Mumthaj Beevi w/o Mohd Arif t/a Bhadhar Point v M/s Niru & Co (Mohamed Arif S/O Sahul Hameed, Third Party)
[2002] SGHC 224

Case Number : DC Suit 300/2000/L

Decision Date : 21 September 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Liew Teck Huat (Niru & Co) for the appellants-defendants; Eddee Ng (Tan Kok Quan Partnership) for the respondent-plaintiff

Parties : Mumthaj Beevi w/o Mohd Arif t/a Bhadhar Point — M/s Niru & Co — Mohamed Arif S/O Sahul Hameed

Judgment

GROUNDS OF DECISION

1 This is an appeal by the Defendants against the decision of District Judge Tan Peck Cheng of 5 November 2001 upholding the order of the Deputy Registrar giving interlocutory judgment against the Defendants with costs. I upheld the decision of the District Judge on 4 April 2002. The Defendants have, with leave, appealed to the Court of Appeal on 13 September 2002 and I now give the grounds for my decision.

2 The brief facts of the matter are as follows. The Defendants, a law firm, had acted for the Third Party, Mohamed Arif ("Arif"), who is the Plaintiff's husband, in Suit No. 321 of 1989 and Suit No. 758 of 1991. Arif did not pay their professional fees in full and the Defendants took up D.C. Suit No. 489 of 1994 to recover the balance. Arif did not defend the action and default judgment was entered. When Arif did not satisfy the judgment sum of $33,922.80 the Defendants took out a Writ of Seizure and Sale on 11 April 1994.

3 Execution of the writ was levied on certain property at Bhadhar Point, a kiosk at the Toa Payoh Bus Interchange selling a variety of goods such as newspapers, periodicals, soft drinks, sweets and tit-bits, cigarettes and other minor items. The Plaintiff, who claimed the goods seized belonged to her, through her solicitors gave notice to the Defendants to release those goods. The Defendants refused and the Plaintiff took out interpleader proceedings, at the end of which the Defendants were ordered to release the goods to the Plaintiff. The Defendants' appeal against that order was heard by District Judge Khoo Oon Soo who dismissed it with costs on 22 August 1994.

4 The Plaintiff then filed the present action to claim for damages in respect of, *inter alia*, losses she had incurred as a result of the seizure of the goods. On the Plaintiff's application, the Deputy Registrar entered interlocutory judgment against the Defendants in respect of the claim for damages. District Judge Tan Peck Cheng dismissed the Defendants' appeal.

5 In the present proceedings the Defendants alleged that the order made in the interpleader proceedings to release the goods to the Plaintiff was procured by fraud on the part of the Plaintiff and her husband, Arif. Therefore there is a triable issue and interlocutory judgment ought not to be given. I should add that this is not pleaded in the Defence filed by the Defendants in this action. It is only alleged in the affidavits filed by the Defendants in opposition to the application for summary judgment. Be that as it may, I shall assume that the Defendants' allegation is *bona fide* and that they would have been permitted to take that position on affidavit in opposing summary judgment.

6 The allegation of fraud is as follows. In the course of giving instructions to the Defendants when they were acting for him, Arif had confirmed that Bhadhar Point belonged to him. The Defendant showed how it was previously known as Arif Jamal Kiosk. The Plaintiff had produced a deed of assignment dated 20 September 1991 which showed that Arif had assigned the business, along with the kiosk, to her. This transfer was effected some three years before the seizure. Since that time the business had been registered in the Plaintiff's name in the Registry of Businesses. However the Defendants gave a number of reasons why this was a sham. I do not propose to set these out as they are not relevant for my present purposes. Suffice it to say that it necessarily involves the Plaintiff and Arif committing perjury in the hearing of the interpleader summons.

7 The main problem with the Defendants' case is that they ought to have raised the question of fraud at the hearing on the interpleader

summons. O 17 r 5, which sets out the powers of the Court in such a hearing, states as follows:

> 5. —(1) Where on the hearing of a summons under this Order all the persons by whom adverse claims to the subject-matter in dispute (referred to in this Order as the claimants) appear, the Court may order —
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> (a) that any claimant be made a defendant in any action pending with respect to the subject-matter in dispute in substitution for or in addition to the applicant for relief under this Order; or
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> (b) that an issue between the claimants be stated and tried and may direct which of the claimants is to be plaintiff and which defendant.
>
> (2) Where —
>
> (a) the applicant on a summons under this Order is the Sheriff;
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> (b) all the claimants consent or any of them so requests; or
>
> (c) the question at issue between the claimants is a question of law and the facts are not in dispute,
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> the Court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just.
>
> (3) Where a claimant, having been duly served with a summons for relief under this Order, does not appear on the hearing of the summons or, having appeared, fails or refuses to comply with an order made in the proceedings, the Court may make an order declaring the claimant, and all persons claiming under him, for ever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him, but such an order shall not affect the rights of the claimants as between themselves.

8 If the allegation of fraud had been made at that stage, the Court would ordinarily have ordered the matter to determined in a trial pursuant to r 5(1)(b). The purpose of the interpleader procedure is to make a finding of the rights of the parties in respect of any goods in the possession of a third party. Those are the proceedings in which the Defendants ought to have raised the issue of fraud of which they had knowledge at the time. Counsel for the Defendants alleged before me that this issue was indeed raised before the District Judge at the hearing of the interpleader summons. He made certain allegations as to the directions of the judge which I do not need to go into for the reason that it was open to the Defendants to appeal against his decision if they were not satisfied with it. They did not and there is an issue estoppel against the Defendants in respect of the ownership of the goods in the present proceedings.

9 The Defendants submit that, because the order in the interpleader summons was procured by the fraud of the Plaintiff and Arif, it may be reopened. They rely on s 46 of the Evidence Act which provides as follows:

> 46. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 42, 43 or 44, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

The Defendants say that because the order made under the interpleader summons was procured by fraud, it is relevant and may be proved in the present proceedings.

10 First of all, I should state that I am extremely surprised at the proposition that a party can avoid issue estoppel or *res judicata* by alleging that an order obtained in a court in Singapore was procured by fraud where he was aware of the fraud but did not raise it in the earlier action, or if he did, did not appeal against it. If that were correct, then no judgment would be final in that a party can raise fraud in a subsequent action.

11 I do not think that s 46 is as wide as the Defendants contend. Unfortunately counsel for both parties have not been able to unearth any authority in Singapore or in Malaysia that could assist in its interpretation. However there is a commentary in *Sarkar's Law of Evidence*, 13th Ed that is helpful. I do not propose to discuss that in any detail, save to say that the editors opine that the fraud contemplated in this provision must be an extrinsic act unconnected with the matter adjudicated upon, e.g. fraud by which a litigant is prevented from appearing and placing his case before the court at trial. They are of the view that it does not apply to an allegation that a party had committed perjury in the earlier action. The editors cite the following passage from the judgment of Petheram CJ in *Md Gulab v Md Sulliman* 21 C 612 @ p 619:

> The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal, which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and may be set aside …, but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree had been passed alleges that it was wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation not only of the law which regulates appeals, but of that which relates to *res judicata* as well.

I respectfully agree with this reasoning and on that basis, I held that the Defendants could not rely on s 46 of the Evidence Act to raise the allegation of fraud in the present case in order to avoid being estopped from asserting that the goods in question do not belong to the Plaintiff.

Sgd:

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT