Form No. J.(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :

The Hon'ble Mr. Justice Ashim Kumar Banerjee

And

The Hon'ble Mr. Justice Shukla Kabir Sinha

A.P.O. No. 194 of 2012
C.P. No. 28 of 1993
C.A. No.145 of 2011

GLOSTER LTD.
Vs.
FORT GLOSTER INDUSTRIES LTD. & ANR.

AND

A.P.O. No. 287 of 2012
C.P. No. 28 of 1993
C.A. No.145 of 2011

BOWREAH JUTE MILLS (P) LTD.
VS.
GLOSTER LTD.

For Gloster Ltd.	:	Mr. S.K. Kapoor, Senior Advocate Mr. Jishnu Saha, Advocate Mr. Ravi Kapoor, Advocate Mr. P.K. Jhunjhunwala, Advocate Mr. B. Sharma, Advocate
For Fort Gloster Industries Ltd.	:	Mr. Debangshu Basak, Advocate Mr. Prantik Garai, Advocate Mr. S.K. Kundu, Advocate Mr. S. Rudra, Advocate

For Bowreah Jute Mills Pvt. Ltd.: Mr. P.C. Sen, Senior Advocate
Mr. Dhruba Ghosh, Advocate
Mr. Sanjoy Bose, Advocate
Mr. Dipnath Roy Chowdhury, Advocate
Mr. Souvik Majumdar, Advocate
Ms. Abha Alley, Advocate

Heard on : August 24, 27, 29 and August 30, 2012

Judgment on : September 13, 2012.

ASHIM KUMAR BANERJEE.J:

BACKDROP :

Fort Gloster Industries Ltd. (hereinafter referred to as the 'Fort Gloster') had two divisions; cable division and jute division. The company, although a public limited company, had scattered shareholding amongst the members of the public as well as financial institutions. Bangur family, a family of industrialists in the State, held the controlling block of shares. In 1992 the Board of Directors decided, for proper expansion and development, the cable division and jute division should have independent entities. They proposed a scheme of demerger. Accordingly, Fort Gloster retained the cable division and transferred the jute division to a new company named as Gloster Ltd. (hereinafter referred to as 'Gloster'). The jute division

had two mills, North mill and New mill. Prior to its demerger in the year 1988 Fort Gloster entered into an agreement with Hooghly Mills Ltd. (hereinafter referred to as Hooghly), the owner of a neighboring jute mill to sell the North Mill along with vacant land attached thereto. The liability attached to the North Mill was also transferred to Hooghly. By the agreement of sale, the entire North Mill along with its assets and liabilities stood transferred to Hooghly. The physical possession was also handed over to Hooghly and since then they were carrying on business.

As per the agreement for sale, the sale was subject to appropriate permission from governmental authorities. A sum of rupees One Lac was kept as outstanding to be paid at the time of execution of the conveyance. Hooghly paid the entire consideration, save and except a sum of rupees One Lac, to Fort Gloster in 1988 itself. Hence, in 1992 when the Board of Directors decided to divide the cable division and jute division, they did not consider the North Mill as we find from the records. We however, do not find any valuation report in the records to support the share exchange ratio. We are thus not sure as to whether the management took into consideration the North Mill at

the time of demerger in 1992. The dispute arose between the members of the Bangur family as we are told, that did not have any direct link with the present litigation. After the overwhelming majority of the shareholders approved the scheme, this Court sanctioned it. The order of sanction was duly drawn up, completed and filed with the Registrar of Companies, West Bengal and the demerger attained finality. In the order as drawn up, the schedule appended to the order, did not take into account the North Mill. Be that as it may, after the demerger, both the companies were functioning under different heads of management.

The sale was not also concluded in respect of North Mill in absence of permission from the Land Ceiling Authority. Hooghly subsequently transferred the jute mill to Bowreah Jute Mills Pvt. Ltd. (hereinafter referred to as Bowreah) (Appellant in Appeal No. 287 of 2012).

