

(1972) 01 AHC CK 0013

Allahabad High Court

Case No: Second Appeal No. 3598 of 1964

Ram Dhani

APPELLANT

Vs

Janki Rai Singh and Others

RESPONDENT

Date of Decision: Jan. 31, 1972

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 101
- Contract Act, 1872 - Section 24, 30
- Criminal Procedure Code, 1898 (CrPC) - Section 145

Citation: AIR 1972 All 553 : (1972) 42 AWR 245

Hon'ble Judges: K.N. Srivastava, J

Bench: Single Bench

Advocate: S. Sadiq Ali, for the Appellant; Keshav Prasad Singh, for the Respondent

Final Decision: Dismissed

Judgement

K.N. Srivastava, J.

The facts giving rise to this appeal are as follows:

2. The disputed property was part of a Waqf property. Smt. Hamida and Smt. Zubaida were the mutwallis of the Waqf. They executed a permanent lease in favour of Shafiuddin, the husband of Smt. Hamida about ten and half kattas of Waqf land. Shafiuddin built a Kachcha construction on the part of the land which was leased out to him. That land has been shown in the map of the Amin by letters YZBA. The plaintiffs purchased this land from Shafiuddin. The defendant is also said to have purchased this land. There was a dispute between the defendant and the plaintiffs about the possession of the land which resulted in a proceeding u/s 145, Cr. P. C. and it was decided in favour of the defendant. The plaintiffs then brought a suit.

3. The defendant contested the suit alleging that the land belonged to him and he was the original owner of the same. He also contended that the mutwallis had no

right to lease out the Waqf property and, as such, no right and interest was created in favour of Shafiuddin nor Shafiuddin had, any power to execute the sale deed in favour or the plaintiffs.

4. The learned Munsif held that the land which the defendant No. 1 purchased was a land other than the disputed land. He also held that the disputed land was the same which was leased out to Shafiuddin and it was sold by Shafiuddin to the plaintiffs, but dismissed the suit on the finding that the mutwallis Smt. Zubaida and Smt. Hamida had no power to execute a permanent lease in favour of Shafiuddin and, therefore, the plaintiffs had no right, title and interest in the disputed land.

5. On appeal by the plaintiffs, the lower appellate Court held that the lease deed was voidable document and was a good and valid document till it was avoided by the mutwallis or beneficiaries and, therefore, the view taken by the Munsif was wrong. He, therefore, allowed the appeal and decreed the plaintiffs' suit. Being dissatisfied, the defendant has filed this appeal.

6. The first question which has to be determined in this case is as to whether the lease deed executed by Smt. Zubaida and Smt. Hamida in favour of Shafiuddin was a void document or a voidable document. If it was a document void ab initio, certainly, no right passed to Shafiuddin which he could have subsequently sold to the plaintiffs but if it was a document which could be avoided, then certainly it was a good and valid document till it was avoided by the person concerned.

7. The learned counsel for the appellant read over the Waqf deed and the lease deed to me. There is no dispute that the mutwallis, under the Mohammedan Law, had no right to execute such a lease of a permanent character unless the permission of the Waqf Board was obtained, but if a mutwalli executed any deed which was not permitted under the Mohammedan Law or it exceeded the right given to him under the law, the deed cannot become void ab initio. It can be a valid document unless it was avoided by the persons concerned. Certainly this deed has not been avoided by the mutwallis or beneficiaries. As a second limb of his argument the learned counsel for the appellant contended that even if this lease was valid till the lifetime of the mutwallis, it did not create any title and interest in the lessee, namely, Shafiuddin, because the lease was executed against the conditions laid down in the waqf deed. A lease deed of any agricultural land which is under a Waqf cannot be created for more than three years and for other properties, such a lease cannot be created for more than a period of one year unless the permission of the District Judge, now the Waqf Board, is obtained. To my mind, there is not the least doubt that such a document, if executed, can be validated retrospectively by obtaining permission of the Waqf Board. Thus by no stretch of imagination, it can be said that the lease is void ab initio.

8. Agreements which are void ab initio have been mentioned u/s 30 of the Indian Contract Act. Section 24 deals with all contracts of which any part of a single

consideration for one or more object is found to be unlawful. This is not the case here. The lease was for consideration and neither its term or object can be said to be unlawful. It was neither without consideration as laid down u/s 25 of the Indian Contract Act. Sections 26 and 27 of the Contract Act would not apply to the facts of this case because they are regarding restraint of the marriage of any person other than a minor or restraint of profession, trade, business etc. Similarly, Sections 28, 29 and 30 of the Contract Act also do not attract the facts of this case. Therefore, in my opinion, this lease deed cannot be said to be a void document. My view on the above point is further strengthened by the observation made in a Madras case in [Sundaramurthi Nainar Vs. Chotti Bibi alias Bacha Bibi and Others](#), where it was held that a lease granted by a Mutwalli in respect of Waqf land for more than three years without the sanction of the court was not void ab initio under the Mohammedan Law and was only voidable. It was also held that such leases are operative or binding on the mutwalli who granted it unless they are declared to be invalid. In this view of the matter, the lease in question is voidable document and, therefore the lower appellate court rightly held that unless this lease deed was avoided, Shafiuddin had right as a lessee to transfer his lessee right to the plaintiffs.

9. The fact that the land which was purchased by the defendant was other than this land is concluded by concurrent finding of fact by the trial Court and the lower appellate Court and as such it cannot be disturbed in this second appeal particularly when this finding is based on good and solid evidence. The contesting defendant is therefore rank trespasser. The learned counsel for the appellant contended that if the plaintiffs and the defendant both were trespassers, then the defendant who was in possession should not be disturbed and the plaintiffs' suit should not be decreed. I fear this argument cannot be upheld. As held above, the plaintiffs are not trespassers. They purchased this land under a valid sale-deed which was legally executed by Shafiuddin for consideration. This right of Shafiuddin to transfer his lessee right for consideration has not been challenged. The plaintiffs are therefore not trespassers. They are lessees of the disputed land being successors-in-interest of Shafiuddin and as such the defendant's possession as trespasser can be of no avail to him.

10. The learned counsel for the appellant also contended that the lease deed did not permit Shafiuddin to sell this land. This argument too has no force in it. The lease was of a permanent nature and Shafiuddin, the lessee, was given the right to transfer it and to be in possession of it generation after generation.

11. The learned counsel for the appellant also contended that the appellant's possession has been upheld in the proceedings u/s 145, Cr. P. C. and he was also a transferee and, therefore, the possession he obtained u/s 145, Cr. P. C. are of a quasi judicial nature. The delivery of possession given to a party u/s 145, Cr. P. C. is subject to a decision by a Court of competent jurisdiction. I have already observed that there is a concurrent finding of fact that the defendant is not the purchaser of

the disputed land and he purchased some other land. Therefore, the argument of the learned counsel for the appellant that the defendant is a purchaser of this very land has no legs to stand.

12. In this view of the matter, for the reasons given above, the appeal fails. It is hereby dismissed with costs. The stay order is vacated.