

(1995) 02 CAL CK 0019
In the Calcutta High Court
Case No : Matter No. 2807 of 1994

G.V.S. Packaging P. Ltd.

APPELLANT

Vs

Vinode Textile Industries P. Ltd.

RESPONDENT

Date of Decision : 09-02-1995

Acts Referred:

Arbitration Act, 1940 — Section 34

Companies Act, 1956 — Section 439

West Bengal Premises Tenancy Act, 1956 — Section 2, 3, 30, 31, 5

Citation : AIR 1995 Cal 260 : (1995) 1 CALLT 413

Hon'ble Judges : Nikhil Nath Bhattacharjee, J

Bench : Single Bench

Judgement

1. This is an application under S. 34 of the Arbitration Act, 1940 for stay of a winding up proceedings pending before the Company Court. The winding up proceeding was instituted by the respondents for failure of the petitioner in paying rents amounting to Rs. 92,000/- to the respondents.

2. The petitioner's case in short is that an indenture of lease dated 28th February, 1986 was executed and registered between the petitioner on the one hand and the respondent on the other for lease of a premises for 20 years at a monthly premium of Rs. 11500/- and Rs. 1 lakh being deposited as a security deposit by the lessee with the lessor which is not to carry any interest and refundable at or on termination of the tenancy between the parties. The petitioner's case is that this is a premises tenancy and by virtue of S. 5 of the Premises Tenancy Act as to consideration can pass for creation of premises tenancy, there was a violation which is to be visited with penalty under S. 30 of the Act, the deposit of Rs. 1 lakh by the petitioner in that event is liable to be adjusted against monthly rent. Petitioner did not pay monthly rent from April, 1993 to December, 1993. It is alleged that if adjustment is allowed there would not be any question of any rent being in arrear. There is also a provision in the said indenture of lease for referring disputes and differences between the parties touching or arising in respect of the lease to arbitration and that being so,

S. 34 of the Arbitration Act has every manner of application in the winding up proceedings that has been brought by the respondent/lessor against the petitioner/ lessee and accordingly the petitioner has prayed for stay of the Company Petition No. 35 of 1994 and mandatory injunction directing the respondents to adjust the said sum of Rs. 1 lakh against arrear monthly rents amounting to Rs. 92,000/-.

3. Mr. Kar appearing for the respondent submitted at the outset that this is not a question of adjustment of Rs. 1 lakh deposited by the respondent as the respondent has already fallen in arrear of paying rents amounting to Rs. 2 lakhs twenty five thousand. Mr. Kar submitted that the present petitioner are unable to pay rents for some reason or other and that being so are not entitled to carry on their business and as such the winding up proceedings had to be brought. Mr. Kar also submitted that there is practically no dispute between the parties relating to the deed of indenture being referable to arbitration and that from the conduct of the present petitioner it will appear that they are not ready and willing to refer the matter to arbitration. Mr. Kar's further submission is that this being a lease in respect of a running factory premises with fittings and fixtures, West Bengal Premises Tenancy Act has no application. He also contended that S. 34 of the Arbitration Act has no applicability in a pending Company Court case for winding up. In respect of this contention Mr. Kar has relied on the decisions of Patna, Madras and Punjab & Haryana High Courts reported in AIR 1968 Patna 289,41 Company Cases 548 and 70 Com Cas 197. It may be pointed out in this connection that against Mr. Kar's submission on this point Mr. Saha, learned Advocate appearing for the respondent placed his reliance on a decision of a single Judge of this Court not yet reported. It appears that the said judgment was delivered on January 24, 1994 in Company Petition No. 84 of 1992, (Central Inland and Water Transport Corporation Ltd. v. Neptun Engineering Services) wherein all such decisions cited by Mr. Kar have been distinguished by Hon'ble Mr. Justice Ajoy Nath Ray of this Hon'ble Court. I have gone through a xerox copy of the said judgment and I feel I have no reason to differ from the said decision. Accordingly the question whether S. 34 of the Arbitration Act has any applicability in a company case or not is set at rest so far at least this case is concerned. Agreeing with the said decision, I hold that S. 34 of the Arbitration Act is applicable in a winding up proceedings and Mr. Kar's objection on this score is overruled.

