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M.V. SHANKAR BHAI AND ANR.

v.

CLAUDE PINTO (SINCE DECEASED) BY LRS. AND ORS.

FEBRUARY 14, 2003

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[S.B. SINHA AND DR. AR. LAKSHMANAN, JJ]

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*Specific Performance Act, 1963—Section 20—Owner of property executing Will and appointing son as executor to sell property and distribute proceeds between legatees—Legatees also given option to partition the property—Executor entering into sale agreement with tenant of the property—Sale agreement containing restrictive covenant that properties subject to ratification by co-heirs—Executor not executing sale deed in terms of agreement—Suit for specific performance of contract—Suit decreed—High Court setting aside the order—On appeal held intention of parties was not that executor would alienate property as executor of his mother's Will—Also as agreement containing restrictive covenant is not a concluded contract such agreement not enforceable in court of law—Thus the question whether the absolute right to dispose the property as an executor of Will or not is of no significance—Hence, not a fit case to exercise discretion and order specific performance.*

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Owner of the property in question executed a Will and appointed defendant No.1 as the executor and directed him to sell the property for the best price and distribute the proceeds between the legatees and the legatees could also seek partition of the property. Owner expired and the executor obtained the probate. The appellant-tenant of the property in question offered to purchase the property. Appellant who was a practicing advocate drafted agreement for sale and defendant No 1 made corrections in the same. He also advised defendant No 1 to obtain power of attorney from other legatees. Parties entered into sale agreement which was subject to ratification by the co-heirs. Defendant No 1 did not execute sale deed in terms of sale agreement. Appellants filed suit for specific performance of contract. Trial Court decreed the suit. Aggrieved, defendant No 1 filed an appeal. However, High Court set aside the judgment of the trial Court. Hence the present appeal.

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Appellants contended that the High Court erred in construing the

Will to the effect that the right of the legatees to ask for partition shall prevail over the right of the executor to sell the property; that under Sections 211(1) and 307(1) of the Indian Succession Act, 1925, the executor has an absolute right to dispose of the property of the testator and in that view of matter the question of the legatees exercising their right of partition in preference of the executor's right to sell the property which would otherwise be in consonance of the aforementioned provisions of the Indian Succession Act, did not arise; that the expression used in the agreement to sell "subject to ratification by the co-heirs" must be held to have been inserted for the benefit of appellant and as such he was at liberty to waive his right; and that the High Court erred in holding that it is not fair and equitable to pass a decree for specific performance of contract.

Respondents contended that the parties to the agreement proceeded on the basis that the deed of sale was to be executed by the legatees and not by the original defendant in his capacity as executor; that it is one thing to say that in terms of Sections 211 and 307 of the Indian Succession Act, a right of the executor of the Will to alienate the property of the testator is absolute but in the instant case, the original defendant did not exercise his right as an executor but only as one of the legatees; that having regard to the fact that in the agreement of sale a stipulation was specifically inserted at his instance that the same was 'subject to ratification by other co-heirs', no concluded contract was arrived at and thus the suit for specific performance was not maintainable; and that the materials brought on record by the parties would clearly demonstrate that the said restriction was inserted not for the benefit of the appellant at all.

Dismissing the appeal, the Court

**HELD 1.1.** A bare perusal of the Will leaves no manner of doubt that although the original defendant was given liberty to sell the property in question and distribute the amount received thereby in the manner stated therein but the legatees have also been given an option to partition the property. Once such a desire is expressed before a deed of sale is executed, the executor had no other option but to consent thereto.

[1220-B-C]

**1.2.** The submission that the appellant created a scare in the mind of defendant No.1 about the house being allotted to some other person by the Rent Controller and that the appellant evidently had an upper hand when negotiation for sale of the house between him and the original

A defendant No.1 took place is accepted. Further the agreement of sale in question was, admittedly, drafted by the appellant and defendant No. 1 made corrections therein. Therefore the submission that the restrictive covenant was inserted for the benefit of appellant cannot be accepted. Furthermore, if the agreement was entered into by the defendant No 1 only as an executor of the will, it was not necessary for him to write that the same was being executed for self as well as an executor. He wanted to convey the property also as a legatee and/or one of the heirs of her mother apart from being the executor of the Will. Further in the aforesaid context only the expression 'subject to ratification by co-heirs' must be interpreted.

