

EMBASSY HOTELS PVT. LTD.

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v.

M/S. GAJARAJ & CO. & ORS.

(Civil Appeal No. 5884 of 2004)

NOVEMBER 12, 2014

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[M. Y. EQBAL AND SHIVA KIRTI SINGH, JJ.]

Specific Performance – Suit for specific performance of an agreement for sale – The suit land earlier mortgaged by the owner of the land with the financing Corporation against a loan – On non-payment of the loan by the owner, the land sold in court auction in the suit filed by the Corporation – Auction sale confirmed upto Supreme Court – Suit for specific performance dismissed by trial court, but allowed by High Court – Held: In view of proviso to s. 60 of Transfer of Property Act, the right to redeem the mortgage got extinguished by the auction sale – The auction sale having attained finality by court orders, cannot be ignored by another court in a collateral proceeding – Thus the High Court was not right in decreeing the suit for specific performance – Transfer of Property Act, 1882 – s. 60 proviso – Code of Civil Procedure, 1908 – Or. 21 r. 89.

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Allowing the appeal, the Court

HELD: 1. It cannot be said that the first defendant being a mortgagor will continue to have a right of redemption although the sale of mortgaged property to a third party through a court auction became final. Section 60 of the Transfer of Property Act protects the right of redemption available to a mortgagor by providing that the mortgagor can exercise such a right by paying the mortgaged money at any time after the principal money has become due. But the proviso clarifies that the right conferred by that Section is available only if it has not been extinguished by act of the parties or by

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A decree of the court. The act of the parties would cover act of the mortgagor and the mortgagee, if they are unable to settle the dispute arising out of money claim covered by the mortgage and by their action, allow the mortgaged property to be sold through auction in favour of a third party. Hence, it is not possible to accept the case of the plaintiff-respondent that in spite of sale of the suit property becoming final through court auction, for the purpose of grant of specific relief to the plaintiff in the present suit, the first defendant would be deemed to still retain the right to redeem the mortgage and transfer the suit property to the plaintiff regardless of the right, title and possession already legally vested in the auction purchaser-the appellant. [Para 18 and 19] [613-C; 613-C-G]

D 2. No doubt, if a fraud is alleged and proved, it can be sufficient to get rid of most solemn of proceedings including court proceedings. But in case of order of a court of competent jurisdiction, this must be done only by throwing a direct challenge to the proceedings by instituting a suit for that purpose or through any appropriate legal proceeding which may permit such direct challenge. Judgments of courts cannot be ignored by another court in a collateral proceeding and that also on mere suspicion of fraud or collusion, as has been done in this case. [Para 20][613-G-H; 614-A-B]

Union of India v. Major S.P. Sharma 2014 (6) SCC 351 – relied on.

G 3. The orders passed in the execution proceedings relating to the mortgage suit were by a competent court which rejected the plaintiff's claims. Such orders cannot be ignored in a collateral proceeding. It is to be kept in mind that the order confirming the sale and rejecting the plaintiff's application under Order 21 Rule 89 for one reason or the other was confirmed by this Court also.

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The High Court while allowing the suit for specific performance ignored the aforesaid cardinal principle of law. [Para 22][614-D-F] A

4. No doubt Section 20 of the Specific Relief Act vests the Court with a judicial discretion in granting or not granting specific performance. But in the present case the plaintiff cannot gain anything from this Section because the suit property or substantial part of the same had already been auctioned and first defendant had no longer any title or ownership over the same and hence it was not possible to grant a decree for a specific performance. [Para 27][616-C-F] B C

