

A.P. No. 211 of 2010
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction

PRESENT:

Hon'ble Justice Mr. I.P. Mukerji

GLOSTER JUTE MILLS LIMITED
- vs -
HOOGLY MILLS COMPANY LIMITED

For the petitioner : Mr. S.K. Kapoor, Sr. Adv.
Mr. S. Sen, Adv.
Mr. Ashis Kr. Mukherjee, Adv.

For the respondent : Mr. P.C. Sen, Sr. Adv.
Mr. U. Majumder, Adv.
Mr. S. Bose, Adv.
Mr. S. Majumder, Adv.

For Bowreah Jute Mills (P) Ltd. : Mr. Debal Kumar Banerjee, Sr. Adv

Heard on: 29.07.2010, 16.08.2010, 21.09.2010, 25.11.2010

Judgment on: **16th December 2010**

I.P. MUKERJI, J.

BACKGROUND:

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996. The prayers are very innocuous. The petitioner

being Gloster Jute Mills Ltd. wants reference of the disputes arising out of an agreement dated 24th March, 1988, to an arbitrator to be appointed by the court.

The agreement was concerned with a Jute mill in Bowraah, Howrah, known as the North Mill. The respondent argues that this mill never vested in the petitioner, as claimed by them. Neither have any rights under the agreement dated 24th March 1988. So, the petitioner is not a party to that agreement. According to the respondent the ownership of the mill remains with Fort Gloster Industries Limited. Presently, its possession is with Bauria Mills Private Limited.

In this circumstance, by my order dated 16th August 2010 I directed the petitioner to serve a notice of this application upon the above two companies. None appeared for Fort Gloster. According to the petitioner they never appeared because they have nothing to do with the property any more as they had transferred it to the petitioner. According to the respondent they did not appear because the property had been virtually transferred in their favour.

Bauria Mills Private Limited was represented by a learned counsel.

This application was argued for several days. Learned counsel for the petitioner tried to show that the mill had vested in them along with all rights, whereas, the learned counsel for the respondent made an arduous effort to demonstrate that the mill had not vested.

FACTS:

Now, the facts in some detail.

An agreement was signed on 24th March, 1988. The parties were Fort Gloster Industries Limited and the respondent. It was for sale of the North Mill in favour of the respondent. The entire price, except Rs. 1,00,000/-, was paid at the time of execution of the agreement. The respondent took over its possession. There are other detailed provisions in the agreement, which are not important at this stage. However, the formal deed of conveyance was not drawn up.

At this point of time I will narrate the basic features of this agreement.

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In one part of the recital of the agreement the property to be sold was described as comprising of land, buildings and machinery. In another part of it, it was described as an "industrial undertaking". In yet another part, it was described as the "North Mill". It was said that the vendor manufactured and sold jute goods from the said mill.

The vendor covenanted to sell this mill to the respondent for Rs.2,00,00,000/-. Thereafter, it would be known as "Bauria Jute Mills". The movable properties situated in it were to be delivered. Conveyance was to be executed later. The entire consideration except Rs. 1,00,000/- was to be paid at the time of signing of the agreement. Only Rs.1,00,000/- was to be paid on execution of the conveyance. It was specifically stated that the original title deeds would remain with the vendor. There were provisions in the agreement for handing over possession of the land, jute goods, machinery, buildings, structures and sheds to the respondent. This according to records were done at or immediately after its execution.

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There is one provision in the agreement which has triggered all the disputes between the parties. If permission for sale was not granted by the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976, the agreement would stand discharged. That is provided in clause 10. More than 4,00,000 sq.ft. of land were sought to be purchased under the agreement. It was part of a larger holding of 12,13,545.11 sq. mts. By a decision dated 14th December, 1984 the Government of West Bengal exercising powers under Chapter III of the Urban Land (Ceiling and Regulation) Act, 1976 exempted 11,62,329.77 sq. mts. of the said holding from the pervue of the Act subject to certain terms and conditions. This land proposed to be sold by Fort Gloster Industries Limited to the respondent was part of that parcel of exempted land.

Now, as is often usual in incorporated companies, Fort Gloster Industries Ltd. and the petitioner prepared a scheme of de merger under Section 391 of the Companies Act, 1956. Under it certain properties of Fort Gloster Industries Ltd. were to be divested from it and to vest in the petitioner. The share holders of both these companies approved this arrangement by the required majority. An application was made to the

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court for sanction. It came to be numbered as Company Petition No. 28 of 1993 connected with Company Application No. 258 of 1992. An order was passed on 31st May, 1993. The scheme was approved by this court.

The respondent flatly denies that the "North Mill" vested in the petitioner. Neither did any rights under the agreement. Hence, the petitioner is not a party to the agreement. Therefore, this application by the petitioner on the basis of the Arbitration clause in the said agreement is incompetent.

On the other hand, the petitioner has founded this application on the said scheme and the order sanctioning it, contending that, thereunder, the entire rights and liabilities of the agreement dated 24th March 1988 along with its subject matter being the "North Mill" vested in it.

