

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. S 447 of 2002

BETWEEN

TEDDY MOHAMMED

PLAINTIFF

AND

GOLD AND GOLD LIMITED

DEFENDANT

Before the Honourable Mr. Justice Gregory Smith

Appearances:

Mr. K. Harrikissoon for the Plaintiff

Mr. A. Sinanan and Mr. O. Lalla for the Defendant

JUDGMENT

1. In this matter, there were two summonses before the court.

(1) The first summons filed on behalf of the Plaintiff on 21st June 2002 sought an injunction to stop the enforcement of a “default” judgment dated

28th February 1991 and a stay of proceedings in that other High Court Action (No. 2165 of 1990).

(2) The second summons filed on behalf of the Defendant on the 2nd July 2002 sought to have the Writ and Statement of claim in the present matter struck out under the provisions of Order 18 Rule 19 of the rules of the Supreme Court.

Background:

2. On the 15th April, 1987 the present Defendant, Gold and Gold Ltd. (hereafter referred to as Gold and Gold) entered a default judgment against the present Plaintiff (Teddy Mohammed), his wife and a company known as General Distributors Limited, in a district court in Louisiana in the U.S.A. The judgment was for the sum of \$170,000.00 (U.S.) with interest and costs. Gold and Gold then commenced High Court Action No. 2165 of 1990 in Trinidad against Teddy Mohammed based on the U.S.A. judgment, and filed an application for summary judgment in that action. On the 28th February 1991 Gold and Gold obtained summary judgment against Teddy Mohammed in that said action. Teddy Mohammed appealed the order for summary judgment but that appeal was dismissed for non-compliance. In October 2001, Gold and Gold brought an application in H.C.A. 2165 of 1990 to cross-examine Teddy Mohammed as to his means, and in December 2001 Gold and Gold issued a judgment summons against Teddy Mohammed; while these two enforcement applications were pending, this present action and the summonses mentioned above were filed.

3. The basis of the claim in this present matter is that the U.S.A. judgment and the local judgment (which is based on the U.S.A. judgment) ought to be set aside on the main ground that they were obtained through the fraud of Gold and Gold.

The essence of the alleged fraud is that whereas the U.S.A. judgment was based upon a loan from Gold and Gold to the Plaintiff, his wife and General Distributors, the true nature of that transaction was that Omi Maraj (the Managing Director of Gold and Gold) conspired with Teddy Mohammed's wife to illegally get foreign exchange (\$170,000.00 U.S.) out of Trinidad for the benefit of Omi Maraj by making false declarations and/or representations so as to obtain approval from the Central Bank of Trinidad and Tobago to remit the \$170,000.00 U.S. out of Trinidad and at lower rates of exchange than would usually prevail. This fraud and illegality was done without the knowledge and approval of Teddy Mohammed.

4. By consent of attorneys, both of the summonses in the present matter were heard together and attorney for the Defendant presented his case first.

The Application to strike out the Writ and Statement of Claim under Order

18 R 19

5. The first ground relied upon under Order 18 Rule 19 was that the Writ and Statement of Claim disclosed no reasonable cause of action.

Counsel for the Defendant referred in depth to the Statement of Claim and submitted that the allegations of illegality and/or fraud were too vague and/or lacked the particularity required when pleading fraud and thus the pleading was defective and ought to be dismissed (Counsel referred to several authorities on the point).

Counsel also noted 2 pleading irregularities in the Writ and Statement of Claim which he contended were fatal to the claim:-

Firstly, in the Particulars of Illegality in paragraphs 8 (a) to (l) of the Statement of Claim, the illegal acts which were identified were done by Omi Maraj personally and not by or on behalf of the Defendant, Gold and Gold.

Secondly, the relief sought in both the Writ and Statement of Claim was for the “summary judgment dated 28th February 1991” to be set aside or stayed on the ground of illegality and/or public policy and/or fraud. This relief referred to the order for summary judgment pronounced by Razack J. in Trinidad. However, neither the pleadings nor the affidavits of Teddy Mohammed in this present action ever alleged that the summary judgment pronounced by Razack J. was obtained by fraud and/or illegality or was otherwise void on the ground of public policy.

6. Counsel for the Plaintiff while not conceding that the pleadings were defective, admitted that a bit more particularity may have been desirable.

