1963

Gilbert N. Anderson and Ella B. Anderson v. E. Val Anderson : Brief of Appellants

Utah Supreme Court

Daines, Thomas and Hodges; Attorneys for Appellant;
Harris and Harris; Attorneys for Respondents;

In the Supreme Court of the State of Utah

GILBERT N. ANDERSON and ELLA B. ANDERSON,
Plaintiffs and Respondents

vs.

E. VAL ANDERSON
Defendant and Appellant

Case No. 9,854

APPELLANTS' BRIEF

Appeal from the Judgment of the
First District Court for Cache
Court

Hon. Charles J. Cowley, Judge

DAINES, THOMAS AND HODGES
442 North Main Street
Logan, Utah
Attorneys for Appellant

HARRIS AND HARRIS
31 Federal Avenue
Logan, Utah
Attorneys for Respondents

TABLE OF CONTENTS

AUTHORITIES & REFERENCES CITED

41 Am. Jur. 50

3 A.L.R. 498

66 A.L.R. 2nd 733

41 Am. Jur. 85

Leach & Tudor, The Rule Against Perpetuities, page 145

Simes, Future Interests, page 381

In the Supreme Court of the State of Utah

GILBERT N. ANDERSON and
ELLA B. ANDERSON,
Plaintiffs and Respondents

vs.

E VAL ANDERSON
Defendant and Appellant

Case No. 9,854

APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE: This is an action originally pleaded as an action to enforce a forfeiture of a real estate contract which was submitted at the time of trial by stipulation on the question of law as to whether or not the contract violated the rule against perpetuities.

DISPOSITION IN LOWER COURT: The case was tried to the Court and from a judgment for the Plaintiff declaring the contract void as a violation of the rule against perpetuities the Defendant appeals.

RELIEF SOUGHT ON APPEAL: Defendant seeks a reversal of the judgment as a matter of law and a judgment holding said contract to be valid.

THE FACTS: Plaintiffs as sellers and Defendant as buyer entered into a real estate contract for the sale of a farm, (Exhibit "A") on the 15th day of January, 1959. Pursuant to the contract Defendant took possession of the land and farmed the same continuously to the date of the filing of the action. The contract price was $26,564.00 with 4½% interest payable in annual installments of not less than $1,000.00. Defendant paid $500.00 on May 1, 1959; $500.00 on December 1, 1959; $1,000.00 on October 1, 1960 and $1,000.00 on October 1, 1961. The minimum payment did not cover the interest. The buyer has an option to accellerate payments.

Plaintiffs filed their complaint on August 1, 1962 claiming that Defendant had defaulted under the contract by failing to make the payments required under the contract and asked the Court's assistance to enforce a forfeiture of the contract. At the trial the Plaintiffs changed their approach and rather than claiming a forfeiture asked the Court to declare the contract null and void as a violation of the rule against perpetuities. Plaintiffs stipulated that Defendants had paid all that was required by the contract but claimed that the contract which Plaintiffs counsel had prepared was nevertheless void.

The effect of the contract is basically that the yearly payments provided fall short of paying the interest on the principal. If the minimum payments were

made the Defendant would be entitled to possession and the profits from the land perpetually but the contract would not be paid out unless the buyer exercised his option to pay sufficiently more on the principal so that the payments would more than cover the interest.

POINT: THE COURT ERRED IN FINDING THAT THE CONTRACT IN QUESTION WAS VOID BECAUSE IT VIOLATED THE RULE AGAINST PERPETUITIES:—Both parties stipulated that the only issue was one of law, to wit: *Does the contract violate the rule against perpetuities?* There is no issue under the pleadings as to whether the contract as it reads violated the *intent* of the parties. We must therefore proceed on the basis that the parties *intended* the contract to have the effect it did; that the parties *intended* that the contract principal would never be paid unless Defendant exercised his option to pay more than the minimum and that the parties *intended* that the buyer should have the possession and profits as long as he paid $1,000.00 a year and otherwise abided by the terms of the contract.

It may well be that if the respondents had claimed that the contract violated the intent of the parties they might have pursued a remedy of reformation. We must conclude that Plaintiffs had their own good reasons for not pursuing such a remedy. The result might have been a reduction of the interest rate, or some other

result consistant with the presumption of construction against a party preparing a contract. In this respect, it should be noted that it was the appellant and not the respondent that attempted to broaden the issue to include possible reformation. (Page 22 O.R. lines 7 to 10) But we face solely the issue of the violation of the rule against perpetuities.

The document, when viewed according to its classification as to legal effect is in essence a *lease in perpetuity with an option to buy* rather than a typical real estate contract because of the following incidents: The buyer or lessee has possession and right to income while he is current on his payments but legal title would always remain in the seller or lessor unless the buyer or lessee exercises his option to pay additional amounts.

The rule aganist perpetuities as its applies to this situation is as follows in 41 American Jurisprudence: 50.

> "The rule against perpetuities prohibits the creation of *future interests or estates* which by possibility may not become vested with a life or lives in being at the effective date of the instrument, and twenty-one years thereafter . . .
>
> "It's usual application and effect is to prohibit or invalidate attempts to create by limitations, whether executory or by way of remainder, *future interests or estates*, the vesting of which is postponed beyond the prescribed period." (Emphasis supplied).

