

M/s. Shanti Vijay and Co. and Others

Vs

Princess Fatima Fouzia and Others

Criminal Appeals Nos. 1105, 1245 and 1269 of 1978, and Special Leave Petitions (Civil) Nos. 3648-3649 of 1978

(Syed M. Fazal Ali, P. S. Kailasam, A. P. Sen JJ)

31.08.1979

JUDGMENT

SEN, J. –

1. In these appeals, one of which is by special leave and the other two on certificate, brought from a judgment of the Andhra Pradesh High Court dated June 12, 1978, the short question is whether that Court was justified in setting aside the alleged sale of 37 items of jewellery belonging to H.E.H. the Nizam's Jewellery Trust, effected by the Board of Trustees in exercise of their discretionary power of sale under Clause 13 of the trust deed in favour of the appellants and other successful tenderers for Rs. 14.43 crores, and accepting instead the offer of the eighth respondent, Peter Jansin Fernandez for Rs. 20.25 crores made during the pendency of the appeal before it.

2. The facts of the case, so far as they are material, are not now in dispute, and are as follows :

2a. The late H.E.H. Nawab Sir Osman Ali Khan Bahadur, the Nizam of Hyderabad, by an indenture dated March 29, 1951, created a trust called H.E.H. the Nizam's Jewellery Trust, in respect of 107 items of extremely valuable, rare and priceless jewellery of exquisite design and beauty studded with emeralds, diamonds, sapphires, rubies, etc. of the highest quality and purity belonging to him, specified in the First Schedule, and Government securities of the aggregate face value of Rs. 10 lakhs, specified in the Second Schedule, for the benefit of his two sons, Prince Azam Jah and Prince Muazzam Jah; two grandsons, Prince Mukarram Jah and Prince Muffakham Jah; two granddaughters, Princess Fatima Fouzia and Princess Amina Mirzia; daughter Shahzadi Begum, and his step-brother Sahebzada Nawab Basalat Jah Bahadur.

3. Clause 13 of the trust deed, Ex. 'A', confers upon the trustees the power of sale of the jewellery, the material portion of which is in these terms :

13. Subject to the Trusts aforesaid in respect of the articles referred to in Clause 3(c), (d), (e) and (f) hereof, during the lifetime of his eldest son Prince Azam Jah (if and so long as the Dynasty of the Settlor continues and Prince Azam Jah succeeds him as the Nizam of Hyderabad) it shall be at the option of the trustees either to keep the said jewels and other articles mentioned in the First Schedule here-under written

unsold or to sell the same or any part thereof at such time or times and in such manner as they may in their discretion think fit, but subject as aforesaid, after death of the Settlor as well as of the said Prince Azam Jah the Trustees shall sell the said jewels and other articles specified in the First Schedule hereunder written within a period of three years after the date of the death of the survivor of the Settlor and the said Prince Azam Jah and any such sale as aforesaid shall be effected by the Trustees at such price or prices or for such consideration and on such terms as the trustees may in their absolute discretion think fit and either in India or in any foreign country without the trustees being liable or accountable to any person whomsoever for the propriety of or justification for any such sale or for the reasonableness or otherwise of the price or consideration or other terms in respect of the sale of any of the said articles.

4. The said jewellery is kept in the safe deposit vault of the Mercantile Bank Ltd. at Bombay.

5. R. N. Malhotra, Addl. Secretary to the Government of India, Ministry of Finance, Department of Economic Affairs, is the Chairman of the present Board of Trustees of H.E.H. the Nizam's Jewellery Trust, as a nominee of the Government of India. The other four trustees are : Prince Muffakham Jah, Zaheer Ahmad, Ataur Rehman and M. A. Abbasi. M. A. Ashruff is the Secretary of the Trust.

6. It appears that Prince Azam Jah died in October, 1970 and thereafter, on July 1, 1972 the trustees submitted a memorial to the then Prime Minister of India to acquire the jewellery as they were of great historical and cultural value and keep it intact as a national heritage, and not allow it to pass into the hands of people who were interested only in their money value. It appears that the trustees acted upon legal opinion that there was no objection to the sales being arranged through negotiation on the basis of valuation by two independent valuers.

7. The Government of India constituted an Experts Committee, whose function was purely of an advisory nature, with a view to guide the Government whether any part of the jewellery should be acquired as antiques under the Antiquity and Art Treasures Act, 1972. It was required to select and evaluate such items of antique jewellery as had to be acquired in the national interest. The Experts Committee inspected the jewellery at the vault of the Mercantile Bank. During these proceedings the Government appointed a Committee of Valuers which by its report dated January 3, 1976, valued all the 107 items of jewellery at Rs. 6,62,58,500 while Vithaldas, RW 6, the valuer appointed by the trustees, by his valuation report dated March 18, 1976 valued these 37 items of jewellery at Rs. 10,26,30,000. Eventually, the Government of India acquired 18 selected pieces of antique jewellery for their cultural and historical importance at a mutually negotiated price of Rs. 1.17 crores.

8. It has been represented that the beneficiaries are in very straitened circumstances due to the abolition of privy purse, heavy incidence of income tax and wealth tax, and are heavily indebted due to the trustees applying the income of the trust largely towards payment of taxes, making it increasingly difficult to maintain themselves. The beneficiaries were, therefore, pressing the Board of Trustees to effect an immediate sale of the 37 items of jewellery.

9. On January 9, 1978, it is alleged that there was a meeting of the Board of Trustees. Malhotra, who is the Chairman, conveyed to the trustees that the Government of India were not likely to acquire any of the 37 pieces of jewellery with regard to which negotiations were being made. The Board of Trustees accordingly passed a resolution to sell the jewellery immediately. The next meeting of the Board was held on January 25, 1978 but Malhotra could not attend it.