4. Regarding Mr. Kar's objection that there is no dispute between the parties relating to the Deed of Indenture so much so that arbitration proceeding can be taken recourse to, it appears that in paragraph 10 of the present petition, the petitioner has noted the disputes which are referable to arbitration. The alleged disputes are four in number and mentioned in sub-paragraph (a) to (d). On a close reading of these paragraphs it will appear that these are all interlinked and hinged on the question whether Premises Tenancy Act has any applicability in the instant lease. The provision as to arbitrator as contained in the said lease provides that every dispute or difference arising between the parties to the said

deed in the matter of working out the agreement shall be referred to arbitration and the provisions of the Arbitration Act shall be applicable. The disputes Nos. (a) to (d) of paragraph 10 of the petition do not appear to be in the working of the agreement or in pursuance thereof but is a question of law whether this lease comes within the purview of the West Bengal Premises Tenancy Act. Mr. Saha in this connection relied on a decision in *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another*, wherein it was held that whenever there is a dispute between the parties over which arbitration clause in question applies, then the application under S. 20 cannot be dismissed on the ground that the claim would not ultimately succeed either on fact or on law and in such a case the dispute has to be left for the decision of the arbitrator But here it is not the question that the dispute of difference between the parties had arisen out of the Agreement of Lease or while working out the lease agreement. It is purely a question of interpretation of a Statute to find out whether the instant lease is independent of the W.P.T. Act or not. In this view of the matter the Supreme Court decision is distinguishable and in all consideration I hold that the disputes raised in paragraph 10 of the Application is not referable to arbitration.

5. The instant lease by a registered Indenture is for 20 years u/s 3 of the West Bengal Premises Tenancy Act all leases of more than 21 years do not come within the ambit of the West Bengal Premises Tenancy Act. That being so, the instant lease straight-way comes under the purview of the West Bengal Premises Tenancy Act. But Mr. Kar submitted that a lease of a running factory with fittings and fixtures is not a lease of a premises to be governed by the West Bengal Premises Tenancy Act. In this connection Mr. Kar has placed his reliance on a decision of this court reported in 82 CWN 1045 (*Alliance Jute Mills v. Alliance Mills*) rendered by Sabyasachi Mukherjee, J., as His Lordship then was. In the said case, there was a lease for the running of a mill and the different covenants in the said lease indicated that the intention of the lease was to run the mill. Also other provisions in the Deed of Lease were indicative that the intention of the lessee was to run the mill. On such facts and circumstances, it was held that the lease of the mill of the type as in that case was not a lease of a premises but a lease of a factory beyond the purview of the West Bengal Premises Tenancy Act. Mr. Saha appearing for the respondents in this connection submitted that the said decision did not lay down a general proposition of law but should be taken as an exception and in the connection he referred to some decisions where lease of a cinema hall or a market place with building thereon was treated as lease of the premises. Mr. Kar on the other hand by referring to *Uttamchand Vs. S.M. Lalwani*, submitted that the lease of a Dal Mill was not taken as lease of an accommodation, the term "accommodation" under the M. P. Accommodation Control Act has almost identical definition as the premises u/s 2(f) of the West Bengal Premises Tenancy Act. In the aforesaid Supreme Court decision the test that was laid down to determine whether a building is a premises to be governed under the West Bengal Premises Tenancy Act or is part of a factory to take it out of the ambit of the said Act. It was laid down that in such a case the court is to