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[1225-A, B, D, E]

C 1.3. The draft sale deeds were drafted by the appellant and also the appellant advised defendant No. 1 to obtain power of attorney from other legatees which were also prepared by him. The draft sale deed would clearly demonstrate that the property in suit was to be executed by legatees. Therefore the intention of the parties was not that defendant No.1 would alienate the property in suit as executor of his mother's Will.

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[1225-F-H]

E 1.4. When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract. Therefore, the agreement for sale was not enforceable in a court of law. Thus the question as to whether the original defendant No.1 had an absolute right to dispose of the property in question in exercise of his power as an executor of the Will or not is of no significance. [1226-A-C; 1228-A]

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G 1.5. Having regard to the facts and circumstances of the case in particular the subsequent events as well as the conduct of the appellant it is not a fit case where a discretionary jurisdiction of this Court in terms of Section 20 of the Specific Relief Act, 1963 should be exercised. [1228-C]

*Dr. Jiwan Lal and Ors. v. Brij Mohan Mehra and Anr.*, [1973] 2 SCR 230, distinguished.

*P.H. Alphonso v. Mrs. Irene Dias and Ors.*, [1967] 2 Mysore Law Journal 465; *Smt. Babuain Chandrakala Devi v. Smt. Pokhraj Kuer and Ors.*, AIR [1963] Patna 2; *Henry Earnest Meaney and Anr. v. E.C. Eyre Walker*,

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**AIR (34) 1947 All 332; Warehousing & Forwarding Company of East Africa Ltd. v. Jafferli & Sons Ltd., [1964] Law Reports—Appeal Cases 1; V. Muthuswami (Dead) by Lrs. v. Angammal and Ors., [2002] 3 SCC 316 and Nirmala Anand v. Advent Corporation (P) Ltd. and Ors., [2002] 8 SCC 146, referred to.**

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2148 of 1998**

From the Judgment and Order dated 4.4.1996 of the Karnataka High Court in R.F.A. No. 296 of 1993.

K.N. Bhat, S.K. Gambhir, S.N. Bhat, D.P. Chaturvedi, K.M. Prakash, K.V. Mohan, K.R. Nambiar, Awanish Sinha, Amit K. Sharma, for A.P. Medh and Vivek Gambhir, (NP) for the appearing parties.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** Plaintiffs are in appeal before us. Plaintiff No.1 was a tenant in a part of the premises in question, which belonged to Montu Mary Pinto, since deceased. She died in 1974. She executed a Will and last testament (Exhibit P-2(2A)) on or about 25.4.1972 whereby Defendant No.1 was appointed as the sole Executor. The relevant clauses of the said Will are :

“After my death the Executor of this Will shall take possession of my entire properties and manage them. He shall also obtain Court probate upon this Will after my death, and sell away my said properties for the best price possible to others. He shall minus the expenses met by him for obtaining the Probate etc. and divide the balance sale price amount unto four equal shares and pay one such share out of the same to my son Staneley T. Thomas alias Stanley Pinto and another such share to my son Victor L. Pinto and obtain receipts from them. He shall further pay of his own share to each of his own children who are living now and who will be born to him hereafter Rs. 100 (one hundred) each and keep the rest of the amount for himself and he shall also pay out of the share amount of my said daughter a sum of Rs. 600 (Six hundred) to her son Sunil Rodrigurs and pay also Rs. 100 (one hundred) each to each of her living children and also to those who may be born to her hereinafter and pay the balance left over to my said daughter.

That if my said heirs desire to partition my property among themselves after my death, the Executor shall consent to it and do so

A by the help of two independent arbitrators and divide them into four equal lots as decided by the Arbitrators and grant each such lot to each one of my said heirs who shall each inherit the respective properties absolutely with entire right. But in these circumstances the amounts mentioned to be paid out as stipulated hereabove shall be paid by the concerned holders of the property shares.”