REQUEST FOR ARBITRATION:

Before proceeding further I would like to narrate the case made out by the petitioner in their letter dated 24th February 2010, asking the respondent to submit to arbitration. Some facts stated earlier have to be repeated. But such repetition is necessary to understand the dispute.

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Fort Gloster Industries Ltd. carried on business in jute and cables. It had two jute mills, the North Mill and the New Mill. They were situated adjacent to each other at Bauria in Howrah. By the said order of this court dated 31st May 1993 the Jute Division of Fort Gloster Industries Ltd. vested in the petitioner along with all rights and liabilities including rights in contract. Therefore, the petitioner became the owner of both the North Mill and the New Mill. All rights and liabilities under the contract dated 24th March 1988 vested in them.

Fort Gloster Industries Limited had vacant land measuring 12,13,545.11 sq. mts. in excess of the ceiling limit prescribed under Section 4 of the Urban Land (Ceiling and Regulation) Act, 1976. On 14th August, 1976 the said company applied for exemption of this vacant land from the pervuew of the said Act. By a decision of the Government of West Bengal dated 14th December 1984 such exemption was granted for 11,62,329.77 sq. mts. with the condition that the company would not without the formal sanction of the State Government transfer it. On breach of such

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condition the exemption was liable to be withdrawn. By a decision dated 15th December 1984 the area under exemption was increased.

The property sought to be transferred by the agreement dated 24th March 1988 included part of such land. The letter says that the agreement for sale was made in the expectation that such permission would be granted by the State of West Bengal for sale of such land. On 19th June 1990 the exemption was withdrawn by the Government of West Bengal. Therefore, according to the petitioner the agreement dated 24th March 1988 stood terminated.

Several litigations are quoted in the letter to have been taken by the petitioner to challenge such withdrawal of sanction by the State Government.

It was said that the 'licence' stood terminated and the petitioner was entitled to get back the property from the respondent.

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The agreement dated 24th March 1988 contained an arbitration clause where one Mr. Giridhari Das Kothari was named as arbitrator. He was asked to commence arbitral proceedings. It appears that by a letter dated 5th March 2010 the named arbitrator refused to act as such. By a subsequent letter dated 12th April 2010 the petitioner asked the respondent to select one of the two senior advocates suggested by them to be the sole arbitrator. By their reply dated 20th April 2010, the respondent replied that it was not a party to such arbitration agreement.

AFFIDAVIT IN OPPOSITION:

The refusal of the respondent to submit to arbitration is more elaborately stated in their affidavit-in-opposition. The point taken is that by the scheme of de merger sanctioned by the court on 31st May 1993 the North Mill did not vest in the petitioner. The schedule of assets in the said order does not indicate that the mill or any right in it vested in the petitioner. The respondent relies on a letter dated 26th May 2009 of Fort Gloster Industries Limited in reply to their letter dated 29th April 2009. In their letter dated 29th April 2009 the respondent told Fort Gloster Industries Limited that on 12th January 2009 it had assigned its rights

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under the agreement dated 24th March 1988 in favour of Bauria Jute Mills Private Limited. Fort Gloster Industries Limited was requested to execute conveyance by receiving a sum of Rs.1,00,000/- from the respondent. Fort Gloster Industries Limited replied to it on 26th May 2009. They said that an appeal from an order passed in a writ petition was pending before the court of appeal in this High Court. In those proceedings they asked for orders upon the Government of West Bengal to grant the necessary permission to execute the conveyance (under the agreement dated 24th March 1988).

They further stated that since there was no permission from the Government of West Bengal, the conveyance could not be executed. Relying on this correspondence the respondent contends that Fort Gloster Industries Limited still asserts legal ownership of the mill.

DISCUSSION:

ON FACTS:

The only question in this application is whether the North Mill was transferred to the petitioner.

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Let us examine the scheme which is schedule 'A' to the order made on 31st May 1993. The recital part states inter alia as follows:

".....And whereas Fort Gloster Industries Limited has two major units one in cable manufacturing and the other in jute goods manufacturing which individually are self sufficient and capable of being operated independently and it is felt that greter focus on the operations of each unit of the company would result in substantial improvement of the result of their operations."

I have taken note of the words used. It says 'Fort Gloster Industries has two major units, one in cable manufacturing and the other in jute goods manufacturing'. The words used are major units. Therefore, these words do not exclude other units of Fort Gloster Industries Limited. These two units are also qualified by the statement that they are self sufficient and 'capable of being operated independently'.

Then I come to the definition part of the scheme, namely, 1F which defines jute division as follows:

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- "F. J.D. of FGIL means the Jute Division of FGIL and shall mean and include.**
- a. All assets moveable or immovable including all plants and machineries as also all the liabilities and debts appertaining to the Jute business of FGIL, as identified in the Balance sheet of JD of FGIL.**
 - b. All permits, quotas, rights, industrial and other licenses, trade marks privilege and benefits of all contracts, agreements and all other rights, licenses, powers and facilities of every kind, nature and description whatsoever appertaining to the jute business of FGIL.**
 - c. All employees of FGIL engaged in or in relation to the Jute Division of FGIL at their factory at Bauria, Howrah as also at their office at 21 Strand Road, Calcutta or elsewhere.**
 - d. All earnest moneys and/or security deposits paid by FGIL in connection with or relating to the Jute business of FGIL."**

A plain reading of this clause makes it clear that all movable and immovable assets of the jute business of Fort Gloster Industries Limited including all rights vested in the petitioner.