10. Pursuant to the resolution of the Board of January 9, 1978, the Secretary of the trust applied to the Director of Archaeological Survey of India, for the grant of clearance for sale of the said jewellery; and in consultation with Dinshaw Jahangir Gazdar, RW 3, a noted jeweller of Bombay, with the concurrence of M. A. Abbasi, decided upon the procedure to be adopted for the eventual sale of these 37 items of jewellery.

11. It appears that the conditions of sale, Ex. B-49, were got drafted by M. A. Abbasi, one of the trustees, and M. A. Ashruff, Secretary, through a firm of solicitors. Conditions 11 and 12, which formed an integral part of the contract of sale, are as follows :

11. Tenders will be opened by the Trustees on the date announced at the time of inspection and the party whose tender is accepted will be notified soon thereafter. The jewellery shall on acceptance of the tender become immediately the property of the buyer and shall be available for delivery to the buyer immediately thereafter on payment of the balance of 90% of the tendered amount as specified in para 12 below. If delivery is not taken at that time the jewellery will be held for and on behalf of the tenderer at his risk.

12. Tenderers whose offers are accepted will be required to deposit in full the tendered amount (after deducting the amount of 10% deposited as per clause 4 above) on the date or dates to be announced on the day of inspection before taking delivery. It is hereby agreed that if the tenderer fails to pay the balance amount within the stipulated period, the sale shall stand cancelled and the earnest money paid by him to the Trust shall be forfeited by the Trustees and the Trustees shall be at liberty to offer the same jewellery at the next sale and any deficiency arising at such sale together with all expenses arising from the subsequent sale shall be borne by the tenderer who shall also pay interest at the rate of 10% per annum to the Trust until the completion of the resale.

12. On January 31, 1978, Gazdar sent intimation (Exs. B-130-133) to some foreign and Indian nationals abroad regarding the intended sale of the jewels. It appears that M. A. Ashruff, Secretary, also addressed letters dated February 8/10, 1978 (Exs. B-72-87) and also sent telegrams dated February 25, 1978 (Exs. B-88-100) to 29 reputed dealers, seven of whom were jewelers from abroad and the remaining 22 in the country, as per list Ex. B-46. The letters of the Secretary, as far as material, read :

The unique collection of the fabulous oriental jewellery of the once richest man of the world, H.E.H. the Nizam of Hyderabad and Berar, the erstwhile premier prince of India, is coming up for sale in Bombay some time during the first or second week of March, 1978. The exact dates will be notified later.

The telegrams sent by him mentioned that : 'inspection of jewellery could be had from March 6 to 9'. It would thus appear that the intending buyers were not notified the date of sale.

13. The 37 items of jewellery put up for sale were divided into 16 groups. Inspection of these 37 items of jewellery was to be offered to the intending bidders from March 6 to March 9. During the course of inspection, however, the trustees decided to restrict the period of inspection till March 8 and they informed the intending bidders accordingly, and asked them to give their bids before a particular hour on March 9. On March 8, Malhotra was present throughout, at the Mercantile Bank

Ltd. and there was also a meeting of the Board of Trustees.

14. The resolution of the Board of Trustees of March 8, 1978 (Ex. B-106) was in these terms :

1. To confirm the minutes of the last meeting. - The minutes of the last meeting of the Trustees held on March 5, 1978 were confirmed.
2. Consideration and decision on tenders received. - Resolved that the tenders received be examined and decided by the Trustees present at the meeting to be held for the purpose on March 9, 1978.

And further resolved that in case such Trustees did not find a satisfactory offer or offers in respect of any of the items offered for sale, they may reject the tendered offers and negotiate the sale of any item with any party for a higher price.

3. Delivery of articles sold. - Resolved that the delivery of articles sold be arranged on dates convenient to the Trustees preferably not later than March 25, 1978.

15. The Chairman of the Board of Trustees, Malhotra was admittedly not present in Bombay on March 9, 1978 when the tenders were opened by the remaining four trustees. He had to be away from Bombay on the morning of March 9 and 10 due to official preoccupation at New Delhi. He was busy at Delhi heading a group which was negotiation with a high-powered Russian delegation to settle the rupee-rouble exchange ratio and connected matters. He could not leave Delhi from March 9 to 23, during which period the talks commenced earlier on January 28, 1978 had entered a crucial stage. These talks required his personal presence at Delhi, because they were matters of national importance.

16. On March 9, 1978, the remaining four trustees are alleged to have opened the tenders and accepted all the highest tenders except in respect of item No. 16 of Group XIV, which was negotiated on the next day for a higher price of Rs. 6.92 crores. On March 10, 1978, the Secretary addressed letters of acceptance, Ex. B-54-65, to the appellants and other successful bidders, requiring them to pay the balance of 90 per cent of the tender price on or before March 21 and 22, 1978 as the case may be, and to take delivery of the items of jewellery purchased by them. In respect of the appellants M/s. Shanti Vijay & Co. the date fixed was March 17, 1978.

17. On March 10, 1978, the first respondent, Princess Fatima Fouzia, one of the beneficiaries and a granddaughter of the Nizam, instituted the present proceedings, being O.P. No. 141 of 1978 in the Court of the Chief Judge, City Civil Court, Hyderabad, under Section 74 of the Trusts Act for removal of the present trustees for alleged dereliction of duty, negligence and mismanagement on their part, with particular reference to the manner in which the 37 items of jewellery belonging to the trust were brought to sale. She also filed an application for temporary injunction under Order 39, Rule 1 of the Civil Procedure Code for restraining the trustees from taking any further steps towards the finalization of the sale of jewellery. The application was taken up by the Court on March 14, 1978, and the learned Judge on the same day, granted an ad interim injunction restraining the trustees from taking any steps to finalise the sale of the jewellery. On March 16, 1978, M. A. Abbasi, one of the trustees filed a counter and prayed for vacating the injunction and ultimately the Court after hearing the parties vacated the injunction on March 27, 1978.