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C Indisputably the said Will was probated. Defendant No.1, however, as Executor or otherwise did not sell the property immediately. While he was toying with the idea of alienating the suit property, the plaintiff-appellant who is a practicing advocate and whose advices had been sought for as regards possible legal impediments, if any, in relation thereto, offered himself as a willing purchaser. A large number of correspondences passed between the parties. The evidence on record shows that the Plaintiff No.1 drafted the agreement for sale and handed over the same to Defendant No.1 who made corrections therein. On or about 4.12.1979, an agreement of sale was entered into between the parties, paragraph 1 whereof is in the following terms :

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E “That in consideration of second party agreeing to pay to First Party a total price of Rs. 1,23,750 (Rupees one lakh twenty three thousand seven hundred and fifty) only, the First Party *for self and as Executor* hereby agrees to convey the property described in the schedule hereto *subject to ratification by the co-heirs to terms hereinafter appearing.*”

(Emphasis supplied)

F It appears from the records that the plaintiff advised Defendant No.1 to obtain power of attorney from the other legatees so that all of them can execute the deeds of sale jointly. Two such draft sale deeds were prepared; one to be executed in favour of Plaintiff No.1 and another in favour of Plaintiff No.2 who was the nominee of the Plaintiff No.1.

G As Defendant No.1 did not execute the deeds of sale purported to be in terms of agreement dated 4.12.1979, the plaintiffs filed the suit for specific performance of contract on or about 24.1.1989. Defendant No.1 contested the said suit raising various pleas, whereupon the learned Trial Court, inter alia, framed the following issues :

H (1) Whether the defendant, as Executor of the Will of his mother, is not competent to sell the plaint schedule property without the

consent or approval of the other legatees under Will ? A

(2) Does the first plaintiff prove that the document dated 4-12-1979 is valid and binding on the defendant and that he is entitled to enforce the terms mentioned therein ?

(3) Does the first plaintiff prove that there was a concluded agreement for sale between him and the defendant dated 4-12-1979 ? B

(4) Whether the second plaintiff can seek specific performance of the agreement dated 4-12-1979 ?

*Additional issues :*

(1) Whether defendants 2 to 7 would be put to great hardship if the agreement of sale is to be enforced ? C

(2) Whether the plaintiff took unfair advantage in obtaining the suit agreement of sale as contended in the written statement by the defendants ?

The learned Trial Court by its judgment and decree dated 11.3.1993 decreed the suit. Aggrieved by and dissatisfied therewith, Defendant No.1 preferred an appeal. The High Court of Karnataka by its judgment dated 4.4.1996 passed in F.R.A. 286 of 1993 reversed the said judgment. The High Court formulated the following points for its consideration : D

(1) Whether the Executor has absolute powers to sell the immovable property bequeathed completely ignoring the provision made in the Will dated 24-5-1972 for partition of the said property among the legatees ? E

(2) Whether the agreement to sell dated 4-12-1979 executed by the first defendant subject to ratification of the terms and conditions contained therein by the other co-heirs is a concluded contract ? F

(3) Whether the suit O.S. No. 26/1981 was rightly proceeded within law bringing the defendants 2 to 7 as legal representatives of the deceased sole Executor, the first defendant ? G

(4) Whether on the facts and in the circumstances of the case, the trial Court is justified in decreeing the suit of the plaintiffs for specific performance ?