Dadi Jagannadham v. Jammulu Ramulu and Ors. 2001 (7) SCC 71 : 2001 (2) Suppl. SCR 60; *Chandra Mani Saha v. Anrjan Bibi* AIR 1934 PC 134; *V.S. Subramania Asari v. Ramaswami Pillai* AIR 1937 Mad 560 ; *Gour Chand Mullick v. Pradyumna Kumar Mullick* AIR 1945 Cal. 6; *Rama Krishna Rao v. Chellayamma* AIR 1953 SC 425: 1950 SCR 806 ; *Ramgonda Patil v. Shripal Balwant Rainade* 1988 (3) SCC 298 : 1988 (3) SCR 689 ; *Maganlal v. Jaiswal Industries* 1989 (4) SCC 344 : 1989 (3) SCR 696 ; *Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy* 1970 (1) SCC 613 : 1970 (3) SCR 830 ; *Pandurang Dhoni Chougule v. Maruti Hari Jadhav* 1966 (1) SCR 102 – referred to. D E F

CASE LAW REFERENCE

2001 (2) Suppl. SCR 60	referred to.	Para 9	
2014(6) SCC 351	relied on.	Para 21	G
AIR 1934 PC 134	referred to.	Para 23	
AIR 1937 Mad 560	referred to.	Para 23	
AIR 1945 Cal. 6	referred to.	Para 23	

A	1950 SCR 806	referred to.	Para 23
	1988 (3) SCR 689	referred to.	Para 23
	1989 (3) SCR 696	referred to.	Para 23
	1970 (3) SCR 830	referred to.	Para 24
B	1966 (1) SCR 102	referred to.	Para 25

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5884 of 2004.

C From the Judgment and Order dated 03-07-2002 of the High Court of Judicature at Madras in A.S. No. 627 of 1991.

Mohan Prarsaran, Sr. Adv., Anand Venkatesh, Sridhar Potaraju, Arjun Singh, Mukunda Rao Angara, Ms. V.E. Gayathri, Advs. for the Appellant.

D K. Ramamoorthy, Sr. Adv., N. Shoba, Sriram J. Thalpathy, V. Adhimoolam, Shilp Vinod, S. Nandakumar, Parivesh Singh (For P.V. Yogeswaran) Advs. for the Respondents.

The Judgment of the Court was delivered by

E **SHIVA KIRTI SINGH, J.**

F 1. The original plaintiff, C S Benjamin (Respondent No. 11) is now dead and is represented by his three daughters (for the sake of convenience they are being described as plaintiff). Respondent No. 1-M/s. Gajaraj & Co. was the original landlord of the suit property and as per its party position in the plaint it is being described as first defendant. The appellant (respondent no. 11 in High Court) is auction purchaser of the property in a court auction in an earlier suit filed by second defendant-respondent No.2- Srinivasa Perumal Financing Corporation against first defendant for recovery of money from first defendant who had mortgaged substantial part of suit land, about 38 cents to the second respondent for the said money due.

H 2. The instant suit was filed by the plaintiff as OS No.1538 of 1980 in the court of Third Additional Subordinate Judge,

Coimbatore for specific performance of an agreement for sale dated 27.5.1978, on the allegation that the land owner, the first defendant was acting against law in refuting the agreement and not executing the sale deed in favour of the plaintiff. The suit was dismissed by the judgment dated 30.4.1991. But plaintiff's money was ordered to be refunded with interest @ 12% per annum. Against that, the plaintiff preferred first appeal bearing AS No.627 of 1991 which has been allowed by the impugned judgment dated 3.7.2002 rendered by the Division Bench of the Madras High Court.

3. Mr. Mohan Parasaran, learned senior counsel for the appellant, who was 11th respondent before the High Court highlighted the chronological list of events to point out that the first defendant mortgaged the suit property on 25.1.1972 to an extent of about 38 cents to the second defendant for availing money loan. The first defendant also owed money to 6th and 7th defendants. Defendant No.6 filed original suit No.421 of 1976 in the Court of Subordinate Judge, Coimbatore in which the present suit property was attached on 28.7.1976. Another suit bearing OS No.352 of 1977 was also filed by the 7th defendant against the first defendant.

