptive title could not be acquired by the respondents-plaintiffs between the years 1935 and 1946 before the new land law came into force and stopped acquisition by prescription against registered owner after that date. The prescriptive period in " mulk " property is no doubt 15 years and the period between the two dates referred to amounted only to 11 years.

(2) It is in evidence however that the land covered by the title deed of the grand-father of the appellant, his predecessor-in-title, was possessed from khali for a period of 50 years. The fact that this land was registered for the first time in the name of the said grandfather in the year 1935 does not mean that the land changed its category from " mevat " to " mirie " or " mulk " only on that date.

(3) The leave of the official to break open mevat land was the only requirement under Article 103 of the Ottoman Land Code to turn such dead land into Arazi Mirie. The land in question being broken open 50 years before 1935 and being privately possessed as arable land or vineyard for such a long time it is difficult to assume that the leave of the official was not at some time or other obtained for cultivating this land before the year 1935. Registration and leave of the official are different matters. No system of recording such leave in Tapou records in respect of unregistered property existed.

(4) Before the general survey in this country one would expect rather the contrary to be proved, that leave of the official was not given in cases where undisputed and undisturbed possession was enjoyed of cultivated " mevat " or " khali " land for a period of 30 years and over.

(5) The attitude and the conduct of the Government—at any rate prior to the enactment of Government Lands Law, 1941 (now Cap. 221)—in allowing people to become registered owners after cultivating khali land for 10 years on the payment of a small fraction of its value leads one to the conclusion that the requirement of the leave of the official for the breaking open of " Mevat " land was not insisted upon or was tacitly given in old cultivations from " khali land ".

(6) We are of the opinion therefore that the disputed land had lost its character as " mevat " land at least for the last 20 years prior to 1935 and it became " Arazi Mirie " long before that date.

(III), on the merits :

(1) From Khalis Eshref Commentary on the Ottoman Land Code it is clear that the disputed land, when it began to be adversely possessed by respondent No. 1 and even long before it, was of " Arazi Mirie " category, and by Articles 20 and 78 of the Land Code, respondent No. 1 acquired prescriptive title over the disputed land before 1935.

(2) Neither the appellant nor his predecessor-in-title was a *bona fide* purchaser for value and could not defeat the right of the respondent No. 1 over the disputed land.

(3) It follows, therefore, that respondent No. 1 was the owner of the disputed land when he transferred plot 549 to his son respondent No. 2 in 1942. The former stated that he transferred the disputed portion along with Plot 549 to respondent No. 2. As stated above the disputed land is within the boundaries of the property transferred by respondent No. 1 to respondent No. 2.

(4) According to the Land Code, Article 47, boundaries indicated are material in transfers of properties rather than the donums mentioned in the title-deed. Here respondents No. 1 and No. 2 agreed that in the transfer of 1942 the disputed land was intended to be included in the transfer by way of gift made.

(5) This was a transfer affected prior to the 1st September, 1946, when the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, came into force and section 50 of the said law expressly provided that the land covered by a registration of title should be the area of the plot related to the survey plan or to a plan made to scale by the Director.

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 221 followed :

Appeal dismissed with costs.

Cases referred to:

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 221.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Georghiou, D.J.) dated the 20th April, 1964 (Action No. 3598/61) whereby it was declared, *inter alia*,

that a piece of land at locality " Vrisi tis Adhia " belongs to plaintiff No. 2 and that he is entitled to be registered as the owner thereof.

A. Tziros, for the appellant.

L. N. Clerides, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by :

JEKIA P. : This appeal relates to the ownership of a piece of land 1 donum in extent situated in the village of Palekhori at the locality " Vrisi tis Adhia " which piece forms part of a bigger area of land bearing registration No. 5623 of 17.11.1936, Plot No. 548. The registered owner is the appellant-defendant No. 2, who in 1936 by way of gift had this property transferred to him by his grandfather Michael Constanti of the same village. The latter obtained registration in his name in the year 1935 and the land in question became registered land for the first time that year.

Michael Constanti had acquired this land as khali land by undisputedly possessing it for 50 years prior to 1935. The said land appears originally to belong to the category of " Arazi Mevat ". The property included in the registration is described as " Mulk " on " Arazi Mirie ".