It is well settled that perpetual leases do not viol-

ate the rule against perpetuities. The earliest collection of cases available on the question of the effect of the rule on perpetual leases is found in 3 ALR 498, which states as follows:

> "Save in a single instance (Morrison v. Rossignol—Cal.—infra), it has been generally held that perpetual leases and leases containing a covenant for perpetual renewal are not violative either of the rule against perpetuities or of statutes limiting the period during which the absolute power of alienation may be suspended."
>
> "The reason why a lease containing a covenant for perpetual renewal does not contravene the rule against perpetuities is that the covenant to renew may be taken as part of the lessee's present interest. "The rule against perpetuities," says Professor Gray (Perpetuities Section 230), "although a strict rule, is yet a practical rule. An estate for years with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, *substantially a fee,* and as such it is regarded."
>
> "And it is obvious that a perpetual lease, or a lease containing a covenant for perpetual renewal is not a restraint or limitation upon the power of alienation of the fee, *for there are at all times persons in being who by joining can convey the fee."*
>
> "A lease for any number of years, whether for 99 or 999 is not in violation of the Statute of Perpetuities for in neither is the lessor precluded thereby from disposing of it at will nor the lessee hindered in selling or assigning the lease; and by uniting in a conveyance the lessor and lessee may freely and without restraint convey both

the fee and leasehold interest." (Emphasis supplied)

The most recent annotation available is found in 66 ALR 2nd 733 at page 734 Section 3 the pertinent part of which is as follows:

> "In regard to whether or not a perpetual lease, or a covenant to renew a lease perpetually, violates the rule against perpetuities, or any rule against suspension of the power of alienation, see the annotation in 3 ALR 498, supplemented in 162 ALR 1147.
>
> Clearly, a lease in praesenti for a term to commence at once does not violate the rule against perpetuities, whether or not the lease term will continue for a time beyond the period allowed by such rule for the vesting of interests."

Said annotation quoting cases reiterates the test as follows:

> "So in Re Hubbel (1907) 135 Iowa 637, 113 NW 152 ,13 LRA NS 496, 14 ANN Cas 640, the Court declared, upon the authority of the Todhunter Case (Iowa supra, that a lease for any number of years, whether for 99 or 999, 'is not in violation of the statute of perpetuities,' since the lessor is not precluded thereby from disposing of the land at will, nor is the lessee hindered in selling or assigning the lease, and moreover, by uniting in a conveyance the lessor and lessee may freely and without restraining convey both the fee and leasehold interest."

The only remaining question, is whether the option to buy, which might be exercised anytime during the

period of the lease, violates the rule. It is conceded that an option, unconnected with any present interest or a lease may, depending upon its provisions, violates the rule. But the authorities are in harmony that where such option is not in gross but is in connection with some present interest and right to immediate possession, the mere fact that an option to buy is attached to such present interest will not render the document in violation of the rule. I quote from 41 Am Jur 85 as follows:

> "Where the option to purchase is contained in a lease giving the lessee an option to purchase during the term of the lease, the courts take the view that the rule against perpetuities does not apply."

The following is from Leach and Tudor, The Rule Against Perpetuities; Page 145, Section 24.57:

> "In the United States an option to purchase in a lease exercisable during or at the end of the tenant's term is valid, regardless of the length of the lease, according to cases which are supported by Professional opinion. Gray thought otherwise, favoring the English cases which hold such an option void if exercisable beyond the period of perpetuities.
>
> Options in a tenant to renew or extend his lease, even options of perpetual renewal, are not invalid under the rule against perpetuities anywhere, including England, but options of renewal may run afoul of statutes which put a time limit on the permissable duration of leases, e.g. as in California, ninety-nine years on urban leases and sixteen on agricultural leases.

> Critique. The situation considered in this section is the exact opposite of that in the previous section. (Options in a person other than a tenant). Improvement of the land is stimulated, not retarded, by the existance of an option to purchase in the tenant. If the tenant has an option to purchase, he can safely improve, for by the exercise of the option he can preserve to himself the benefit of the improvement. If he has no option, he cannot economically make an improvement which will have a substantial value at the termination of the lease. Thus, a rule which invalidates an option in a tenant for the full term of his lease defeats the policy favoring free alienation and full use of property which the rule against perpetuities was designed to further. The American cases which exempt from the Rule Options in a tenant to purchase or to renew are sound."

The following is from Simes, Future Interests, Section 110; page 381:

> "The question has also been raised whether or not an option inserted in a lease permitting the lessee to buy reversions during the term is valid, even though it may be exercised at a time beyond the period of the rule. It would seem that this provision is just as much a commercial device as the option to renew the long term lease and should be held valid for the same reason. This is the conclusion reached by the American Decisions; but the English Courts have treated this option like any other option to purchase and have held it subject to the rule."

There is no basis in the law for holding that the

contract in question violates the rule against perpetuities.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed and the contract declared valid and the defendant be allowed to reinstate himself under said contract and that the defendant be awarded his costs herein.

Respectfully submitted
DAINES, THOMAS AND HODGES
By David R. Daines
Attorneys for Appellant