18. On March 28, 1978, the first respondent, Princess Fatima Fouzia filed an appeal before the Andhra Pradesh High Court and on April 13, 1978 the High Court directed that the status quo ante

be maintained. It appears that in the meanwhile, the eighth respondent, Peter Jansin Fernandez, made an offer to purchase the 37 items of jewellery in one lot for Rs. 20.25 crores and also applied to be impleaded as a party respondent in the appeal. On April 18, 1978, the appellant M/s. Shanti Vijay & Co., one of the successful bidders, also applied to be impleaded as a party respondent. On April 21, 1978, the High Court impleaded the appellant as a party to the appeal, and in order to test the bona fide of the eighth respondent, Peter Jansin Fernandez, directed that he should deposit the amount of Rs. 20.25 crores within one week from that date. On such deposit being made, the eighth respondent along with his foreign counterpart were to be given an opportunity to inspect the 37 items of jewellery which were previously offered for sale by the Board of Trustees. On May 8, 1978, the State Bank of India Overseas Branch, Bombay, furnished an unconditional guarantee to the tune of Rs. 20.25 crores on behalf of the eighth respondent and his counterpart. The eighth respondent having furnished the bank guarantee, the High Court directed that inspection of the jewellery be granted to him and his counterpart at the Mercantile Bank Ltd. on May 27, 1978. After an inspection of the 37 items of jewellery, the eighth respondent, Peter Jansin Fernandez, confirmed his offer and deposited the amount of Rs. 20.25 crores in Court, and was, therefore, permitted to intervene.

19. At this stage, the first respondent, Princess Fatima Fouzia, filed an application to withdraw the appeal. The parties were heard on the application, but before any orders could be passed, her sister, Princess Amina Mirzia, the second respondent, applied for permission to be impleaded as appellant 2, as there was a danger of the entire body of beneficiaries being deprived of an amount of Rs. 5.78 crores. On June 12, 1978, Princess Fatima Fouzia was permitted to withdraw and her sister Princess Amina Mirzia was brought on record as appellant 2.

20. The High Court by its order dated June 12, 1978 set aside the alleged sale of the 37 items of jewellery by the Board of Trustees in favour of the appellant and other successful tenderers for a sum of Rs. 14.43 crores on the ground that there was no concluded contract between the parties and instead accepted the offer of the eighth respondent, Peter Jansin Fernandez, for the sale of the aforesaid jewellery to him for Rs. 20.25 crores.

21. When the matter came up for hearing before this Court, a grievance was made that the High Court had no power to set aside the sale of the jewellery by the Board of Trustees for Rs. 14.43 crores without impleading the other successful tenderers and without affording an opportunity to the appellants M/s. Shanti Vijay & Co. to substantiate their claim that there was a concluded contract for the sale of the jewellery to them for Rs. 14.43 crores. Inasmuch as the appellants M/s. Shanti Vijay & Co. were alone a party respondent to the appeal and the remaining successful tenders were not so impleaded, the matter was remitted by this Court by its order dated September 14, 1978, to the High Court for a decision afresh on the question whether there was a concluded contract or not, after impleading all the necessary parties and affording them an opportunity to lead such oral or documentary evidence, as they desired.

22. In compliance of the order of this Court, the High Court impleaded the other tenderers, respondents 7 to 17 in the appeal and they were given an opportunity to substantiate their claim and they, as well as the opposite parties, filed their statements and counter-statements touching upon the question of the factum, validity and propriety of the alleged sales effected by the Board of Trustees of the 37 items of jewellery for Rs. 14.43 crores in favour of the appellants and other tenderers.

23. In the present case, the learned Judges of the High Court in their judgment dated February 28, 1979 have very carefully examined all the evidence and have reached a result unfavorable to the

appellants. It would serve little purpose to go through the evidence which has already been dealt with in detail by these learned Judges, seeing that the accuracy of their statement of facts and the soundness of their reasoning has not been successfully criticized. It is sufficient to say that we entirely agree with the judgment and reasoning of Kondaiah, J., who delivered the judgment of the High Court on remand. We shall only touch upon the salient features to show that no other conclusion is possible. There was, in fact, no evidence that any binding contract came into existence.

24. In these appeals, three questions arise for consideration. The first is, whether there was a concluded contract effected between the appellants and the other successful bidders of the one part, and the Board of Trustees of the other, for the sale of the 37 items of jewellery for Rs. 14.43 crores by the alleged acceptance of their bids by the four trustees on March 9, 1978; secondly, whether there was frustration of contract in that the ad interim injunction of March 14, 1978 made further performance of the alleged contracts impossible; and thirdly, whether the exercise of the discretionary power of sale exercised by the trustees conferred on them by Clause 13 of the trust deed, which is subject to the Court's overriding power under Section 49 of the Trusts Act to interdict the sale and issue necessary directions in that behalf, ought not to be set aside as an improvident sale because of the fact that an amount of Rs. 20.25 crores for the 37 items of jewellery had been offered by the eight respondent, which showed that the trustees had not acted with prudence and due care or attention, or whether it merely indicates an error of judgment on their part and the sale was on a mistaken impression of the actual value of the jewellery.