In 2009, Gloster Ltd. filed an application with an innocuous prayer for correction of the drawn up order as according to them, since jute division stood transferred by demerger, the North Mill also came through such demerger, subject to the agreement for sale. Since sale was frustrated in absence of permission from the Land Ceiling

Authority, it should retain with them. However, because of the mistake crept in the order so drawn up, it would need correction. Gloster also took the plea that the order was required to be drawn up as per Form No. 42 of Company Court Rules, 1959. While doing so, the portion as statutorily required to be incorporated *"and all other the property, rights and powers of the transferor company"* was omitted. Correcting the drawn up order should incorporate that. Prayer (a) of the Judge's summons is quoted below :

"The order dated 31 May 1993 in Company Petition no. 28 of 1993, as drawn by the Company Department be clarified and/or modified and/or rectified by directing that not only the assets and properties, rights and interests of the Jute Division. specified in Schedule B of the said order but also all other properties, rights and interests of the Jute Division including North Mill of the transferor to and vested, without any further act or deed, in the applicant company under Section 394 (2) of the Companies Act, 1956 but subject to all charges affecting the same".

Fort Gloster contested the said proceedings. Bowreah also intervened. Initially they were allowed to participate, however at the final hearing learned Judge found, they could not have any say in the matter. Learned Judge dismissed the application by holding that the North Mill was not in contemplation when the sanction was prayed for and granted. Gloster filed the appeal being A.P.O. No. 194 of 2012 without making Bowreah a party. Bowreah intervened. The Division Bench, while admitting the appeal, permitted Bowreah to make submission. However, at the time of hearing of the application, Gloster objected to their presence as according to them, the learned Judge had already held that they would not be entitled to hearing. Hence, they should not be heard. At that juncture, we granted leave to Bowreah to file independent appeal against the order of the learned Judge, holding that they were not necessary party in the proceeding. Pursuant to such leave, Bowreah filed Appeal No. 287 of 2012.

RIVAL CONTENTIONS:

Mr. Jishnu Saha, learned counsel appearing for Gloster opened the case placing the scheme. He referred to page-368 of the paper book to mention that in the Memorandum of Understanding between Shree Kumar Bangur and Benu Gopal Bangur both the Bangur groups

agreed to divide the company on 50-50 basis. He referred to clause-13 of the said Memorandum of Understanding to show that the land, if acquired by the Government from the areas allotted to any of the parties, would go from the areas of the respective parties and the compensation, if received, would automatically go to the concerned party who lost the land. It was agreed that Gloster having jute mill division would be responsible for execution of the conveyance in favour of Hooghly. Relying on such clause, Mr. Saha contended that the parties kept in mind the North Mill at the time of entering into agreement for partition of the family business. Hence, Gloster was entitled to get back the North Mill. In case any part of the said property was subsequently transferred to the Government by acquisition or vesting or otherwise, Gloster would be entitled to the benefit of compensation. In short, the rights and responsibilities in respect of North Mill would still remain with the jute division that stood transferred through demerger to Gloster and Gloster was entitled to have correction of the order as drawn up, while sanction of the scheme by this Court in 1992.

S.K. KAPOOR :

Mr. S.K. Kapoor, leaned Senior Counsel also appearing for Gloster, while taking over from Mr. Saha, placed the list of dates and the judgment and order impugned to contend that the learned Judge had thoroughly misunderstood the innocuous prayer of Gloster to have a correction that had been required to be done as the order as drawn up would contain an inherent lacuna being contrary to Form-42. He referred to the schedule as well as the scheme particularly schedule-F to contend that the parties had contemplated transfer of jute division that would obviously include, what right Fort Gloster had in respect of the North mill after execution of the agreement for sale with Hooghly in 1988. He admitted that no valuation had been done at the time of demerger. It was really a division of business between two groups on 50-50 basis as contained in the Memorandum of Understanding. He referred to page-101 of the petition where schedule of assets were appended to, that would not include North Mill. Mr. Kapoor relied on the Apex Court decision in the case of **Ram Chander Vs. The State of Haryana** reported in **1981 Volume-III Supreme Court page 191** equivalent to **All India Reporter 1981 page-1036**. Paragraph-3 was relied upon wherein the Apex Court

observed, *"The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure"*. Citing the above passage Mr. Kapoor commented on the role of the learned Judge while disposing of the said application. He referred to the judgment and order impugned to say, learned Judge, instead of dealing with the arguments that was advanced by the other parties, assumed the role of an objector to contest the prayer of the appellant that was deprecated by the Apex Court.

DEBANGSHU BASAK :

Mr. Basak appeared for Fort Gloster. His argument was somewhat amazing. According to him, neither Gloster nor Fort Gloster would have any right to claim North Mill back. According to him, North Mill was not in contemplation at the time of demerger. Hence, the attempt on the part of Gloster to incorporate the same was without any basis. He would further contend that the decision of another

learned Judge while dismissing an application under Section 11 of the Arbitration and Conciliation Act, 1996 appearing at page 233-251 of the paper book, would operate as *res judicata* and both the Fort Gloster and Gloster were precluded from contending otherwise. North Mill was no more an asset of Fort Gloster or Gloster. Hooghly owned the North Mill in terms of the agreement dated March 24, 1988. The scheme was propounded in 1993 long after the agreement for sale. Gloster was not even born in 1988. The Board of Directors of Fort Gloster approved the agreement as would appear from page-625 of the paper book in Appeal No. 287 of 2012. Clause-9 of the scheme would show, the share exchange ratio would not depend upon North Mill being a part to the said scheme. Mr. Basak further contended, no mistake crept in the order as drawn up. The balance-sheet for the relevant years would show that the Fort Gloster, prior to its demerger, accepted the transfer with all assets and liabilities of the jute division pertaining to North Mill, to Hooghly that could not come back to the jute division or that the parties to the demerger contemplated so. He referred to the schedule to the balance-sheet particularly schedules 13 and 18 to show that the concerned property was shown to have been transferred to Hooghly. Page-629 of the said

paper book would show that the payment was also received. Pages 628 and 629 of the paper book would show that the agreed consideration was rupees Two Crores out of which Fort Gloster received rupees1.39 Crores through pay order dated March 28, 1988. The balance rupees Sixty Lacs was adjusted against leave and bonus liability of the workers in terms of clause-7 of the agreement and a sum of rupees One Lac was kept outstanding to be paid at the time of execution and registration of conveyance. He lastly contended that the order of sanction dated May 31, 1993 was duly drawn up and there was substantial compliance of Form-42. It would need no further correction. In any event, the petitioner being the Gloster did not make any averment in the pleading as to the mistake. They approached the Court after nineteen years and the application would be grossly delayed and barred by the provisions of Article 137 of the Limitation Act. He prayed for dismissal of the appeal filed by Gloster. He did not make any comment on the other appeal. He rather indirectly supported Bowreah, claiming title over the North Mill through Hooghly.

P.C. SEN :

Mr. P.C. Sen, learned Senior Counsel appearing for Bowreah adopted the submissions made by Mr. Basak. Mr. Sen based his argument principally on *res judicata* so advanced by Mr. Basak. He took us to the agreement for sale to show that it was nothing but a concluded sale subject to further formalities being completed. He further contended that before the Arbitration Court Gloster did not take the plea of mistake. The learned Single Judge held that Gloster was not a party to the arbitration agreement between Fort Gloster and Bowreah. The scheme also did not transfer the interest of North Mill to Gloster. Hence, Gloster was not entitled to invoke the arbitration clause. Such decision attained finality. Hence, Gloster was not entitled to contend otherwise. He placed the decision of the Arbitration Court in detail to contend, it would operate as *res judicata* as against Gloster. He lastly contended, having complied all formalities before the Registrar of Companies by filing the order as drawn up as per back in 1993 and having failed before the Arbitration Court the Gloster was not entitled to pray for correction. He relied on two decisions, one of the Apex Court in the case of **M. Nagabhushana Vs. State of Karnataka** reported in **2011 Volume-III Supreme Court case page-408** and the other of this Court in the