4. Thereafter the second defendant on 23.1.1978 filed original suit No.85 of 1978 in the same court at Coimbatore for realization of his money dues, if required, by selling of the property mortgaged in his favour through mortgage deed dated 25.1.1972. It was during the pendency of the above suits that the plaintiff, on 27.5.1978 entered into an agreement for sale of the suit property measuring about 41.24 cents including the mortgaged property with the owner, the first defendant. The plaintiff initially paid an advance of Rs.1,00,000/- against the agreed consideration of Rs.6,00,000/-. Further amount of Rs.67,700/- was also paid by the plaintiff to first defendant on different occasions within a period of about one year. The time limit of the agreement was extended from 30.6.1979 to 31.12.1979. It has been highlighted that as per clause 7 of the agreement if the vendor fails to convey full title, the money paid

- A by the purchaser shall be refunded with interest at the rate of 15% per annum and other damages if suffered by the purchaser. In the suit preferred by second defendant, OS No.85 of 1978 a preliminary decree was passed on 9.2.1980. After March 1980, the plaintiff and the first defendant could not agree
- B on further extension of time for complying with the agreement of sale. On 26.6.1980 an agreement of sale was entered between the appellant and first defendant and the property was leased out to the appellant. The appellant filed the present suit OS No. 1538 of 1980 on 20th November, 1980. Final
- C decree was passed in the mortgage suit OS No.85 of 1978 on 10.2.1981. In execution proceedings the mortgaged property which is, in substance, also the suit property in the present proceedings was purchased in Court auction by Mr. P.K. Unni, said to be Managing Director of Embassy Hotels-
- D the appellant, on 26.8.1981 for a sum of Rs.7,52,000/-.

5. Efforts made by the plaintiff to get the sale of suit property in execution proceedings arising out of OS No.85 of 1978 set aside could not succeed. EA 2058 of 1981 filed by the plaintiff on 22.10.1981 under Order 21 Rule 89 of CPC
- E along with deposit of the required amount was rejected by the executing Court on 7.5.1983 and on the same date sale was confirmed and a sale certificate issued. The plaintiff's appeal bearing AAO No. 421 of 1983 was finally allowed by the High Court on 9.12.1986, but the matter was brought to this Court
- F by Mr. P.K. Unni and this Court by its judgment dated 20th February, 1990, reported in 1990(2) SCC 378 granted leave and reversed the judgment of the High Court and the same has acquired finality.

6. On the basis of the aforesaid facts Mr. Parasaran
- G submitted that the plaintiff's suit for specific performance was rightly dismissed by the Trial Court and it should not have been decreed in appeal by the High Court because of (i) *res judicata* would apply, in view of judgment of this Court dated 20th February, 1990; (ii) The plaintiff could not have raised a
- H collateral challenge to the sale certificate on the ground of

alleged fraud, on the basis of mere submissions raised for the first time before the High Court; and (iii) There were no pleading in support of alleged fraud nor any such issue was raised before the trial court. A

7. In reply Mr. K. Ramamoorthy, senior advocate for the plaintiff-respondent accepted that the plaintiff's suit was one for specific performance of agreement for sale and there was no direct or even indirect challenge to the sale certificate issued by the executing Court on 7.5.1983. It was also not disputed that there was no pleading or issue to support the ground of fraud in respect of court sale of the suit property. But he emphatically argued that earlier judgment of this court in the case of **P.K. Unni** (supra) could not constitute *res judicata*. B C

8. According to his submissions the judgment of this Court dated 20th February, 1990 was confined to the issue of limitation prescribed under law for an application under Order 21 Rule 89 of the CPC and only on account of finding given by this Court that the limitation would be only 30 days, the judgment of the High Court was reversed, hence the judgment must be confined only to be an expression of law regarding the period of limitation and not judgment on merits of the case of the parties. D E