25. This in the arguments before us has resolved into two subsidiary questions, namely (1) whether in the absence of a provision for the delegation of powers in the trust deed, it was competent for four of the trustees to effect a sale, and if so, whether in the absence of authorisation by R. N. Malhotra, Chairman of the Board of Trustees, the remaining four trustees could exercise the power of sale of the jewellery under Clause 13 of the deed; and (2) whether, if there was a valid acceptance of the bids as alleged, by the remaining trustees on March 9, 1978, the Chairman of the Board of Trustees could not have accorded his approval on the Secretary's note, Ex. B-124, dated March 14, 1978, in view of the ad interim injunction granted by the Court of the Chief Judge, City Civil Court, Hyderabad, dated March 14, 1978, by which the trustees were restrained from taking any further steps to finalize the sale of the jewellery.

26. The law governing the executing of trusts is well settled. In the case of a private trust, where there are more trustees than one, all must join in the execution of the trust. The concurrence of all is in general necessary in a transaction affecting the trust property, and a majority cannot bind the trust estate. In order to bind trust estate, the act must be the act of all. They constitute one body in the eye of law, and all must act together. This is, of course, subject to any express direction given by the settlor. The Judicial Committee in *Lala Man Mohan Das v. Janki Prasad* (LR (1944) 72 IA 39, 52, 53) quoted a passage from Lewin's Law of Trusts, 15th ed., p. 190 to the effect

"In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee but the Court knows no such distinction : all who accept the office are in the eyes of the law acting trustees. If any one refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and

approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."

which, in their opinion, contains a correct statement of law applicable England and that the same doctrine applied to India also. The decision in Lala Man Mohan Das case (LR (1944) 72 IA 39, 52, 53) has been followed with approval by this Court in L. Janakirama Iyer, v. Nilakanta Iyer (1962 Supp 1 SCR 206 : AIR 1962 SC 633).

27. It follows as a necessary corollary, that where there are several trustees they must act unanimously in making a sale or a contract of sale, unless it is provided otherwise by the terms of the deed. In exercising the power of sale, as in the exercise of other powers a trustee cannot, therefore, properly delegate the performance of the acts which he ought personally to perform. Although a trustee may listen to the opinions and wishes of other, he must exercise his own judgment. Thus a trustee for sale of property, cannot leave the whole conduct of the sale to his co-trustees. The reason for this is that the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience. (Underhill's Law of Trusts and Trustees, 12th Ed., pp. 434, 442-443 : Scot on Trusts, Vol. 2 p. 1033).

28. In L. Janakirama Iyer case (1962 Supp 1 SCR 206 : AIR 1962 SC 633). This Court observed that all acts which the trustees intend to take for executing the trust, must be taken by all of them acting together, as provided by Section 48 of the Trusts Act, 1882, Section 48 of the Trusts Act provides as follows :

When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

29. It is axiomatic that where there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides. Therefore, as laid down by this Court in L. Janakirama Iyer case (1962 Supp 1 SCR 206 : AIR 1962 SC 633), if the validity of an alienation effected by the trustees falls to be considered only in the light of Section 48, the fact that out of the three trustees only two have executed the sale deed would by itself make the transaction invalid and would not convey a valid title to the transferee.

30. In the present case, as the High Court rightly observes, there is no such clause in the trust deed authorising the execution of the trusts to be carried out not by all but by one or more or majority of the trustees. In the absence of such a specific provision, the general law envisaged in Section 48 of the Act would govern the rights of the parties. We are, accordingly, of the opinion that the alleged contracts of sale entered into by the four trustees were not binding and of no legal effect, and could not be enforced. It must necessarily follow that the alleged contracts for sale entered into by them could not ripen into concluded contracts so as to bind the entire body of beneficiaries.

31. It was not disputed that a trustee cannot delegate his functions except as provided in Section 47, which reads :

A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

32. Section 48 is a corollary of the Section 47 for, if the trustees cannot delegate their duties, it follows that they must all personally perform those duties, and not appoint one of themselves to manage the business of the trust; for the settlor has trusted all his trustees, and it behoves each and every one of them to exercise his individual judgment and direction on every matter, and not blindly to leave any questions to his co-trustees or co-trustee.

33. In the course of the arguments, the resolution of the Board of Trustees dated March 8, 1978 has been discussed with great minuteness, but we have no doubt that the view taken of it by the High Court was right. The language used is perhaps not of a trained draftsman, but it clearly does not, in terms, confer 'authorisation' upon the remaining four trustees to accept the bids, or any one of them.

34. Learned Counsel for the appellants strenuously urged that the resolution of March 8, 1978 is in two parts. It is pointed out that the second part unequivocally confers upon the trustees the power of rejection of bids. It is, therefore, urged that the first part must be construed with reference to the second. It is said that we must correlate the second part to the first, and when so read, the words "be examined and decided" must, in the context in which they appear, mean the conferment of authority to reach a 'decision', i.e., as to acceptance or rejection of bids. It was also submitted that the words "by the trustees present" clearly meant the remaining four trustees. It was argued that when the Board of Trustees met on March 8, 1978, the trustees knew full well that R. N. Malhotra, the Chairman could not be present at the meeting of the Board of Trustees to be held on March 9, 1978 as he had to leave Bombay on the morning of the 9th, as his presence in Delhi was required for pressing official business. Upon these premises, it is contended that the resolution of March 8, 1978 cannot but be construed as giving 'authorisation' to the remaining four trustees to accept the bids on March 9, 1978.