Then I come to paragraph 1 of the order of this Court. Paragraph 1 of the order is the vesting part. It orders as follows:

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"1. That the Jute Division of the said transferor company with all its properties, rights and interests of the said transferor company and specified in the first , second and third parts of the schedule B hereto be transferred from the said transfer date and be vested without further act or deed to the said transferee company and accordingly the same shall pursuant to section 394(2) of the Companies Act, 1956, be transferred to and be vested in the said transferee company for all the estate and interest of the said transferor company but subject nevertheless to all charges now affecting the same;"

Mark the words in this paragraph. The jute division with all its properties described in the schedule will vest in the petitioner. The interpretation put by the petitioner is that 'with' is to be read as 'including'. The schedule only qualifies "the properties". The schedule does not include the North Mill. But the schedule, includes a part of the properties of the jute division and specifies, and classifies them. The jute division, which includes the north mill together with the said part was transferred to them, according to their argument.

According to the respondent all that vested by the said order was described in the schedule and no other property vested.

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These two approaches in interpretation have a hairline difference but the results are opposite and far reaching for the party to be affected by either interpretation.

Form 42 of the Company Court Rules 1959 prepared under Rule 84 prescribes a form for an order under Section 394 of the Companies Act, 1956. According to this form the language of the first paragraph of the order should have been: 'all of the property, rights and powers of the transferor company specified in the first, second and third parts of the Schedule hereto be transferred without further act or deed to the transferee company and accordingly the same shall pursuant to section 394(2) of the Companies Act, 1956, be transferred to and vest in the transferee company'.

Paragraph 1 of the order dated 31st May 1993 (these orders are submitted in draft to the court by the applicant) is contrary to such form. This has resulted in ambiguity in that part of the order regarding the property that vested in terms of that order.

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Now, I come to schedule 'B'. Schedule 'B' is a detailed description of properties of the transferor company which are to vest in the petitioner. It is titled 'schedule of assets of the jute division of Fort Gloster Industries Limited to be transferred to and vested in Gloster Jute Mills Limited'.

Now, this schedule does not contain any property of the North mill.

In my opinion, the description of the schedule as assets of the jute division settles the above problem in interpretation. The schedule plainly clarified that the properties mentioned in that schedule were the properties of the jute division that were to vest in the petitioner. Therefore, although there is a lot of ambiguity in paragraph 1 of the order of this court as discussed above, this problem is resolved by the statement made at the top of the schedule. Therefore, the jute division described in para 1 of the scheme which is schedule 'A' to the order relates to the properties in schedule 'B' only. Only those properties have vested in the petitioner by the scheme of de merger as confirmed by this court.

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LAW:

Now, to the authorities.

The respondent has invited this court to dismiss this application on the ground that it was not a party to the agreement of 24th March 1988 as the property which was the subject matter of that agreement did not vest in the petitioner by the arrangement. Hence, no right arising out of that contract vested in them. The parties have asked this court to adjudicate this point.

SBP & Co. - vs. - Patel Engineering Ltd. and another, reported in (2005) 8 SCC 618 is a case in point. In paragraph 9 of that report the Supreme Court has said that the court in exercise of its powers under Section 11 of Arbitration and Conciliation Act, 1996 may have to determine its own jurisdiction. In determining such jurisdiction the court is to decide inter alia whether there was an arbitration agreement between the parties. Once the court decides the point the arbitrator cannot redecide it (see paragraph 12). In paragraph 19 the Supreme Court has recognized the power of the court to decide whether the

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dispute is covered by the agreement. The court is also empowered to decide whether the claim is barred by limitation or has been satisfied by mutual consent of the parties. In that case the dispute is not to be resolved to arbitration at all.

CONCLUSION:

In view of my discussion above, I have no doubt in my mind that the North mill which was the subject matter of the agreement dated 24th March 1988 did not vest in the petitioner. Further, in my opinion, no other right concerning the mill vested in the petitioner because only the rights concerning the property which had vested in the petitioner have been assigned to them by the scheme of de merger as approved by this court. Therefore, no right arising out of the contract dated 24th March 1988 vested in the petitioner.

In the circumstances, I hold on the basis of the above Supreme Court decision that there is no agreement between the parties, as the petitioner cannot claim any right under the agreement dated 24th March 1988.

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Hence I do not entertain this section 11 application made by the petitioner. This application is dismissed. In the facts and circumstances there is no order as to costs.

Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

Sd/- Indra P. Mukerji, J.
(I.P. MUKERJI, J.)

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Exd.
Bhabani Chatterjee
22.12.10.*

CERTIFIED TO BE A TRUE COPY

Prabir Kumar Das 22/12/10
Authorised under Section 76 of
the Indian Evidence Act, 1872
(Act-1 of 1872)