All the questions were answered by the High Court against the appellants. H

- A Mr. K.N. Bhat, learned Senior Counsel appearing on behalf of the appellants, would submit that the High Court committed a serious error in construing the Will to the effect that the right of the legatees to ask for partition shall prevail over the right of the Executor to sell the property. The learned counsel would submit that having regard to the provisions contained in Sections 211(1) and 307(1) of the Indian Succession Act, 1925, the Executor has an absolute right to dispose of the property of the testator and in that view of matter the question of the legatees exercising their right of partition in preference of the Executor's right to sell the property which would otherwise be in consonance of the aforementioned provisions of the Indian Succession Act, did not arise.
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- C Mr. Bhat would urge that the expression used in the said agreement to sell dated 4.12.1979 "subject to ratification by the co-heirs to terms hereinbefore appearing" must be held to have been inserted for the benefit of Plaintiff No.1 and as such he was at liberty to waive his right. In support of the aforementioned contentions reliance was placed on *P.H. Alphonso v. Mrs. Irene Dias and Ors.*, (1967) 2 Mysore Law Journal 465] and *Smt. Babuain Chandrakala Devi v. Smt. Pokhraj Kuer and Ors.*, AIR (1963) Patna 2, *Dr. Jiwan Lal and Ors. v. Brij Mohan Mehra and Anr.*, [1973] 2 SCR 230.
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- E It was pointed out that the Executor of the Will Claude Pinto, Original Defendant No.1, died on 15.12.1988 and having regard to the fact that the legatees had been brought on record as his legal representatives in respect whereof the Trial Court held that the suit did not abate, the High Court committed a manifest error in holding that it was obligatory on the part of the plaintiffs to approach the District Judge for appointment of another Executor of the Will in view of Section 21(1) of the Indian Succession Act. As regards Point No.4, it was submitted that having regard to the fact that the
- F Trial Court negated the contention raised on behalf of the defendants that Plaintiff No.1 was not the lawyer of Defendant No.1 and, thus, there was no question of any undue influence, having not been disturbed by the High Court, it erred in holding that it is not fair and equitable to pass a decree for specific performance of contract.
- G Mr. S.K. Gambhir, learned counsel appearing on behalf of the respondents, on the other hand, would submit that the parties to the agreement proceeded on the basis that the deed of sale was to be executed by the legatees and not by the Original Defendant in his capacity as Executor. The learned counsel would contend that it is one thing to say that in terms of
- H Sections 211 and 307 of the Indian Succession Act, a right of the Executor

of the Will to alienate the property of the testator is absolute but in the instant case. the Original Defendant did not exercise his right as an Executor but only as one of the legatees. Mr. Gambhir would urge that having regard to the fact that in the agreement of sale dated 4.12.1979. a stipulation was specifically inserted at his instance that the same was 'subject to ratification by other co-heirs', no concluded contract was arrived at and in that view of the matter the suit for specific performance was not maintainable.

Mr. Gambhir would further submit that the materials brought on records by the parties would clearly demonstrate that the said restriction was inserted not for the benefit of Plaintiff No.1 at all. Mr. Gambhir argued that the sequence of events would clearly demonstrate that Plaintiff No.1 took undue advantage of his position as a tenant as also a practicing advocate. The learned counsel pointed out that in view of the provisions of the Karnataka Rent Control Act, as it then prevailed, the Rent Controller had the absolute jurisdiction to induct a tenant as and when a tenanted premise is vacated. It was pointed out that Plaintiff No.1's legal advice was sought for by the said defendant as to how to prevent such action on the part of the Rent Controller. At that time he was advised that in the event an agreement of sale is executed, such a contingency can be avoided.

The learned counsel, however, conceded that the High Court may not be correct in its view that although the legatees had already been brought on record on the death of the Original Defendant, it was obligatory on the part of the plaintiffs to approach the District Judge with a prayer to appoint another Executor in his place.

The learned counsel supported the judgment of the High Court as regards its refusal to exercise of discretionary power in terms of Sections 20(2)(b) of the Specific Relief Act, 1963. Our attention has been drawn to the fact that in the suit for specific performance of the contract, the other respondents herein filed an application for getting impleaded as parties but the same was rejected. A revision application filed there-against by the respondents was also dismissed by the High Court observing that they were free to file a suit for partition. Relying on or on the basis of such observation of the High Court, a suit for partition was filed to the knowledge of the plaintiffs. The same was decreed. The house in question was allotted in favour of the Respondents according to the respective shares. Respondent No.6 also took certain steps against Plaintiff No.1 as a tenant wherein also Plaintiff No.1 did not examine himself or questioned the validity of the decree passed in the



A partition suit. The learned counsel pointed out that the plaintiffs did not pay a single penny to the respondents and furthermore keeping in view the subsequent events, namely, the decree passed in the partition suit, it may not be equitable to grant a decree for specific performance of the agreement of sale at this distant point of time.