Further, Counsel conceded that the other two irregularities mentioned above, were critical to his case. However, he contended that simple

amendments to paragraphs 8(a) to (l) of the Statement of Claim so as to allege that the acts were done by Omi Maraj on behalf of the Defendant, would cure the first defect and that the defect in the pleading was an oversight on his part.

With respect to the defect in the relief sought, Counsel also admitted that he had made an error in the pleading and that what was really being attacked for fraud and illegality was the default judgment obtained in the U.S.A. Nevertheless, a simple amendment to the reliefs claimed could cure the defect.

In this regard, counsel referred to the learning in the 1997 White Book at paragraph 18/19/3 to the effect that where an amendment would cure a defect in the pleading, the preferred course was to strike out the relevant pleading or part thereof and grant leave to amend, without dismissing the action.

7. Having regard to the alleged defects and the admissions of Counsel for the Plaintiff, I agreed with Counsel for the Plaintiff that the proper course to have adopted with respect to the alleged defects and lack of particularity in the pleadings would have been to strike out the relevant parts of the Writ and Statement of Claim and to grant leave to amend the Writ and Statement of Claim, and also, for the Defendant to request whatever further particulars were required from the Statement of Claim, rather than dismissing the claim entirely.

8. The other arguments for dismissal of this claim under Order 18 Rule 19 were based on the grounds that the present proceedings were an abuse of the process, were frivolous and vexatious and/or that they should be dismissed

under the inherent jurisdiction of the Court. The reason for the invocation of these grounds of dismissal of the Plaintiff's claim was based on estoppel under the principle in Henderson v Henderson 3 Hare 100. In Henderson's case (which is still accepted as good law today) Wigram V.C. stated the law on this area of estoppel as follows:-

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

The rule was elucidated by Stuart-Smith L. J. in Talbot v Berkshire County Council 1993 3 W.L.R. 708 at page 713 when he said:

"The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of res judicata but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: see per Lord Wilberforce in *Brisbane City Council v Attorney-General for Queensland* (1979) A.C. 411, 425G."

In the present matter, both aspects of this estoppel were to be found.

Res Judicata on some issues:-

9. In paragraph 10 of the Statement of Claim, it is alleged that Teddy Mohammed was not a party to the alleged loan contract between Gold and Gold and himself, his wife and General Distributors Ltd., and that he had no knowledge of the contract. In paragraph 11 it is alleged that he was wrongly made a party to the U.S.A. action in his personal capacity since it was his wife and General Distributors Ltd. who were the proper parties to that action.

These allegations are repeated in Teddy Mohammed's affidavits in the present proceedings, and in his supplement affidavit, filed on the 18th July 2002, he goes on to state that he was never even served with or notified of the U.S.A. proceedings.

However, in the summary judgment proceedings in H.C.A. 2165 of 1990, before Razack J., Teddy Mohammed had sworn to an affidavit dated 11th December, 1990 (which affidavit was an exhibit in the present applications) where he stated:

“4. I never entered into any contract with the Plaintiff (Gold and Gold) in 1988 or at all for the alleged sum of U.S. 170,000.00)

5. In or about January 1985, my then wife ANN MOHAMMED and I started a trading operation under the name of General Distributors. Occasionally we had dealings with Gold and Gold Limited, but at no time to my knowledge did General Distributors or the Deponent (Teddy Mohammed) enter into any contract for the sum of \$170,000.00...

8. I was never served with any Petition or any Summons in this matter from any Court in the United States of America accordingly...the default judgment obtained...in the district Court of New Orleans was irregularly obtained.

9. I have been informed by my former wife, ANN MOHAMMED...that no legal documents of any nature were mailed or delivered to me at our matrimonial home at the time...

10. Moreover, to date I am yet to know the particulars of the Plaintiff's (Gold and Gold) claim against me."

In response to this affidavit in the summary judgment proceedings before Razack J., one Stephen Singh, an attorney-at-law, filed an affidavit on 6th February 1991, (which was an exhibit in the present matter) where he annexed an affidavit of a U.S.A. attorney which showed that Teddy Mohammed was duly served with the U.S.A. proceedings, took part in them and submitted to the jurisdiction of the Louisiana District Court.

10. In the circumstances, the issues concerning the knowledge of Teddy Mohammed of the U.S.A. proceedings and whether he was a party to any contract with Gold and Gold at all or in his personal capacity were at the heart of the summary judgment application before Razack J.. These issues being critical to the summary judgment proceedings, must have been decided against Teddy Mohammed by Razack J. and as such, he is now estopped from raising them in these proceedings.