case of **Abdul Gani & Anr. Vs. Nabendra Kishore Roy & Ors.** reported in **Volume-XXXIII Calcutta Weekly Notes page-876**. He lastly contended, Code of Civil Procedure would be applicable in the case of company proceedings. Section 11 of the Code would squarely be applicable in the instant case. The decision of the Arbitration Court would operate as bar in considering the prayer of Gloster. Mr. Sen also cited the House of Lords decision in the case of **The Rev. Oswald Joseph Reichel, Clerk (Pauper) and The Rev. John Richard Magrath** reported in **Volume- XIV Appeal Cases page-665**.

S.K. KAPOOR IN REPLY :

Mr. Kapoor, in reply distinguished the English case to contend that the facts would defer. On the Apex Court decision in the case of **M. Nagabhushana** (supra) Mr. Kapoor contended, the issue was decided between the same party whereas in the present case the arbitration proceeding was between the Gloster on the one hand and Bowreah on the other hand and the present application was between the Gloster and Fort Goloster where the learned Judge specifically held that Bowreah was not a necessary party. Hence, the proposition of law as to *res judicata* would not apply at all. He rather conceded that North Mill was possibly an issue that would have to be decided in the

pending civil action between the parties. He would rather insist to have correction of the order by incorporating the words so missed out from Form-42. It would have statutory force. On the issue of limitation, he contended, the reasons were assigned as to why Gloster did not approach the Court earlier. It was only after mistake surfaced during other proceedings, Gloster came to know of the said mistake and approached the Court. With the leave of the other counsel, he cited the Apex Court decision in the case of **Chandra Bhal Vs. The State of U.P.** reported in **1971 Volume-III Supreme Court Cases page-983** and in the case of **Narayanan Vs. Kumaran & Ors.** reported in **2004 Volume-IV Supreme Court Cases page-26**.

Mr. Dhruba Ghosh, while distinguishing Chandra Bhal (supra) :

Mr. Dhruba Ghosh, learned counsel dealt with the decision in the case of **Chandra Bhal** (supra) to say that the said decision would rather support Bowreah, not Gloster.

OUR VIEW ON THE CASES CITED :

The Rev. Oswald Joseph Reichel :

Bishop of a Church filed a suit claiming that he was vicar of the benefice. He lost the case. Subsequently someone else was appointed Bishop. When he wanted to take charge the earlier Bishop objected contending that he was the vicar. The House of Lords affirming the decision of the Court of Appeal, held that there was an inherent jurisdiction in the Court to strike out the statement of defence as frivolous and vexatious and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed. Lord Halsbury would say, "*My Lords, I think it would be a sandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action*". It was the self-same issue that was being considered

in the earlier proceeding. Hence, the House of Lords declined to go into the issue again.

Chandra Bhal (supra) :

Here the Apex Court held that the relevancy of the judgment in other trials would not be applicable, although involving same issue.

Ram Chander Vs. The State of Haryana reported in **All India Reporter 1981 Supreme Court page-1036 :**

The paragraph quoted hereinbefore would comment on the role of a Judge in an adversarial proceeding.

Abdul Gani & Anr. Vs. Nabendra Kishore Roy & Ors. reported in **Volume-XXXIII Calcutta Weekly Notes page-876 :**

In this decision the Division Bench of our Court once again interpreted the phraseology *"Matter in issue"* within the meaning of Section 11 of the Code to say, it is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it and the cause of action on which it is based and the rule of

res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. The Division Bench further observed, *"It is the matter in issue and not the subject-matter of the suit that forms the essential test of res judicata"*.