The adjoining land bearing Registration No. 4863 of 2.7.1942 and Plot No. 549 is registered in the name of respondent No. 2–plaintiff No. 2, who by way of gift obtained the same from his father Michael Yianni Karaoli, respondent No. 1–plaintiff No. 1. The said Karaoli became the registered owner of the land in question in the year 1933 on account of 20 years undisputed possession and inheritance. The disputed land falls within the boundaries given in the Certificates of Registration of both of the appellant and of the second respondent.

The trial Court found as a fact that the disputed piece of land was never possessed by the appellant or his predecessor-in-title but it was undisputedly possessed by respondent No. 1 up to the year 1939 and thereafter by respondent No. 2 up to the year 1961. In 1952 respondent No. 2 by means of a traxcavator uprooted the vines standing on the disputed land and levelled up the soil and started sowing it with cereals until May 1961 when appel-

lant interfered by cutting the barley crop growing on this land. It appears also that it was in 1960 when for the first time appellant, after the holding of local inquiry by Lands Registry Office, discovered that the disputed portion of the land was included in the plot given in his title deed.

There is no question as to the facts found by the trial Court which facts are strongly supported by evidence. The learned Counsel of the appellant did not contest the findings of the trial Court but argued that the Court was wrong in applying the law to the facts.

In the instant case however we need not examine all the points of law raised and the many cases referred to. In our view the main point which governs the case is the fact that the land in dispute before 1935—when it was registered in the name of the grandfather of the appellant, his predecessor-in-title—for 20 years and over and after that date up to the year 1939 it was continually possessed without any dispute by respondent No. 1 and after that year up to 1961 in the same way by respondent No. 2.

It is clear from the evidence that by mistake committed at the provisional survey held on the occasion the title deeds of the litigants were to be issued the disputed area was excluded from plot 549 and included in plot 548. The interested parties were not aware of this error until the local inquiry was held in 1960. Regardless of the error however respondents went on possessing the land in question until 1961 undisturbed.

Respondent No. 1 by the year 1939 when he handed over possession to his son respondent No. 2 he had undisputed continuous possession of the land in dispute for a period of 26 years and his son continued to possess adversely the same piece up to the year 1961 that is for a period of 20 years and over.

Let us turn now to the legal aspect of the case. Plaintiffs-respondents by their pleadings did not assert an error in the original registration and did not seek its rectification. They did not contend that inasmuch as the disputed land lies within the boundaries described in their title deed and the transfer having been effected prior to 1946, by virtue of Article 47 of the Ottoman Land Code they might be considered as owners of the said land and that the plan based on the provisional survey, so far as the disputed portion is concerned, should be discarded.

Plaintiffs simply sought a declaration of the Court that the property in dispute belongs to the plaintiffs or to either of them by virtue of continuous free adverse and lawful possession for over 30 years. We are constrained to examine the case of the plaintiffs on this ground alone.

It was indicated earlier that respondent No. 1 adversely possessed the disputed land for 26 years when he parted with its possession in 1939 in favour of his son respondent No. 2. It was submitted by the learned Counsel of the appellant that there was not acquisitive prescription in lands of " Mevat Category ". This is correct according to the old law and under the Government Lands Law, 1941 (now Cap. 221) and section 9 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. It was further submitted that the land in dispute ceased to be " mevat " land only in 1935 and the said land being covered both vines it was converted into " mulk " category in 1935. A prescriptive title could not be acquired by the respondents-plaintiffs between the years 1935 and 1946 before the new land law came into force and stopped acquisition by prescription against registered owner after that date. The prescriptive period in " mulk " property is no doubt 15 years and the period between the two dates referred to amounted only to 11 years. It is in evidence however that the land covered by the title deed of the grandfather of the appellant, his predecessor-in-title, was possessed from khali for a period of 50 years. The fact that this land was registered for the first time in the name of the said grandfather in the year 1935 does not mean that the land changed its category from " mevat " to " mirie " or " mulk " only on that date. The leave of the official to break open mevat land was the only requirement under Article 103 of the Ottoman Land Code to turn such dead land into Arazi Mirie. The land in question being broken open 50 years before 1935 and being privately possessed as arable land or vineyard for such a long time it is difficult to assume that the leave of the official was not at some time or other obtained for cultivating this land before the year 1935. Registration and leave of the official are different matters. No system of recording such leave in Tapou records in respect of unregistered property existed.