9. He also submitted that subsequently the law laid down in the case of **P.K. Unni** was overruled by this Court by judgment in the case of **Dadi Jagannadham vs. Jammulu Ramulu and Ors.**, 2001(7) SCC 71. F

10. Mr. Ramamoorthy laid much emphasis on the provisions of Order 34 Rule 5 of the CPC, which according to him was the appropriate provision of law under which the offer of deposit of the due amount ought to have been accepted by the concerned courts including this Court while hearing the appeal of Mr. P.K. Unni because there is no limitation of time for making such a deposit and the aforesaid provision permits deposits any time before the confirmation of sale. G

A 11. He placed several case laws in support of relevance
of Order 34 Rule 5 to the issue canvassed by him. He also
placed judgments in support of legal proposition that since
the order rejecting the plaintiff's application under Order 21
Rule 89 and confirming the sale was subjected to appeal, the
B order confirming the sale could not be treated to be final so
long as the appeal was pending.

C 12. Since the senior counsel for the appellant has not
disputed the proposition of law settled in the various case laws
relied upon by Mr. Ramamoorthy, we propose to refer to those
case laws only in brief for considering the relevant facts and
counter submissions in respect of pleas raised by Mr.
D Ramamoorthy.

E 13. It is not in dispute that the Trial Court non suited the
plaintiff on account of his finding in respect of issue Nos. 1, 2
and 5 which required an answer whether the plaintiff is entitled
to relief under Specific Relief Act, whether the suit property
had been sold in Court auction as claimed by 11th defendant
and whether the agreement dated 27.5.1978 is true, valid and
binding on the defendant. Although the Trial Court gave a
finding that the plaintiff was ready and willing to play his role
qua the agreement and the agreement was valid, it further held
in respect of the aforesaid issues that although the agreement
was true and valid, the 11th defendant (appellant herein) having
purchased the property in the court auction and the same
having been confirmed, the aforesaid agreement will not be
binding on 11th defendant. The Trial Court further held that the
first defendant was no longer the owner of the property and
therefore, the plaintiff cannot obtain any relief. The Trial Court
also found that the plaintiff fully well knew about the mortgage
relating to the property and on that account also he was not
entitled to obtain the relief of specific performance. Interestingly
in paragraph 22 of the trial court judgment an affidavit filed by
the plaintiff to seek stay of trial of the suit as per Section 10
CPC has been noticed. In that, according to the plaintiff's
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own stand, since the sale which was challenged in O.S.2058 of-1983 had not been set aside till then, the suit should not be taken up for trial, otherwise it will be infructuous and plaintiff will have to make amendments to seek at least the balance of sale proceeds. A

14. The High Court was required to meet the reasonings of the Trial Court particularly those based upon confirmation of court sale and sale certificate issued on that basis. The High Court could not find any valid ground to reverse the said finding of the trial court except by proceeding to hold that it was the first defendant who had induced the 6th defendant to execute his decree by bringing the property to sale and by collusion, keep the auction a secret. After referring only to some averments in a reply statement of the plaintiff, in paragraphs 33 and 34 of the judgment, the High Court rendered a finding that the first defendant is trying to commit fraud on the powers of the court by colluding with the decree holders. As regards the rights of the court auction purchaser- the appellant, the High Court has given only a passing comment in the penultimate paragraph that the court auction purchaser was fully aware of the pendency of the suit and from the facts it was clear that he had been acting at the instance of and collusion with the first respondent. B
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15. The findings and reasoning given by the High Court as noticed above are in absolute disregard of the fact that there are no pleadings in the plaint to support the aforesaid conclusions nor any issue was framed in respect of fraud or collusion. The only issue in respect of court auction was issue No. 2 : "whether the suit property had been sold in court auction as represented by 11th defendant?" This issue was rightly answered by the trial court and has not been explicitly reversed by the High Court. The High Court has not declared that the sale certificate was invalid or that the application under order 21 Rule 89 of the CPC was within time. In fact, in view of judgment of this Court dated 20th February, 1990 in the case F
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A of P.K. Unni rendered inter-parties, it was not open for the High Court to reverse the finding of the Trial Court on this relevant issue.