B The core question which, in our opinion, arises for our consideration in this appeal is as to whether the restrictive covenant contained in the agreement dated 4.12.1979 would amount to a conditional agreement or a concluded contract and/or whether the same was for the benefit of Plaintiff No.1.

C A bare perusal of the Will dated 25.4.1972 leaves no manner of doubt that although thereby the Original Defendant was given liberty to sell the property in question and distribute the amount received thereby in the manner stated therein but the legatees have also been given an option to partition the property. Once such a desire is expressed before a deed of sale is executed, the Executor had no other option but to consent thereto.

D It is in the aforementioned backdrop, the conduct of the parties may be noticed. Plaintiff No.1 was a tenant in respect of a part of the premises in suit. The other part of the premises was occupied by one Venketesh. The evidence on record clearly shows that the parties to the agreement were in correspondences. The Original Defendant took the legal advice of Plaintiff E No.1 as regards the effect of the said Will in 1974. Plaintiff No.1 advised the Original Defendant to obtain a probate. He also gave an advice that steps are required to be taken under the Urban Land (Ceiling and Regulation) Act. The correspondences passed between the parties would clearly show that they were in good terms.

F A question also arose as to whether any lease in favour of Plaintiff No.1 without filing any declaration under the Urban Land (Ceiling and Regulation) Act would be valid or not or whether they could take action for regularisation thereof. The question as regards sale of property appears to have cropped up in February 1977 whence the Original Defendant No. 1 by G a letter dated 11.2.1977 addressed to Plaintiff No.1 informed him that he had obtained a probate and he is required to take action in terms thereof. It was in that connection a query was made "if we (presumably the legatees) wanted to dispose of the property, would it be necessary to take permission from the court or the land ceiling authority". Plaintiff No.1 by his letter dated 19.3.1977 H gave his advices in details on his proposal to dispose of the property saying:

“If you want to dispose of the property, permission of the court is unnecessary. But the permission of competent authority under the Land Ceiling Act is necessary. Only after you fix up a buyer, necessary formalities can be gone through. There are no provisions for obtaining a blanket permission to sell. The formalities are quire laborious and in some. If you have any particular buyer in mind and only after such and you agree, then only you can think of obtaining the permission of the competent authority. In passing I may mention that if you have any idea to sell the property or any portion thereof, please let me place my first offer. Probably even Mr. Venketesh might be interested to buy though I have not specifically asked him.....”

The Original Defendant No. 1 thereafter visited Mangalore and discussed about the pros and cons of selling the property with the plaintiff, which would appear from his letter dated 20.3.1978. He again wanted Plaintiff No.1’s advice on certain matters. Plaintiff No.1 pointed out several disadvantages in respect of the property in question which may be proved to be impediments in the matter of getting good price. He in his letter dated 9.4.1978 contended :

“It is difficult to give current market price in terms of square metres because land in Mangalore is even now sold only in terms of cents. Your plot is mulageni plot. It is situated by the side of a lane in which no heavy vehicle can pass through. There are two disadvantages which will diminish the value. Any building licence at Mangalore will be granted only after the land is converted as house site as per Sec.95 of the Land Revenue Act, the authority to grant conversion certificate (popularly called NOC) being the Deputy Commissioner, Conversion will be granted only to an owner applicant and not to a mulagenidar applicant. No new building can be easily constructed on your plots without doing some underground work in the concerned offices. On the main road side, near Kamath Nursing Home, Mr. Prabhu who owns lands, has recently sold them at the rate of about Rs. 3 to 3½ thousand per cent of land. Your lands may fetch about Rs. 2 to 2½ thousand and the buildings being of mud will not fetch any value. Again, a third party purchaser will consider the question whether he gets actual possession or not.”

Yet again in the said letter, Plaintiff No.1 made an offer to purchase the property on his own behalf as well as on behalf of Mr. Venketesh.