35. While we are not oblivious of Malhotra's statement that it was decided the meeting on March 8, 1978 that 'the trustees were free to accept the highest tenders, if they did not see any reason to reject the same' and also that 'if the trustees felt that a higher amount could be obtained, they could negotiate with the tenderer and obtain a higher price'. May be, that is what the trustees meant, i.e., the remaining four trustees, were fully authorised to deal with the matter in all its aspects. But that intention of the trustees is not at all manifested in the resolution of March 8, 1978, the terms of which are clear and explicit. In the case of a trust, we are clearly of the view that the 'authorisation' must be express, specific and in the clearest of terms. The words "be examined and decided" in the first part of the resolution, may mean anything, and are not necessarily susceptible of the only construction as contended for, namely that of 'acceptance'. The expression "to negotiate for sale" in relation to the authority of an estate agent, has a definite legal connotation. He gets an authority to find a purchase, but he cannot bind the principal by entering into a contract of sale : *Chadburn v. Moore* ((1892) 61 LJ Ch 67 : 67 LT 257) and *Rosenbaum v. Belson* (LR (1900) 2 Ch 267 : 82 LT 658). These two decisions have been approved of by this Court in *Abdul Ahmed v. Animendra Kissen Mitter* (1950 SCR 30 : AIR 1950 SC 15 : 1950 SCJ 153) laying down that there is a substantial difference between 'to sell' and 'to find a purchaser'. There is no reason why the same principle should not apply with regard to the authority, if any, of the remaining trustees, in terms of the resolution of March 8, 1978. If the second part of the resolution has to be construed with reference to the first, as is contended for, then their authority was limited to find purchasers for the jewellery, and then place the matter before a meeting of the Board of Trustees, for acceptance of their bids.

36. When the trustees took care in drafting the second part which relates to rejection of bids, there was no reason for their leaving any ambiguity in the first part. It is not permissible to spell out

something which is not explicit, by merely saying that it is implicit, when the language is clear and it does not bear out any such construction. We are not prepared to take a view which would be prejudicial to the entire body of beneficiaries. There is no reason why the words "be examined and decided" in the first part, should not have their plain meaning that the tenders were to be opened and examined by the remaining four trustees to see if they were valid tenders. The first part did not, in our opinion, give any 'authorisation' to the remaining trustees to accept any of the tenders. If they did not find a satisfactory offer or offers for any of the items offered for sale they could only under the second part reject the tenders submitted. It is needless to stress that delegation must be express. The trend of cross-examination of Malhotra also shows that his concurrence was necessary.

37. What transpired on March 9, 1978, is completely shrouded in mystery. The Secretary's note, Ex. B-124 dated March 14, 1978 reveals that the tenders were received on March 9, 1978 in sealed covers accompanied by ten per cent of the value of jewellery tendered for, in room No. 305, Ambassador Hotel, Bombay, between 3 and 4 p.m. It asserts 27 tenders were received and they were opened at 4.30 p.m. on the same day, in the presence of the trustees and except for item for No. 16, of group XIV, they accepted the same. As regards items No. 16, of group XIV, negotiations were entered into with the appellants, M/s. Shanti Vijay & Co., the highest tenderer and the price of Rs. 6,81,00,000 offered by them for item No. 16 was enhanced to Rs. 6,92,00,000 which the trustees accepted. It then mentions that acceptance letters were issued to all the tenders whose tenders had been accepted. The date for delivery of groups VII and XIV had been fixed for March 17, 1978 and for the other items on March 21 and 22, 1978. The Secretary's note, Ex. B-124 reached R. N. Malhotra, the Chairman of the Board of Trustees at New Delhi on March 23, 1978 and bears his initials of that date.

38. It is accepted before us that Malhotra was not aware till March 23, 1978 that the tenders or any of them had been accepted by the four trustees on March 9, 1978. In his examination-in-chief, he states that one or two days after he had left for Delhi, the Secretary rang him up at Delhi. He says :

I remember that the Secretary of Trust intimated to me on phone that the trustees had opened the tenders and the highest amount offered for all the items was over 14 crores. I remember I received that phone call one or two days after I reached Delhi and at a time when I was in my office. I enquired of the Secretary whether the amount was the total of the highest bid for each item and he confirmed it. I made a particular enquiry from the Secretary as to how much amount the item consisting of 22 emeralds had fetched. The Secretary told me that item fetched over six crores. As I was broadly aware of the values of the jewels, per the valuations earlier made, I said "Teek Hai".

During his cross-examination, he states :

When the Secretary telephoned to me within one or two days after I left Bombay he did not inform me as such that the trustees have accepted the tenders.

He then goes on to say that he read in the newspapers that a suit had been instituted against the trustees at Hyderabad and that an injunction was granted, and accordingly rang up the Secretary of the Trust, and states :

I remember it was about March 15, 1978 and I rang up the Secretary on that very day to enquire what it was about. Till then the Secretary did not inform me about the

institution of the proceedings in the City Civil Court. It will be more correct to say that I had not received any intimation from the Secretary before I contacted him on telephone.

It, therefore, appears that the Secretary drew up the note, Ex. B-124, in undue haste despite the Court's order granting the injunction.

39. It is not disputed that Malhotra had no knowledge of the acceptance of the tenders till March 23, 1978 when the note of the Secretary, Ex. B-124 reached him. It is also not disputed before us that no minutes of the alleged meeting of the remaining four trustees held on March 9, 1978 exist. We have gone through the Minutes Book of the Board of Trustees. It reveals that minutes were regularly kept and indeed each and every meeting began with the confirmation of the minutes of the earlier meeting. The minutes of the meeting held on March 5, 1978 and of March 8, 1978 are there. Thereafter appears the minutes of a meeting held on May 15, 1978, Ex. B-125. But there are no minutes of the alleged meeting held on March 9, 1978. It is thus clear that no meeting of the Board of Trustees was held at all on March 9, 1978.

40. The story of the alleged acceptance of bids by the remaining four trustees on March 9, 1978 appears to be a complete myth. The Secretary's note, Ex. B-124 was intended to mislead R. N. Malhotra, the Chairman of the Board of Trustees, in a frantic attempt to obtain his concurrence to something which never transpired.