16. So far as the emphatic reliance on Order 34 Rule 5 is concerned, it has rightly been pointed out in reply by Mr. Parasaran that after 3-3½ months of the judgment dated February 20, 1990, the plaintiff filed application under Order 34 Rule 5 of the CPC bearing E.A. No. 1000 of 1990 before the executing court in the proceeding relating to O.S. No.85 of 1978 and the same was dismissed on 11.6.1990. The plaintiff accepted the said order and preferred no appeal or revision to challenge the same.

17. In view of the aforesaid facts it is not understandable as to how the provisions of Order 34 Rule 5 of CPC can be of any help to the plaintiff in the present suit filed only for specific performance of an agreement.

18. The contentions that the plaintiff had made payment in the court of all the amounts due from the defendant in the execution proceedings arising out of OS No.85 of 1978 on 26.10.1981, much before the sale was confirmed on 7.5.1983 and therefore right of redemption of the mortgagor- the first defendant could not be extinguished in spite of confirmation of sale, ought to have been raised in the proceedings connected with OS No. 85 of 1978 including the execution proceedings for seeking a decision whether the present plaintiff, without getting himself impleaded as a defendant could have invoked the provisions of Order 34 Rule 5 or not and further for a direction that his application under Order 21 Rule 89 be treated more appropriately as an application under Order 34 Rule 5 of the CPC. Such steps were clearly not taken and as a result, between the parties the judgment of this Court dated 20th February, 1990 became final. Thereafter, the plaintiff made an attempt and filed an application under Order 34 Rule 5 but that also was rejected by the executing court and the plaintiff did not take steps to challenge the same. In such

circumstances, in our considered view, the only option was to directly challenge the court auction of the suit property and the issuance of sale certificate. Learned counsel for the appellant has correctly submitted that as a result of judgment of this Court dated 20th February, 1990 the order of the executing court dated 7.5.1983 got confirmed and the sale certificate obtained finality. As a sequel, the ownership of the suit property or at least a major part of it got transferred from first defendant to the auction purchaser- the appellant. In such a situation, it is not possible to accept the contention on behalf of the plaintiff that the first defendant being a mortgagor will continue to have a right of redemption although the sale of mortgaged property to a third party through a court auction became final.

19. Section 60 of the Transfer of Property Act protects the right of redemption available to a mortgagor by providing that the mortgagor can exercise such a right by paying the mortgaged money at any time after the principal money has become due. But the proviso clarifies that the right conferred by that Section is available only if it has not been extinguished by act of the parties or by decree of the court. The act of the parties would cover act of the mortgagor and the mortgagee, if they are unable to settle the dispute arising out of money claim covered by the mortgage and by their action, allow the mortgaged property to be sold through auction in favour of a third party. Hence, it is not possible to accept the case of the plaintiff-respondent that in spite of sale of the suit property becoming final through court auction, for the purpose of grant of specific relief to the plaintiff in the present suit, the first defendant would be deemed to still retain the right to redeem the mortgage and transfer the suit property to the plaintiff regardless of the right, title and possession already legally vested in the auction purchaser-the appellant.

20. No doubt, if a fraud is alleged and proved, it can be sufficient to get rid of most solemn of proceedings including court proceedings. But in case of order of a court of competent jurisdiction, this must be done only by throwing a direct

A challenge to the proceedings by instituting a suit for that purpose or through any appropriate legal proceeding which may permit such direct challenge. Judgments of courts cannot be ignored by another court in a collateral proceeding and that also on mere suspicion of fraud or collusion, as has been done in this case.

21. Learned counsel for the appellant has rightly placed reliance for this purpose on paragraph 76 of a recent judgment of this Court in the case of **Union of India vs. Major S.P. Sharma**, 2014(6) SCC 351. Paragraph 76 of the judgment reads as follows:

“76. A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be “confusion and chaos and the finality of proceedings would cease to have any meaning.”