A The Original Defendant No.1 was merely nurturing the idea of selling the property. Various correspondences passed between the parties and whenever any occasion arose, Plaintiff No.1 renewed his offer. In the meantime, Mr. Venketesh was transferred to Bangalore and although he retained the possession of the tenanted premises for some time, but later on vacated the same. In terms of the provisions of the Karnataka Rent Control Act, in the event a tenanted premises falls vacant, the Rent Controller may allow the same to other person. Sections 4 and 5 of the Karnataka Rent Control Act, 1961 read thus :

C “4. *Intimation of vacancy by landlords.*- (1) Every landlord shall, within fifteen days after the building becomes vacant by his ceasing to occupy it or by the termination of a tenancy or by the eviction of the tenant or by the release of the building from requisition, or otherwise, give intimation in the prescribed form by registered post to the Controller.

D (2) Except as provided in this Part, no person shall let, occupy or otherwise use any building which becomes vacant without the landlord giving intimation under sub-section (1) and for a period of fifteen days from the date on which the intimation is received by the Controller or within a period of one week after the termination of the proceedings under Section 8, if any, whichever is later :

E Provided that this sub-section shall not apply to a building in respect of which the landlord has obtained an order for possession on any of the grounds specified in clause (h) of the proviso to sub-section (1) of Section 21 or to any building which has been released from requisition for the use and occupation of the landlord himself :

F Provided further that if the building is not occupied in accordance with an order for possession under clause (h) of the proviso to sub-section (1) of Section 21, or if the building is not occupied by the landlord after its release from requisition, within a period of two months from the date of such order or release, as the case may be, the landlord shall immediately after the said period of two months or within such further time as the Controller may allow, give intimation to the Controller in accordance with the provisions of this sub-section and for this purpose the building shall be deemed to have become vacant on the date of the expiry of the said period of two months.

H (3) Any landlord who contravenes the provisions of sub-section

(1) or (2) shall, on conviction, be punished with fine which may extend to one thousand rupees : A

Provided that such fine shall not be less than fifty rupees.

(4) Nothing contained in this section shall apply

- (i) to a residential building the monthly rent of which does not exceed fifteen rupees per month or the annual rental value of which does not exceed one hundred and eighty rupees; or B
- (ii) to a non-residential building the monthly rent of which does not exceed twenty-five rupees or the annual rental value of which does not exceed three hundred rupees; or C
- (iii) to any building in any city, town or village owned by any local authority, company, association or firm, whether incorporated or not and bona fide intended solely for the occupation of its officers and servants employed in the same city, town or village. D

*5. Order of leasing of vacant building.* (1) The Controller may, by order in writing served on the landlord, direct that any vacant building, whether intimation of its vacancy has been given by the landlord under sub-section (1) of Section 4 or not, be given to the landlord for his use and occupation or on lease to such public authority or other persons as he may think fit: E

Provided that where such building is a residential building no such order shall be made in favour of a person not being the landlord, who or any member of whose family owns a residential building in the same city or town or village in which the vacant building is situated. F

**Explanation.** - A building may be directed to be leased under this section notwithstanding that it is subject to an agreement of lease or has been let or occupied in contravention of sub-section (2) of Section 4. G

(2) Any landlord, who contravenes an order made under sub-section (1) shall, on conviction, be punished with simple imprisonment for a term which may extend to three months or with fine or with both." H

By a letter dated 30.10.1979 (Exhibit D/40) Plaintiff No.1 intimated to the Defendant No. 1 about the visit of the Rent Controller and the latter

A having made queries as regards the status of the tenanted premises. Plaintiff No.1 stated that he had tried to see that the Inspector does not file his report. He also intimated that he had spent Rs. 50 for keeping the matter in abeyance.

B By a letter dated 13.11.1979 (Exhibit D/41). Plaintiff No.1 informed the Defendant No. 1 that somebody had complained to the Rent Controller and as such he would have to submit a report. Yet again by a letter dated 19.11.1979 (Exhibit D-42), he advised the Original Defendant that in the event he received notice, it will be appropriate that he appears through a lawyer and contest the proceedings. He stated :

C “.....Once the lawyer appears he can ask for time for filing objection etc. and the allotment can be stalled. If decision goes against us, we can appeal to D.C. and then to High Court.