Narayanan (supra) :

The Apex Court herein observed, *"It is a well-established principle that when there is inconsistency in the body of the document, containing the evidence clause and the schedule, the former prevails over the latter"*. Citing this decision, Mr. Kapoor contended that the scheme itself would be the guiding factor and not the schedule.

M. Nagabhushana (supra) :

Paragraph-12 of this decision was relied upon by Mr. Sen to support his interpretation of *res judicata*. The said paragraph being relevant and is quoted below :

"The principles of res judicata are of universal application as they are based on two age-old principles, namely, interest reipublicae ut sit finis

litium which means that it is in the interest of the State that there should be an end to litigation and the other principle is nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. The doctrine of res judicata is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the question litigated and should for ever set the controversy at rest".

Our understanding of the law and its application in the present case :

Let us first decide the issue of *res judicata*. The learned Single Judge held it in favour of Mr. Kapoor. His Lordship held that the plea of *res judicata* may not be applicable in the present case. To decide this question let us consider the decision of the Arbitration Court in this regard. The judgment would appear at page 233-251 of the paper book. His Lordship held, *"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 merger as approved by this Court".

From the cause title we find, it was between Gloster and Hooghly wherein Gloster prayed for reference to arbitration the dispute they had with Hooghly in relation to the agreement for sale dated March 24, 1988. Fort Gloster was not a party to the said proceeding whereas in the present proceeding, Bowreah claiming right through Hooghly mill, was considered by the learned Judge, not a necessary party. Hence, the parties to the arbitration proceeding and the company proceeding are different, having Gloster a common feature.

Section 11, on a close reading, would depict two requisites; the matter in issue, must be the same and both the proceedings must be between the same parties. The decision in the other Court might have a persuasive value in the latter proceeding. However, it would not operate as *res judicata* as parties were not same that would take care of the plea of *res judicata.*

Let us now come to the core issue. From the agreement dated March 24, 1988 it was clear that the parties to the said agreement

understood the same as concluded subject to formalities being completed on the permission from the statutory and/or governmental authorities being received. If the agreement did not stipulate, what would happen in case the permission would not come, it would be for the parties to take appropriate steps. We are told, civil suits are pending and/or likely to be filed on the issue. We refrain from making any comment that might prejudice the rights of the parties in the civil action. We only say, at the time of sanction of the scheme, the parties having the management and control of the original company having cable and jute division wanted to divide two divisions being cable division and jute division on equal basis. Whether the jute division would include the eventuality that would arise in case North mill comes back from the clutches of Hooghly Mills or Bowreah Mills as the case may be that would be a subject-matter for the Civil Court to decide. It would not be proper for us to allow prayer (a) as a whole that too, after nineteen years of sanction. It would be absolutely travesty of justice if we allow such prayer under the guise of correction. We would only observe that the parties contemplated, the jute business and cable business as of 1992 would be divided between two groups of Bangurs through demerger. We

would prefer to stop there. Being a Court of record, we however wish to correct the mistake that crept in the drawn up order by incorporating the words so inadvertently omitted. We thus allow prayer (a) to the extent that the order dated May 31, 1998 as drawn up be corrected by incorporating the following words, *"and all other the property, rights and powers of the transferor company in jute division"*.

The Judgment and order of the learned Single Judge stands modified accordingly. Appeals are accordingly disposed of without any order as to costs.

We abundantly make it clear that our observations as contained herein including those of the learned Single Judge impugned herein must not prejudice the rights and contentions of the parties in the pending and/or future civil proceedings on the issue.

Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[SHUKLA KABIR (SINHA),J.]

Later :

Learned Counsel for Bowreah Jute Mills and Fort Gloster Industries pray for stay of the operation of the judgment and order. Such prayer is considered and rejected.

Shukla Kabir (Sinha), J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[SHUKLA KABIR (SINHA),J.]