22. There is no dispute that the orders passed in the execution proceedings relating to OS No. 85 of 1978 were by a competent court which rejected the plaintiff's claims. Such orders cannot be ignored in a collateral proceeding. It is to be kept in mind that the order confirming the sale and rejecting the plaintiff's application under Order 21 Rule 89 for one reason or the other was confirmed by this Court also, as noticed earlier. It is clear that the High Court while allowing the suit for specific performance ignored the aforesaid cardinal principle of law.

23. Before recording the final outcome of the aforesaid discussions, out of deference to the senior counsel appearing for the plaintiff, it is noted that he placed reliance upon the judgment of the Privy Council in the case of **Chandra Mani Saha vs. Anrjan Bibi**, AIR 1934 PC 134 in support of the proposition that where an appeal is taken from an order disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though

the lower court may have confirmed the sale. The Judgment of the Madras High Court in the case of **V.S. Subramania Asari vs. Ramaswami Pillai**, AIR 1937 Mad 560 was cited for the well recognized legal principle that Order 21 Rule 92 of CPC requires passing of an order of confirmation which makes the sale absolute. The sale does not become absolute merely on lapse of 30 days. **Gour Chand Mullick vs. Pradyumna Kumar Mullick**, AIR 1945 Cal. 6 is also on the aforesaid lines and inter-alia holds that an application under Order 21 Rule 89 may in an appropriate situation be treated as one under Order 34 Rule 5 of the CPC. The case of **Rama Krishna Rao vs. Chellayamma**, AIR 1953 SC 425 has also followed the law noticed above as laid down in **Chandra Mani Saha vs. Anrjan Bibi** (supra). Judgment in the case of **Mhadagonda Ramgonda Patil vs. Shripal Balwant Rainade**, 1988 (3) SCC 298, reiterated the proposition that the mortgage can be redeemed by paying the dues even after the sale has taken place but before the confirmation of such sale. To same effect is the judgment in the case of **Maganlal vs. Jaiswal Industries**, 1989 (4) SCC 344. Since there are several other cases on the point noted above, on which reliance was placed by the learned counsel for the plaintiff, no useful purpose should be served by cataloging all those judgments. It is sufficient to notice the propositions of law indicated above as those have not been controverted by the leaned counsel for the appellant and rightly so because in the present case they are not relevant.

24. On the issue of collateral challenge to the judgment and order of Court as *res judicata*, learned counsel for the plaintiff placed reliance upon **Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B. Jeejeebhoy**, 1970(1) SCC 613. Paragraph 9 of that judgment was highlighted and it runs thus:

"A question of jurisdiction of the Courts, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not *res judicata* in the subsequent suit."

A 25. Reliance was also placed upon **Pandurang Dhoni Chougule vs. Maruti Hari Jadhav**, 1966 (1) SCR 102 for the following view expressed therein:

B "It is well settled that a plea of limitation or a plea of res-judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings."

C 26. We do not find the aforesaid propositions to be relevant in the present case in view of issues noticed earlier and the error noticed in the judgment of the High Court under appeal.

D 27. No doubt Section 20 of the Specific Relief Act vests the Court with a judicial discretion in granting or not granting specific performance. But in the present case the plaintiff cannot gain anything from this Section because the Trial Court rightly found that the suit property or substantial part of the same had already been auctioned and first defendant had no longer any title or ownership over the same and hence it was not possible to grant a decree for a specific performance. As noticed and discussed earlier the view taken by the High Court on this issue is found to be wholly untenable. Hence the judgment and decree under appeal passed by the High Court is set aside and the judgment of the Trial Court is restored. The appeal is allowed to that extent. In the facts of the case, there shall be no order as to costs.

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Kalpana K. Tripathy

Appeal allowed.