

Castron Technologies Limited and Vs. Castron Mining Limited

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Court : Kolkata

Decided On : Dec-02-2011

Appellant : Castron Technologies Limited and

Respondent : Castron Mining Limited

Judgement :

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Form No. J. (2)

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

Original Side

Present:

The Hon'ble Mr. Justice Subhro Kamal Mukherjee.

C.A. No. 209 of 2006

C.A. No. 667 of 2006

C.A. No. 96 of 2007

C.A. No. 689 of 2009

C.P. No. 594 of 2002

Castron Technologies Limited and another

Versus

Castron Mining Limited

For the Castron Technologies Limited: Mr.Soumendra Nath Mukherjee, Mr.
Ratnanko Banerjee,

Mr. Kuldip Mullick,

Mr. Susanta Bose.

For the Castron Mining Limited: Mr. Anindya Kumar Mitra, Mr. Debanshu Basak,

Mr. Piyush Meharia,

Mr. Amit Meharia,

Ms. Aimon Abdullah.

Date: December 2, 2011.

The Court: I am invited to decide following four applications being C.A. no. 209 of 2006, C.A.Tender no. 209 of 2006 (re-numbered as C.A. no.667 of 2006), C.A. no.96 of 2007 and C.A.no.689 of 2009.

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C.A. no.209 of 2006 is an application purportedly filed by Castron Technologies Limited and Castron Mining Limited (in short, CTL and CML respectively) for recalling of the order dated May 13, 2003, inter alia, sanctioning a scheme of arrangement passed in C.P. no.594 of 2002 connected with C.A. no.202 of 2002.

The application filed under C.A.Tender no 209 of 2006, which has, since, been re-numbered as C.A. no.667 of 2006, is an application filed by CML and Anup Agarwalla seeking directions for implementation of the scheme sanctioned by the

order dated May 13, 2003 in C.P. no.594 of 2002 connected with C.A. no.202 of 2002.

C.A. no. 96 of 2007 is an application filed by CML and the said Anup Agarwalla for leave to rely upon letters dated May 18, 2006, June 7, 2006, July 6, 2006, August 12, 2006, August 25, 2006, August 30, 2006 and September 4, 2006 - all issued by CTL; letter dated September 4, 2006, issued by Anup Agarwalla of CML and letters dated November 17, 2006, December 20, 2006, December 21, 2006 and December 26, 2006 being annexures 'A', 'G', 'I', 'J', 'K', 'L', 'M', 'N', 'O', 'P' respectively and, also, for leave to rely upon inspection reports dated July 28, 2006 and September 5, 2006 being annexures 'R' and 'S' respectively and, also, to rely upon a Press Report dated December 24, 2006 being annexure 'Q', at the time of hearing of the C.A. no. 667 of 2006.

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In substance, in the said application, the petitioners pray for taking into consideration events subsequent to the order passed by this Court and for leave to rely upon certain documents in support of their application. In C.A. no.689 of 2009 is filed by CML and the said Anup Agarwalla seeking leave to bring on record the letter of Central Government dated February 26, 2009 being annexure 'A' to the said application, the letter dated May 27, 2009 being annexure 'B' to the said application and the deed of rectification dated June 8, 2009 being annexure 'C' to the said application.

Facts relevant for the purpose of disposal of all the said four applications are as under: -

(a) CTL and CML (formerly known as Industrial Alliance Private Limited) were family companies of the Agarwallas.

(b) On April 18, 1996, CTL applied for grant of lease of an abundant underground Coal Mine in Giridi, then in the State of Bihar, now in the State of Jharkhand. The mine was known as Brahmadiha Coal Mine. (c) On May 26, 1999, Agarwallas entered into a family arrangement concerning control and management of the said

companies. It was, inter alia, agreed that upon the said mining lease being granted, which was applied for by CTL, the said mining lease would be assigned in favour of Parameswar Kumar Agarwalla or his nominees.

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(d) The Clause 5 of the family arrangement runs as under:- "5. The First Party has applied for grant of lease of a Coal Mine in Giridi, Bihar in the name of CTL and in the case, the said lease is granted then in such event, the Third Party hereto agree that the Directors of CTL (castron) shall assign and transfer the right, title and interest of Castron in the said lease-hold property in favour of the First Party or his nominees. 5.1. All costs and expenses so far incurred or is likely to be incurred in the matter of obtaining such lease from the date of applicability till the grant of lease and, thereafter have been and shall be paid by the First Party and the Third Party shall not be liable on account of such costs and expenses. 5.2. The First Party will be entitled to follow up the application for grant of lease on behalf of CTL.

