

(1941) 06 BOM CK 0001

In the Bombay High Court

Case No : Second Appeal No. 96 of 1939

Shekh Zafarbhai Guljarbhai

APPELLANT

Vs

Chhaganlal Aditram Gandhi

RESPONDENT

Date of Decision : 30-06-1941

Acts Referred:

Citation : (1941) 43 BOMLR 854

Hon'ble Judges : Divatia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Divatia, J.—This is a second appeal in a suit by the plaintiff-appellant to recover possession of a piece of land and damages for occupation at certain rate. The plaintiff is the present mutawalli of the suit property and his case was that the suit land which was wakf property was given on a lease for fifty-one years by his predecessor, defendant No. 2, to defendant No. 1 on. November 12, 1925, but that he had no power under the Mahomedan law to grant a lease for a long period. The lease being therefore void, he sued to> recover the property from defendant No. 1. Defendant No. 1's case was that the lease was validly passed by defendant No. 2 acting as mutawalli, that the transaction was for necessity as well as for the benefit to the wakf, that a mosque was erected with the money obtained by defendant No. 2 front him, and if permission of the Court was necessary to validate the transaction, such permission should be granted in this suit.

2. The main question, therefore, was whether the lease for a long period granted by the then mutawalli was valid. The trial Court was of the opinion that it was invalid because under the Mahomedan law he had no power to grant the lease of non-agricultural property for more than one year except with the previous sanction of the Court, and no such sanction had been obtained in the present case. On appeal, the Extra Assistant Judge reversed that decision and held that the mutawalli had the power to grant the lease as it was for the benefit of the

wakf property and that such a lease could be validated by retrospective sanction of the District Court, and he thereby gave the sanction for the said lease.

3. The learned Judge held relying upon several authorities that the case of a lease for a long term was on the same footing as the case of a mortgage or a sale, that under the Mahomedan law it was competent to a mutawalli to mortgage or sell the wakf property with the sanction of the Court, and that even if such sanction was not obtained, the Court has the power to grant retrospective sanction if it was satisfied that the transaction was for the benefit of the institution. The same principle, according to the learned Judge, would apply to the case of a long term lease, and he therefore allowed the appeal. Hence this second appeal by the plaintiff.

4. The decisions about mortgage transactions lay down that a mortgage by a mutawalli for necessity or benefit is valid even if permission of the Court is obtained subsequent to the mortgage. The principal case on this point is *Nimai Chand Addya v. Golam Hossein* (1909) ILR 37 Cal. 179, and that case has been followed in *Afzal Husain v. Chhedi Lal* (1934) ILR 57 All. 727. With regard to a long term lease, it has been held in the matter of *Woozatunnessa Bibee* (1908) ILR 36 Cal. 21 that the Court has the power to grant permission for such lease. In that case permission was granted to a mutawalli to enter into a lease for a period of thirty year That decision was followed in *Habibar Rahaman v. Saidanessa Bibi* (1923) ILR 51 Cal. 331. It is true that both these cases were of antecedent sanction and not of retrospective validation. The only question therefore is whether it is open to a Court to grant permission retrospectively in the case of a long term lease. I see no distinction in principle between antecedent and subsequent sanction in the case of a long term lease if a mortgage by a mutawalli can be validated by subsequent sanction as in the cases of *Nimai Chand Addya v. Golam Hossein* and *Afzal Husain v. Chhedi Lal*. The test in both cases is the same, viz., necessity or benefit to the institution.

5. It is, however, contended that even if the transaction could be subsequently validated by the Court, it is only the District Judge who could do it and not the Assistant Judge, because the power of a kazi who can, under the Mahomedan law, grant such permission, is being exercised now by the District Judge and not by any Judge subordinate to him in the District Court, and that in the present case the permission is given by the Assistant Judge and not by the District Judge. Reliance is placed for that proposition on the decision in *Fakrunnessa Begum v. District Judge of 24-Parganas* (1920) ILR 47 Cal. 592. There no doubt it is said that the District Judge has power to grant such sanction. But on the other hand in the leading case of *Nimai Chand Addya v. Golam Hossein* it is observed as follows (p. 187):

. . . . we can see no reason why an approval by a Subordinate Judge of a transaction by which wakf property is mortgaged, provided he has jurisdiction over the wakf property, should not be quite as effectual as a sanction by a District Judge.

It has also been recently held by a special bench of the Calcutta High Court in *Burhan Mirdha v. Khodeja Bibi* [1937] 2 Cal. 79, s.B. that the civil Courts have taken the place of kasis under the Mahomedan law. I do not think there is, therefore, any substance in the contention that the District Judge alone enjoys the function of a kazi and that sanction must be granted by him.

6. In the present case defendant No. 1 expressly asked in his written statement for such permission if it was necessary and he repeated the same in his memorandum of appeal to the lower Court. The learned appellate Judge acceded to that prayer as he was of opinion that the transaction was beneficial to the institution, and I do not think that he has erred in doing so.

7. The decree of the lower Court is, therefore, confirmed and the appeal is dismissed with costs in favour of respondent No. 1.