11. Even assuming that it were possible for these issues not to have been dealt with before Razack J., then the second limb of estoppel would apply, for the

issues were raised in those proceedings and could and should have been decided upon there, and to seek to litigate them now, some 11 years later, is an abuse of the process of court.

Fraud, Illegality, Immorality and Issue Estoppel

12. In the present proceedings, Teddy Mohammed has for the first time, raised an issue of fraud in respect of the U.S.A. judgment. The fraud alleged was already stated at paragraph 2 above. The point now raised by Counsel for the Defendant is that Teddy Mohammed is estopped from raising this fraud in the sense that according to Henderson's Case (mentioned above) it was a "point which properly belonged to the subject of (the earlier) litigation", namely the proceedings before Razack J. To attempt to bring it forward now is an abuse of the process and/or frivolous and vexatious and the claim ought to be struck out.

13. In his submissions, Counsel for Teddy Mohammed re-stated the issue to be decided by reference to settled authority that where an action is brought to enforce a foreign judgment, the Defendant may raise the defence that the judgment was obtained by the fraud of the Plaintiff even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign court. (See Vadala v Lawes 25 Q.B.D. 310 and Abouloff v Oppenheimer 10 Q.B.D. 295). Further, as was stated in the 1999 White Book at 71/9/2 "In an application to set aside (a foreign judgment) on the ground that the judgment was obtained by fraud, it is immaterial that the facts on which the

defendants relied to establish fraud were known to them and could have been raised in the original proceedings, and the defendants are entitled to have tried the issue of fraud (Seyal v Heyward (1948) 64 T.C.R. 476)".

Thus, Counsel submitted, that this present matter must be allowed to proceed so that the issue of the fraud in obtaining the U.S.A. judgment could be decided upon locally, even though that may mean that the U.S.A. proceedings would have to be readjudicated upon, and also, even if Teddy Mohammed could have taken the point of fraud in those proceedings. Further, if that foreign judgment could be set aside, then the judgment of Razack J., which was founded upon that foreign judgment should also be set aside. Therefore, this Court was bound to dismiss the Order 18 R19 application and to grant the injunctions or stays of the Razack J. judgment, pending the determination of the issue of fraud.

14. Counsel for Gold and Gold rightly pointed out that, as ingenious as the arguments of counsel for Teddy Mohammed were formulated, they were misconceived.

The fundamental issue here was not the setting aside of a foreign judgment for fraud and by extension a local judgment based on to the foreign one, but whether the domestic judgment of Razack J. ought to stand and to create an issue estoppel against the Plaintiff since the issue of fraud could and should have been raised before Razack J.

15. It should be noted firstly that when one is dealing with a domestic judgment the principles are different even when fraud is alleged. As was stated even in Seyal v Heywood, which was one of the major cases cited by Counsel for Teddy Mohammed; “in proceedings to set aside an English Judgment, the defendants cannot ask for a re-trial of the issue of fraud as between them and the Plaintiffs on facts known to them at the date of the earlier judgment.” This principle applicable to domestic judgments was also re-stated later on in the very citation of the 1999 White Book cited by Counsel for Teddy Mohammed.

16. The principle used to be stated in earlier cases as “The Court requires a strong case to be established before it will set aside a judgment on this ground (fraud), and the action will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment” (my emphasis) (quoting from Halsbury’s Laws of England 4th ed Vol. 26 para 560 and see Birch v Birch (1902) P. 130 C.A. and Boswell v Coaks (no. 2) 1894 8 GLT 365 H.L.).

The more recent cases speak of the principle relating to raising the issue of fraud in answer to a domestic judgment when the issue could have been raised in earlier local proceedings, as an abuse of process. A forceful statement of the law is to be found in the case Sanctuary Housing Association v Baker C.A. (U.K.) and No. 98/1000/2 where at page 9 Ward L. J. states:

“To say baldly only that this lady should not enjoy the fruits of her fraud is again perhaps to fall into the error which the Court of Appeal corrected on the last occasion, that fraud somehow unravels all. Nothing

prevented the plaintiff in this case relying upon the fraud as it attempted to do and even if in the result they have been saddled with a tenant whom they do not want, the wider interests, of the administration of justice prevail, in my view, and demand that all actions, whether those against fraudsters or otherwise should be brought at one and the same time. That rule of public policy overrides even the inevitable repugnance one has to seeing this lady, found to have been dishonest, enjoying the fruits of a tenancy which, in some way, was procured by her fraudulent misrepresentation.”