41. One fact in particular may be alluded to. The absence of any minutes of the alleged meeting held on March 9, 1978 must, as it should, clearly excite our suspicion about the genuineness of the sale. Our attention was drawn to the tabular statement prepared by the Secretary containing acceptance of bids by the four trustees, Ex. B-123. The authenticity of this document is not beyond question. It is a tabular chart running into 34 large sheets with minute details. On each of the sheets there is a letter 'A' encircled against the highest tender, and at the foot appears the alleged initials of three trustees bearing the date March 9, 1978. None of the remaining trustees except M. A. Abbasi have entered the witness-box. We do not know whether the initials at the foot of the document, Ex. B-123, are of the trustees or not, as none has proved them. Nothing is known as to when the initials were put and by whom. There is another alarming feature. According to Abbasi, he encircled the highest tender with the letter 'A' and then initialled it on the statement Ex. B-123. During his cross-examination, he gave a lie to this and asserted that the letter 'A' encircled against the highest tender was not inscribed by him but by the Secretary and he only initialled it. Though the other three trustees are alleged to have put their initials at the foot of the statement on March 9, 1978, there is nothing on record to show that all this was done that day, at one sitting, at the same time.

42. This document certainly cannot take the place of the minutes of the alleged meeting. The Secretary's note, Ex. B-124 shows that the sealed tenders were received between 3 and 4 p.m. and they were opened at 4.30 p.m., i.e. within half an hour. It was humanly impossible to prepare this document within such a short time. Furthermore, if the four trustees with the assistance of the Secretary, could prepare these large tabular charts there was no reason why they could not record the minutes of the meeting, if any, held on that day showing that there was acceptance of the bids by them. The Minutes Book is the primary evidence, and the chart cannot form the basis for a finding that there was any acceptance of the tenders on March 9, 1978.

43. It is amply clear that there was no meeting of the Board of Trustees on March 9, 1978. The allegation that there was such a meeting, is completely belied by the affidavit of M. A. Abbasi, the

material portion of which may be extracted :

8. Out of the 107 items of jewellery only 37 items were put up for sale in the first instance and tenders invited. About sixty foreign and Indian buyers of repute inspected the jewellery between March 6 and 8, 1978 at Bombay. On March 9, 1978 the trustees received the tenders and the same were opened on March 10, 1978. The highest tenders received were accepted and letters of acceptance were issued on the same day to the persons whose tenders had been accepted. In no case has any lower tender been accepted.

This tends to suggest that the alleged meeting was held not on March 9, 1978 but on March 10, 1978. He clearly states that the tenders were opened on March 10, 1978, they were accepted on that day and letters of acceptance were sent to the persons on the same day whose tenders had been accepted. This is in contradiction with the Secretary's not Ex. B-124. It is quite clear to our mind that either M. A. Abbasi is not speaking the whole truth or that the story of the alleged meeting of the Board of Trustees of March 9, 1978 was feigned to beguile R. N. Malhotra, the Chairman of the Board of Trustees and also the beneficiaries. We cannot rely on the bare assertion of M. A. Abbasi, RW 1 that the bids were accepted by the trustees on March 9, 1978.

44. It must, accordingly, be held, for all these reasons that the High Court was justified in setting aside the alleged sale of 37 items of jewellery belonging to H.E.H. the Nizam's Jewellery Trust effected by the Board of Trustees in favour of the appellants and other tenderers for Rs. 14.43 crores on the ground that there was no concluded contract between the parties.

45. The second question is perhaps a more difficult one for the appellants to surmount, though the difficulty was sought to be explained away by saying that they had fulfilled their part of the contract and they should not be deprived of the fruits of their bargain merely because of the Court's injunction. It is unfortunate that this aspect of the case was not submitted to the High Court, and we, therefore, have not the assistance of that Court's opinion. We, however, think, that the meaning of Section 56 of the Contract Act is clear. The Section, insofar as material, runs as follows :

56. An agreement to do an act impossible in itself is void.

An contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

46. In the present case, Clauses 11 and 12 of the conditions of sale embodied the terms of the contract. By Clause 11, time is made the essence of contract. Clause 11 cannot be read in isolation but both Clauses 11 and 12 must be read together because they form an integral part of the contract. These clauses in addition to making time the essence of contract, clearly provide that in the event there was a failure to pay 90 per cent of the tender amount, i.e., the balance of the price "the contract would be deemed to have been cancelled". It is, however, argued that upon acceptance of the tender, the property in the goods passed to the buyer. We are afraid, we cannot appreciate this line of argument. It totally ignores the effect of the defeasance clause contained in Clause 12. On a reading of both Clauses 11 and 12 together, there can be no doubt that the passing of the property was dependent upon the tender of the balance of the price and the taking delivery of the goods upon payment.

47. Even assuming that there was acceptance of tenders by the four trustees on March 9, 1978, as alleged, in terms of the resolution of March 8, 1978, the contract was frustrated by the grant of an ad interim injunction by the Court of the Chief Judge, City Civil Court, Hyderabad on March 14, 1978. The grant of such injunction prevented the performance of the alleged contracts. The appellants could not have tendered 90 per cent of the tender amount, i.e., the balance of the price, by the stipulated date or taken delivery of the jewellery so long as the injunction lasted.