Before the general survey in this country one would expect rather the contrary to be proved, that leave of the official was not given in cases where undisputed and undisturbed possession was enjoyed of cultivated " mevat " or " khali " land for a period of 30 years and over.

From time to time people have been encouraged to turn into arable land "khali" lands in order to increase production and revenue. Circular 692/93 of 3rd November, 1896 for instance reads as follows :

> "Where it is proved that applicant opened the land from 'Hali' and no registration by Tapou exists—
>
> (*a*) If he has had undisputed possession and has cultivated the land for a period of not less than 10 years, registration may be effected on his paying fees at the rate of 5% of the equivalent value of the land ;
>
> (*b*) If he has had undisputed possession and cultivated the land for a less period than 10 years, registration may be effected on his paying the equivalent value ; but in all cases where the land has been cultivated for a period of less than 4 years reference shall first be made to the Registrar General."
>
> (*From Departmental Instructions for Land Registry Officers*, 1902)

Old cultivations (10 years and over) from khali as a matter of course were registered against payment of the prescribed fee which could be regarded as nominal.

The attitude and the conduct of the Government—at any rate prior to the enactment of Government Lands Law, 1941 (now Cap. 221)—in allowing people to become registered owners after cultivating khali land for 10 years on the payment of a small fraction of its value leads one to the conclusion that the requirement of the leave of the official for the breaking open of "Mevat" land was not insisted upon or was tacitly given in old cultivations from "khali land". We are of the opinion therefore that the disputed land had lost its character as "mevat" land at least for the last 20 years prior to 1935 and it became "Arazi Mirie" long before that date. While on this point we might as well refer to Khalis Eshref Commentary on the Ottoman Land Code, page 572, para. 757, where it is stated as follows :

> "After an Arazi Mevat is broken open it becomes Arazi Mirie. This is the purpose of the text (Article 103). Therefore if somebody with the leave of the official or *without such leave* breaks open from mevat land a place that place ceases to be mevat and becomes Arazi Mirie. The "Raqabé", "*domaine eminent*",

belongs to the Treasury and all incidents appertaining to the possession, transfer, inheritance and acquisitive prescription (hakki karar) in Arazi Mirie are applicable to such lands."

In the next paragraph it is stated that Arazi Mevat even with leave of the official cannot be converted into "Mulk" property unless a decree of the Sultan is granted. It follows therefore that vines and trees planted on land originating from "mevat" land could not alter the character of the land.

From the Commentaries of Khalis Eshref it is clear that the disputed land, when it began to be adversely possessed by respondent No. 1 and even long before it, was of "Arazi Mirie" category, and, by Articles 20 and 78 of the Land Code, respondent No. 1 acquired prescriptive title over the disputed land before 1935. Neither the appellant nor his predecessor-in-title was a *bona fide* purchaser for value and could not defeat the right of the respondent No. 1 over the disputed land. It follows, therefore, that respondent No. 1 was the owner of the disputed land when he transferred plot 549 to his son respondent No. 2 in 1942. The former stated that he transferred the disputed portion along with plot 549 to respondent No. 2. As stated above the disputed land is within the boundaries of the property transferred by respondent No. 1 to respondent No. 2. According to the Land Code, Article 47, boundaries indicated are material in transfers of properties rather than the donums mentioned in the title-deed. Here respondents No. 1 and 2 agreed that in the transfer of 1942 the disputed land was intended to be included in the transfer by way of gift made. This was a transfer effected prior to the 1st September, 1946, when the Immovable Property (Tenure, Registration & Valuation) Law, Cap. 224, came into force and section 50 of the said law expressly provided that the land covered by a registration of title should be the area of the plot related to the survey plan or to a plan made to scale by the Director (see *Papageorghiou* v. *Komodromou*, (1963) 2 C.L.R. 221.

We are of the opinion, therefore, that the appeal should be dismissed with costs.

Appeal dismissed with costs.