(See also Anderton v Hume Ch D, Laddie J. 1999).

17. The issue which now falls for decision can be properly stated to be whether Teddy Mohammed is estopped from raising the issues of fraud/illegality/immorality since he could and should have raised them in the earlier proceedings before Razack J.

18. In the affidavits sworn by Teddy Mohammed in these proceedings, he stated that he did not disclose the alleged fraud earlier when Gold and Gold were seeking to enforce the judgment against him because he did not have “the relevant evidence or requisite documents to substantiate the particulars of fraud of the said contract.”

Counsel for Gold and Gold submitted that this bald statement was inadequate to show that these issues could not have been raised earlier; it was also a very vague statement and when taken in conjunction with the other facts of this case and Teddy Mohammed’s overall conduct of litigation, it was far from being a satisfactory explanation as to why the issues were not raised earlier.

19. I agreed with Counsel for Gold and Gold on this point. The statement above, when read, only indicates that Teddy Mohammed did not have evidence and documents to substantiate the particulars of fraud. It does not state that he did not know of the fraud/illegality/immorality or that he did not or could not have found out about it before the proceedings brought before Razack J. It merely indicates that he could not prove the fraud to a great degree of particularity. Neither does it indicate how much knowledge of the fraud/illegality/immorality he had at the time. It gives no real explanation as to why he could not have raised the issues of fraud, immorality or illegality before Razack J. and perhaps indicate then that he would get particulars at a later date (on discovery for example).

A second point to note relates to the very documents produced to the court as now substantiating the particulars of fraud. In paragraph 8(f) of the Statement of Claim, it was alleged that Teddy Mohammed's wife deposited the U.S. draft of \$205,000.00 bought with the funds of Omi Maharaj into the account of General Distributors held in New Orleans U.S.A.. However, in the documents annexed as "T.M.6" to Teddy Mohammed's principal affidavit in these proceedings, the U.S. bank draft which was made out to General Distributors Ltd. and was allegedly part of the evidence in support of these allegations, was in the sum of \$170,000.00, not \$205,000.00.

Further, in paragraph e(1), e(2) and e(3) of the Statement of Claim, it was alleged that Teddy Mohammed's wife was to receive a commission \$35,000.00 U.S. for the purchasing of the \$205,000.00 U.S. funds and that the remainder of the funds

in the sum of \$170,000.00 U.S. were to be returned to Mr. Omi Maraj through his U.S. agent and nephew Mr. Ashwani Sagar. In the same exhibit "T.M.6" the Central Bank approval form (form EC1) was annexed and it showed the date of approval as either the 16th or 18th August 1985; also annexed is a certified cheque stub in favour of the said Ashwani Sagar dated either the 2nd or 7th August 1985 (prior to the alleged Central Bank Approval) and further, that document shows a purchase in the sum of \$44,000.00 U.S. (and not \$170,000.00 U.S.).

Therefore, even the documentary evidence which was supposed to be in support of the fraud/illegality/immorality claim, did not support the alleged fraud, nor was any explanation forthcoming of these obvious discrepancies from Teddy Mohammed. It leaves one to wonder about the bona fides of his claims of fraud, illegality and immorality.

Another point to note is that he alleged that he left the U.S.A. at some indefinite time in 1985, yet he was one of the major directors of General Distributors Ltd. and ought to have been in a position to get the documentary evidence in support of the alleged fraud, illegality, immorality. The statements made do not tell us what part he played in the company at any given period of time and why, if at all, he was not in a position to see or have access to the documents in "1985".

Teddy Mohammed's overall failure or inability to provide details threw doubts on his candour and conduct of the proceedings especially since he had

waited more than 11 years to come forward with these serious allegations at a time when the judgment of February 1991 is soon due to expire (February 1993).

In all the circumstances, I was not satisfied that Teddy Mohammed produced any credible support for his bald allegation that he only became aware of the alleged fraud after the proceedings before Razack J.. In fact, the evidence now produced was inconsistent with his assertions and there was no reasonable explanation coming forward for these inconsistencies. Teddy Mohammed failed to clear the first hurdle of showing that the fraud was only discovered since the judgment so that his case must be considered as frivolous and vexatious. Alternatively, this was a case where the rule of public policy insisting that all matters be brought forward at the same time ought to prevail in the wider interests of the administration of justice so that Teddy Mohammed's attempt to litigate the issues of fraud, illegality and immorality in the present action when there is no proof that they could not have been raised in the proceedings before Razack J., was an abuse of the process of the Court.