D In the meantime, our High Court has ruled that if owner requires release of building for sale, the Rent Controller should ordinarily accept it.”

E However, it does not appear from the records that any provision of law or any judgment of the High Court had been rendered to the effect that in the event a landlord requires the premises for the purpose of selling the same, Sections 4 and 5 of the Karnataka Rent Control Act would not apply.. The Plaintiff No.1 in his deposition stated :

F “Through Ex.D.42 I have not given advice to the defendant as suggested by you that the Mysore High Court ruled that if the agreement is executed in respect of the vacant tenanted house it cannot be allotted to anybody. It is not true to suggest that I got executed Ex.P.10 mentioning the defendant that the vacant house of him cannot be allotted by the Rent Controller”

He further stated :

G “.....In my letter at Ex.D.41, I assured him that I would protect his interest before the Rent Controller. But in Ex.D.41, I have asked him to send a vakalath form i.e., duly signed by him to me. In Ex.D.40 I informed him to act quickly and preferably to visit Mangalore and save the house from Rent Controller. After Ex.D.40, he came to Mangalore during 1st week of December, 1979. I cannot say as to how many days prior to the sale agreement at Ex.P.10 he came from H Bombay to Mangalore”

It is evident that negotiation for selling the property in question started in the aforementioned backdrop of events and ultimately the agreement of sale was executed. A

Mr. Gambhir, therefore, in our opinion is right in contending that Plaintiff No.1 created a scare in the mind of Defendant No.1 about the house being allotted to some other person by the Rent Controller. Plaintiff No.1 evidently had an upper hand when negotiation for sale of the house between him and the Original Defendant No.1 took place. B

The agreement of sale in question was, admittedly, drafted by Plaintiff No.1. He in his deposition stated : C

“Defendant is a Law Graduate and an officer in Tata Company. Defendant read the contents of Ex.P.12, and made corrections therein. The corrections made by the defendant in Ex.P.12 are at Ex.P.12(a), P.12(b), P.12(c) and P.12(d). Defendant himself wrote the description of the suit property in the schedule to the agreement at Ex.P.12(e). After correction made by the defendant at Ex.P.12(b), I carried out the same by correcting in Ex.P.12 in the language of lawyer.” D

It would, therefore, not be correct to contend that the restrictive covenant was inserted for the benefit of Plaintiff No.1. Furthermore, if the agreement was entered into by him only as an Executor of the Will, it was not necessary for him to write that the same was being executed for self as well as an Executor. He, therefore, wanted to convey the property also as a legatee and/or one of the heirs of her mother, Mrs. Minto Mary Pinto apart from being the Executor of the Will. E

In the aforesaid context only the expression ‘subject to ratification by the co-heirs’ must be interpreted. F

The draft sale deeds which were marked as Exhibits D-15 and D-23 were also drafted by Plaintiff No.1. It appears from the letter dated 21.1.1980 that Plaintiff No.1 asked the Defendant No.1 to get power(s) of attorney executed by his brothers and sister in his favour, the drafts whereof were also prepared by him. The draft sale deed would clearly demonstrate that the property in suit was to be executed by Stanely T. Thomas, Victor L. Pinto, Mrs. Agnee Rodrigues Nee Pinto, represented by their brother and power of attorney holder Claude Pinto having been authorised by Nos. 1 and 2 as per power of attorney (dated blank) and by Claude Pinto. G H

A It, therefore, cannot be said that the intention of the parties was that the Defendant No.1 would alienate the property in suit as Executor of his mother's Will.

B When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.

C The word 'subject to' has been defined in Black's Law Dictionary, Fifth Edition, at page 1278, inter alia, as : "subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for". In Collins' English the words 'subject to' has been stated to mean as : "under the condition that : we accept, subject to her agreement".

D The said agreement for sale, therefore, was not enforceable in a court of law.