determine the dominant character of the lease by asking itself as to what was the intention of the parties for executing the document and bearing this principles in mind, Sabyasachi Mukherjee, J. held in the Calcutta decision cited above that the mill of the type under consideration would not come within the purview of the West Bengal Premises Tenancy Act. Therefore, the said test is to be applied in the instant case also. It appears that what was leased out was three factory sheds, one office block and one power house along with fittings and fixtures in the said factory and user of lavatories in common with the landlord "for the purpose of establishing and/or running a factory for manufacturing high density polythene bags and allied products only". The lessee was entitled to diversify with previous consent of the landlord. The lessee was to keep the demised premises insured against fire etc. for a sum of Rs. 7,30,000/-. The lessee was also given liberty to assign or mortgage his leasehold interest by way of collateral security to West Bengal Financial Corporation "and/or to nationalised banks. All these provisions in the agreement unmistakably point out that the purpose of the lease was not to let out a premises for residential purpose but to allow the factory to be run under specific conditions and that being so, the lease cannot be termed as a lease of the premises as defined u/s 2(f) of the West Bengal Premises Tenancy Act. This being the position it follows that whether the lease is below 20 years or terminable before expiry of the said period is no factor for holding that this lease is a lease of a premises and governed by the. West Bengal Premises Tenancy Act.

6. Regarding the objection that the respondent was not eager and willing to refer the disputes to arbitration. Mr. Saha relied on a decision reported in Food Corporation of India Vs. Thakur Shipping Co. and Others, to highlight that when there are repeated demands by one party to refer a dispute to arbitration and other party fails to respond then only the court can presume unwillingness or lack of eagerness on the part of the other party to refer the dispute to arbitration. In the instant case rents fell in arrear and by two successive notices dated 15th September, 1993 and dated 16th December, 1993, the respondent drew attention of the petitioner regarding their failure to pay rent. Mr. Kar submitted that the petitioner who are now raising the point that there is a dispute between the parties, did not take any step to refer the dispute to arbitration. The provision as to arbitration provides that either party is to elect an Arbitrator and the Joint Arbitrators would elect an Umpire. Mr. Kar submitted that when repeated demands were made for payment of rent the petitioner ought to have referred the matter straightway to arbitration by electing one Arbitrator and asking the respondent to elect his own nominee. That having not been done, it should be taken that the respondent was not eager and willing to refer the matter to arbitration. And in that view of the matter, Mr. Kar submitted, this application should be dismissed.

7. There is no dispute that the petitioner failed to pay rent amounting to Rs. 92,000/-. The respondent repeatedly asked them to pay the rent but no favourable response having been received, the application for winding up was

filed and thereafter the respondent has come up with the present application. In the meantime more than 2 lacs of rupees have fallen in arrear. Considering all these I proposed to Mr. Saha whether his client was agreeable to pay the rest of the sum beyond Rs. 1 lac prayed for adjustment and to get the matter arbitrated. Mr. Saha took time to obtain instruction but failed to respond to my offer. I take it that there is little bona fide on the part of the respondent to raise any dispute to arbitration; clearly the purpose is to delay the payment of rent and frustrate the course of justice in the Company Case also.

8. To sum up Section 34 of the Arbitration Act is applicable in respect to Company Case for winding up but the disputes sought to be raised are not referable to arbitration on the grounds first, that the disputes sought are not the disputes touching the agreement and secondly, this being a lease of a factory, West Bengal Premises Tenancy Act has no application and so Section 5 read with Sections 30 and 31 of the West Bengal Premises Tenancy Act are not attracted and question of adjustment of considerations lying in deposit would not arise. In my view this is the lease of a factory and not a lease of a premises. Petitioner's bona fide are also lacking in preferring this application.

9. For the reasons aforesaid I, therefore, hold that the petition u/s 34 of the Arbitration Act is not sustained and the same stands dismissed but in the circumstances without costs.

10. All parties are to act on a signed copy of the minutes of the operating portion of the judgment and order on the usual undertaking.

11. Petition dismissed.