48. It is, however, pointed out that the appellants M/s. Shanti Vijay & Co. by their lawyer's notice dated March 15, 1978, Ex. B-66, confirmed that they had sent a telegram making a demand for delivery of the two items of the jewellery purchased by them against payment of Rs. 8.52 crores. It is true that the letter was accompanied with a photostat copy of a certificate of foreign inward remittance of the amount. But the fact remains that in terms of the said notice, the appellants never made a tender of the balance amount to the Board of Trustees at the Mercantile Bank, at Bombay on March 17, 1978. They knew full well that the trustees would not accept the amount nor could deliver all the jewellery in question, in view of the injunction granted by the Court. The injunction, in terms, restrained the trustees "from taking any steps to finalise the sale of the jewellery". The injunction was not vacated till March 27, 1978. Even after the injunction was vacated, the appellants or other successful tenderers never made an attempt to pay the balance amount till April 13, 1978, on which date the High Court passed an order for maintaining the status quo ante. It is nobody's case, that a new contract was ever entered into. We are clearly of the opinion that there was a frustration of the alleged contracts, in the facts and circumstances of the present case.

49. It was faintly argued by learned Counsel appearing for some of the appellants that by reason of the concluding words 'without the trustees being liable or accountable to any person whomsoever' in Clause 13 of the trust deed, the discretionary power of sale conferred upon the trustees was not liable to be interfered with under Section 49 of the Trusts Act, which is in these terms :

Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

After a stage in the arguments before us, learned Counsel appearing for the Board of Trustees was at pains to impress upon us, that the trustees would be "subject to the directions of the Court" and would act in the best interests of the beneficiaries. This if we may say so, is a complete change of front. On the contrary, the submission in the High Court was that, not only the Court will refuse to restrain the exercise of discretionary power, but it will give no relief to the beneficiaries where honest exercise of such a power has by an error of judgment led to loss for, as Lord Normand said in *Dundee General Hospitals Board of Management v. Walker* ((1952) 1 All ER 896, 901 (HL)) :

It is one thing to say that the trustees must honestly discharge their trust and keep within the bounds of the powers and duties entrusted to them, and quite another to say they must not fall into errors which other persons, including a court of law, might consider unreasonable.

50. The learned Judges of the High Court, however, have rightly, in our opinion, repelled the contention. It was certainly open to the Board of Trustees to effect a sale of the 37 items of jewellery under Clause 13 of the deed. But the power, although discretionary, must be exercised reasonably and in good faith.

51. The power conferred on the Board of Trustees is no doubt discretionary, but the principle embodied in Section 49, viz., that when such discretionary power is not exercised reasonably and in good faith, such power may be controlled by a court. There was no warrant for the suggestion made by the Board of Trustees before the High Court that the power is absolute. The law on the subject is succinctly stated in Underhill's Law of Trusts and Trustees, 12th Ed., p. 472 :

[I]t would seem that, even where trustees claim to exercise their discretion as to investments, the court will, in a proper case, direct an inquiry whether it is for the interest of the beneficiaries that a particular investment should be continued or called in. So, too, where absolute discretion has been given to trustees to do a particular act (e.g., to sell the trust property), the court cannot compel them to exercise the power; but if they do exercise it, the court will see that they do not exercise it improperly or unreasonably.

52. The proposition is no doubt one which speaks for itself. When it appears from the facts that the act of the trustees in offering for sale these 37 items of jewellery at an inadequate price of Rs. 14.43 crores was not the act of all, that it was undoubtedly an improvident sale as the jewellery has been found to be worth Rs. 20.25 crores, if not more; and more so, when the alleged sale was effected by them in favour of the appellants and other bidders without trying to ascertain their actual price, it certainly follows that they acted in flagrant disregard of the interests of the entire body of beneficiaries.

53. It is somewhat disconcerting that throughout this litigation, the trustees should have, as they appear to have done, aligned themselves with the appellants and other successful tenderers. They not only asserted that there was a 'concluded contract' for the sale of 37 items of jewellery by the alleged acceptance of bids by them on March 9, 1978, but also that the Court had no power to interdict the sale under Section 49. If we may say so, the attitude adopted by the Board of Trustees was clearly against the interests of the beneficiaries.

54. In the present case, evidence is tendered by the trustees, not for the purpose of showing that they tried to protect the interest of the beneficiaries, but for proving facts from which it could be inferred that, accepting that the price of Rs. 1443 crores offered by the appellants and other tenderers was wholly inadequate, the discretionary power of sale was not liable to be interfered with.

55. It remains then to determine whether on the whole of the evidence as tendered, the appellants have established facts from which a sale in their favour could be inferred or, that the act of the trustees was not a bona fide exercise of their power so as to attract the Court's overriding power to annul the sale under Section 49 of the Trusts Act. The testimony of Dinshaw Jahangir Gazdar RW 3, Kashmir Chand RW 4 and Vithaldas RW 6 goes to show that they have been in jewellery business since long, and selling jewellery belonging to several Indian princes. Dinshaw Jahangir RW 3, was a consultant to the late Nizam for sale of his jewellery, and had also arranged the sale of jewellery belonging to late Salarjung of Hyderabad. Kashmir Chand, RW 4, partner of the appellant firm M/s. Shanti Vijay & Co., had participated in the sale of jewellery belonging to the Maharajahs of Gwalior, Darbhanga, Jodhpur and Bikaner. Vithaldas, RW 6, is one of approved valuers appointed by the Government of India, and had valued the jewellery belonging to the Paiga of Khrusheed Jah and also some jewels belonging to the late Salarjung. At the instance of the Government of India, he had valued the jewellery belonging to the Nizam as also the Nawab of Rampur. According to these jewellers, the only method of sale adopted in all these sales was to inform reputed jewellers both in the country and abroad, and none of the sales were by advertisement in the press.

56. As regards value of the jewellery, Dinshaw Jahangir Gazdar, RW 3, and M. A. Abbasi, RW 1, want us to believe that Rs. 14.43 crores was the 'best possible price' that the 37 items of jewellery could ever fetch, despite the fact that the eighth respondent, Peter Jansin Fernandez, made an offer of Rs. 20.25 crores for the same, during the course of the proceedings. For this they largely relied upon the valuation report of Vithaldas, RW 6, showing that these 37 items of jewellery were worth Rs. 10,26,30,000. We shall deal with these witnesses later.