In *Henry Earnest Meaney and Anr v. E.C. Eyre Walker*, AIR (34) (1947) All.332, the law is stated in the following terms :

E "Apart from this, we are of the opinion that there was no completed contract between the parties. We have already said that in the plaint the plaintiff alleged that the letter of Mr. Meaney dated 29th August 1941, was an offer and the telegram dated 31st August 1941, was the acceptance by which the contract was completed. In his arguments before us learned counsel for the plaintiff-respondent admitted that the letter of 29th August 1941, was nothing more than an invitation to offer and the plaintiff's telegram dated 31st August 1941, must be taken as a definite offer of purchase made on his behalf. We have already said that the letter of 1st September 1941 was not an absolute and unqualified acceptance of the offer as required by s.7, Contract Act. In the letter there was no doubt an expression of the willingness to sell the land to the plaintiff, but then it was qualified by the statement that the defendant would sell the land to the plaintiff if it was not wanted by others who might have a right of pre-emption. The plaintiff was not able to rely on any correspondence after 1st September 1941, for his argument that there was a completed contract between the parties. It was not till about 2nd October 1941, that the parties met when Mr. Meaney came to Dehra Dun. It is nobody's case that there

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was an oral contract entered into between the 2nd and 4th October. On 4th October we know that the plot of land which the defendants intended to sell and the plaintiff intended to purchase was measured and was found to be less than five bighas in area and the whole talk fell through.” A

In *Warehousing & Forwarding Company of East Africa Ltd. v. Jafferali & Sons. Ltd.*, (1964) Law Reports - Appeal Cases 1], the Privy Council held: B

“.....If Elliott contracted subject to ratification by his principal there would be no concluded contract until ratification had been obtained. The respondents contended upon the authority of *Koenigsblatt v. Sweet* that ratification by the principal can operate back to the date when the contract was made by the agent without the necessity of communication to the other party. But in that case the limitation of the agent’s authority was not known to the other contracting party. In such a case the agent contracts as principal and his principal is bound upon ratification taking place. When, however, the other party to the contract has intimation of the limitation of the agent’s authority neither party can be bound until ratification has been duly intimated to the other party to the contract. It would be contrary to good sense to hold that a concluded contract had been made in these circumstances.” C D E

In *Dr. Jivan Lal’s* case (supra) whereupon reliance has been placed by Mr. Bhatt, Clause (6) of the agreement was as under :

“6. In the event of the above said premises, which is the subject matter of sale not being vacated by the Income-tax Authorities or is subsequently requisitioned by the Government prior to the registration of the sale-deed the vendor shall refund to the purchaser the sum of Rs.10,000 (Rupees ten thousand only) received by the vendor as earnest money plus interest at the rate of 6 per cent per annum.” F

Having regard to the nature of the transaction and keeping in view the materials on record it was held that the clause 6 aforementioned was for the benefit of the purchaser and in that situation, this Court held that the same may be waived. Such is not the position here. G

It is, however, beyond any cavil that in terms of Sections 211(1) and 307(1) of the Indian Succession Act, the Executor of a Will has an absolute H



A right to transfer the property as has been held in *Smt. Babuain Chandrakala Devi's* case (supra) and *P.H. Alphonso's* case (supra).

B However, in the instant case the question was as to whether in the facts and circumstances of the case a concluded contract can be said to have been arrived at. Having regard to the discussions made hereinbefore, we have no hesitation in holding that the agreement of sale in question could not have been specifically enforced and in that view of the matter the question is as to whether the Original Defendant No.1 had an absolute right to dispose of the property in question in exercise of his power as an Executor of the Will or not takes a back seat.

C In any event, having regard to the facts and circumstances of this case and in particular the subsequent events as well the conduct of Plaintiff No.1, we are of the opinion that it is not a fit case where a discretionary jurisdiction of this Court in terms of Section 20 of the Specific Relief Act, 1963 should be exercised. [See *V. Muthusami (Dead) by Lrs. v. Angammal and Ors.*, [2002] 3 SCC 316 and *Nirmala Anand v. Advent Corporation (P) Ltd. and Ors.*, [2002] 8 SCC 146].

D The appeal being devoid of any merit is, therefore, dismissed but without any order as to costs.

N.J.

Appeal dismissed.