20. Accordingly, I dismissed Teddy Mohammed's Writ and Statement of Claim on the ground that his claim was frivolous and vexatious and/or an abuse of the process of court.

The Injunction/Stay of proceedings in H.C.A. No. 2165 of 1990

21. Having decided that the claim was to be dismissed as frivolous and vexatious or as an abuse of the process of the court it was no longer necessary to deal with Teddy Mohammed's claims in this action for an injunction and/or stay of the proceedings in H.C.A. 2165 of 1990. However, in the event that my findings on the Order 18 R 19 point are proved to be wrong and for the sake of completeness I will also consider Teddy Mohammed's application for the injunction and/or a stay of H.C.A. 2165 of 1990.

22. Since the American Cyanamid case (1975) A.C. 396, it is accepted that one of the main requirements for a Plaintiff to establish before an injunction can be granted is that there is a serious issue to be tried.

In the present matter Teddy Mohammed has not, in his pleadings, stated that he only became aware of the fraud after the proceedings before Razack J. Further, as has been stated before, his affidavits are, at best equivocal on this crucial issue which he must first establish before he can be allowed to raise the issue of fraud (see paragraphs 13-18 above). Having failed to do this, Teddy Mohammed cannot proceed on the case of fraud as raised.

Additionally, as was stated above (see paragraphs 8 – 10 above) he is estopped from raising the other issues about the existence of a contract and his knowledge of the U.S.A. proceedings.

In the circumstances, he has failed to show that he is in a position to raise a serious issue for trial and the claim for the injunction must be refused.

Likewise, if he has failed to show an entitlement to raise the issues which he alleges ought to be tried, there is no reason why a stay of the earlier judgment of Razack J. should be granted.

23. Another point to consider is that in any claim for equitable relief in the nature of an injunction or a stay of proceedings, it is incumbent on the applicant to make full and frank disclosure of all the material facts.

As was stated before, (see paragraph 17 and 18 above) Teddy Mohammed's disclosure of material facts relating to fraud, illegality, immorality was, at best, equivocal and incomplete to the point of putting his credibility in serious doubt and, in my view, falls far short of a full and frank disclosure of material facts. Additionally, this lack of full and frank disclosure of material matters is also evident in the fact that he failed to disclose the affidavits in the prior proceedings before Razack J., which affidavits would have demonstrated that he had previously raised the issues about the existence of the contract and his knowledge of the U.S.A. proceedings and submission to the U.S.A. jurisdiction, in the proceedings before Razack J. . It was the Gold and Gold's attorneys who had to produce these documents to the Court.

As a result, his failure to make full and frank disclosure of material facts was another reason for refusing him either the injunctive relief or the stay requested.

24. Another major factor to consider in the grant of an injunction is where does the balance of convenience lie.

While Teddy Mohammed may argue that it would be repugnant for the “fraudster” to get away with it, he himself has waited for almost 12 years after the judgment of Razack J. (and some 15 years after the U.S.A. judgment) to raise the issue of fraud. If this issue is to go for trial, enforcement of the present judgment would be barred by the provisions of section 3 of Limitation Ordinance Ch.5 No. 6 and Gold and Gold would have to recommence proceedings from on or before the 27th February 2003 to try to enforce their judgment, if the present matter is resolved in their favour. Teddy Mohammed, if unsuccessful in the present matter, would have once again delayed and frustrated his creditors and cause them to incur more and substantial costs in enforcing their claim.

This in my view, seems to be a case where the wider interests of the administration of justice whereby Teddy Mohammed should have brought forward all his claims together, ought, on the grounds of public policy, to override the possible repugnance of not having the issues of fraud, illegality, immorality fully aired. In other words, I find that the balance of convenience is in the favour of Gold and Gold and this is a further reason for refusing injunctive relief.

Conclusion:

25. In all the circumstances, I ordered that the Plaintiff’s Writ and Statement of Claim be dismissed and the Plaintiff was ordered to pay the Defendant’s costs of

both summonses. On the application of Counsel for the Plaintiff, I also granted leave to appeal on both summonses.

Dated this 11th day of October, 2002

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Justice Gregory Smith
JUDGE