57. It is somewhat strange that the Board of Trustees should have acted in a cavalier fashion in disposing of the jewellery, without trying to ascertain their actual value. The alleged sale effected by them was clearly detrimental to the interests of the beneficiaries. M. A. Abbasi, RW 1, admits during his cross-examination, that 'the trustees had no definite idea of the value of the 37 items of jewellery' when they were offered for sale. He further admits that he did not consult anyone except Dinshaw Jahangir Gazdar, RW 3, about the actual value. He also admits that he did not get in touch with any curators of Museums of foreign countries to find out whether they were interested in purchasing any of the items, nor were any letters sent to any jewellery of Holland, Belgium, United Kingdom, Switzerland and Geneva. Even in this country, the trustees did not appear to have written to any jeweller from Calcutta, Madras, Hyderabad or Bangalore. M. A. Abbasi states that the trustees were advised particularly by Dinshaw Jahangir Gazdar that it was not desirable to give publicity in the daily newspapers as undesirable elements might step in for inspecting the jewels and he could not assure them the bona fides of every such person, who wanted to inspect the jewellery. He, therefore, approached some of the jewellers through letters.

58. Then we come to Dinshaw Jahangir Gazdar, RW 3. It is true that this witness has wide experience in jewellery business and tries to assert that the amount of Rs. 14.43 crores offered by the successful tenderers was a 'very good price', but then had to admit that he does not possess any qualification in gemmology. According to this witness, 'there is no principle as such in valuing an item of jewellery. One looks at it and values the same'. He, however, had to admit that he never participated in sales of rare jewels held abroad, nor is he aware of the practice where jewels are sold abroad in auction rooms after proper advertisement. This witness goes on to say : 'It is only a jeweller who can value jewels by having a look at them. He will keep in consideration the size, cutting, clarity and lustre, and colour'.

59. Vithaldas, RW 6, also asserts that the price of Rs. 14.43 crores fetched was a 'very good price' in March 1978 for these jewels. When he was confronted with the offer made by the eighth respondent during his cross-examination, he stated that according to him an offer of Rs. 20.25 crores for these 37 items of jewellery was a 'fancy price'. He explains by saying that a fancy price would be higher than the market price. All this evidence was led by the appellants and the other tenderers as well as by the Board of Trustees, in trying to establish that the trustees acted honestly and there was no lack of good faith on their part.

60. It appears that, as so often happens when one deals with another's property, it matters little to him what price the property fetches. But in the case of a trust, there arises the duty of the trustees to act with prudence and as a body of reasonable men. The High Court has come to a definite conclusion that the improvident sale of the jewellery at such a low price without due public notice was not a bona fide exercise of their power conducive of beneficial management. There is no reason for us to come to a different conclusion.

61. On the totality of the evidence, in our opinion, the High Court rightly came to the conclusion that though there were no mala fides, corrupt motives, fraud or misrepresentation on the part of the

trustees and they acted honestly, the trustees in the facts and circumstances of the present case, did not act reasonably and in good faith, i.e., with due care and attention. Upon its finding that there was no concluded contract between the parties within the meaning of Section 2(h) of the Contract Act, it accepted the offer of the eighth respondent, Peter Jansin Fernandez, for Rs. 20.25 crores for the purchase of 37 items of jewellery.

62. It is necessary to mention that upon receipt of the findings recorded by the High Court, these appeals were placed before the Court for orders on April 18, 1979, when it issued a direction to the effect :

The parties will submit the methodology by which a maximum price may be fetched for the benefit of the beneficiaries. Any offer which is below Rs. 20 crores will automatically be ignored.

Since the Court was rising for the summer vacation from May 5, 1979, learned Counsel for the eighth respondent, Peter Jansin Fernandez, made a request for withdrawal of the deposit of Rs. 20.25 crores made by him before the High Court for the purchase of the 37 items of jewellery, and instead gave an undertaking to furnish an irrevocable bank guarantee by the State Bank of India Overseas Branch, Bombay. This was duly complied with by the eighth respondent, Peter Jansin Fernandez, and the irrevocable bank guarantee for Rs. 20.25 crores furnished by him is due to expire on September 20, 1979.

63. The appeals came up for hearing before the Court on August 18, 1979. We regret to say that though the appellants and other successful tenderers had nearly four months' time, no better offer than the one made by the eighth respondent, Peter Jansin Fernandez, for Rs. 20.25 crores was forthcoming. We, therefore, proceeded to hear the appeals on merits. The parties were heard on all aspects.

64. The question still remains as to the course open. Accepting the offer of the eighth respondent, Peter Jansin Fernandez, without inviting fresh tenders would be subject to the same infirmity. From the evidence on record, it appears nobody really knows the actual value of the 37 items of the jewellery. It may be well worth more than Rs. 20.25 crores.

65. We must, therefore, uphold the judgment of the High Court setting aside the alleged sale of 37 items of jewellery belonging to H.E.H. the Nizam's Jewellery Trust, effected by the Board of Trustees in favour of the appellants and other successful tenderers for Rs. 14.43 crores, but set aside its order accepting the bid of the eighth respondent, Peter Jansin Fernandez, for purchase of the jewellery for Rs. 20.25 crores, and direct a re-auction on the terms specified separately.

66. The appeals are disposed of accordingly. The appellants in all these appeals, excepting Civil Appeal No. 1269 of 1978, shall bear their own costs and pay one set of costs to the respondents as they have substantially failed. The two special leave applications are also dismissed.

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