5.3. Unless the transfer as contemplated in Clause 5, hereinabove, is made, the Third Party agrees to have granted from Castron an irrevocable registered Power of Attorney in favour of the First Party or his nominee to do all acts, deeds and things as may be required in connection with the said Coal Mine in Giridi.

5.4. It is clarified that upon grant of the lease of the said Coal Mine, the First Party shall have absolute right, title and interest in the said Coal Mine and be entitled to deal with the same in any manner as he may deem fit and proper 5

and the other parties hereto shall not have any claim or demand in the said Coal Mine in any manner whatsoever."

(e) On March 8, 2002, a joint petition was filed by CTL and CML under Sections 391 and 393 of the Companies Act, 1956, for sanctioning scheme of arrangement in the light of the said family arrangement. (f) On June 18, 2002, the State of Jharkhand executed the mining lease in respect of the said coal mine in favour of CTL.

(g) On July 1, 2002, the said deed of lease was registered in favour of CTL. (h) On June 6, 2003, the advocates-on-record of CTL and CML issued a notice addressed to the Secretary, Ministry of Coal, Government of India, intimating that CTL and CML had filed a petition for confirmation of a scheme for transfer of Coal Mine Division held in the name of CTL in favour of CML. Similar notices were, also, issued to the Chief Secretary, Government of Jharkhand and the Secretary, Mines and Geology Department, Government of Jharkhand.

(i) On April 28, 2003, the Regional Director, Department of Company Affairs, intimated the learned Central Government Advocate that, as neither any complain nor any representation was received against the proposed scheme of amalgamation/arrangement, the Central Government had decided 6

that the prayer for sanctioning of the scheme of the amalgamation/arrangement need not be opposed.

(j) On May 13, 2003, Ashim Kumar Banerjee, J. sanctioned the proposed scheme of arrangement.

(k) On July 18, 2003, both CTL and CML filed form no. 21 along with copies of the said order dated May 13, 2003 in the office of the Registrar of Companies. Both the said applications on behalf of CTL and CML were signed by Mahendra Kumar Agarwalla.

(l) In the balance sheet of CTL for the years 2003-2004 it was shown that, in accordance with the said scheme of arrangement, as approved by this Court on May 13, 2003, the Mining Division of CTL has been transferred and vested to CML as a going concern with effect from October 31, 2001. It was, also, recorded that, in terms of the said scheme, the entire undertaking, properties, assets, debts and liabilities, contingent liabilities, duties and obligation of the mining division have been transferred to CML with effect from October 31, 2001.

(m) On July 2, 2004, Mahendra Kumar Agarwalla, Director, CTL, issued a letter to the Secretary, Department of Mines and Geology, Government of Jharkhand, through the District Mining Officer, Giridi, requesting the said 7

authorities for granting permission to transfer the mining lease held in the name of CTL to CML in terms of the order of this Court dated May 13, 2003. (n) On October 1, 2004, the Deputy Commissioner, Giridi, issued a letter to the Director of Mining, Department of Mining and Geology, Government of Jharkhand, recommending the proposal for transferring the said mining lease in favour of CML.

(o) On February 4, 2005, the Deputy Secretary, Department of Mines and Geology, Government of Jharkhand, addressed a letter to the Deputy Commissioner of Giridi, requesting him to submit a report as to whether the conditions enshrined in the departmental sanction order dated May 6, 2005, was complied with by CTL or not.

(p) On February 15, 2005, the Coal Controller, Government of India, granted permission to CTL to open Karharbari (Lower) Seam of Brahmadiha Open Cast Colliery.

(q) On May 25, 2005, CTL addressed a letter to the Secretary, Department of Mines and Geology, Government of Jharkhand, expressing their intention to withdraw their application for transfer of Coal Mining lease in favour of CML. (r) On July 13, 2005, CTL addressed a similar letter to the District Mining Officer, Giridi, expressing their intention to withdraw their application for transfer of mining lease in favour of CML.

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(s) On August 19, 2005, the writ petition filed by CTL in the High Court of Jharkhand at Ranchi being W.P.C. no.3961 of 2005, inter alia, seeking direction upon the respondents in the said writ petition to dispose of their applications for withdrawal of their applications for transfer of the mining lease, came up for hearing before M.Q. Iqbal, J., in presence of CML. (t) M. Q. Iqbal, J., dismissed the said writ petition holding, inter alia, that the said Court was unable to grant any relief to the writ petitioner unless the order passed by this Court in the company petition was modified. However, Iqbal, J. observed that CTL, if so advised, might move the appropriate authority for redress of its grievances.

(u) On March 28, 2006 Mahendra Kumar Agarwalla affirmed an application for recalling of the order dated May 13, 2003 purportedly on behalf of both CTL and CML. This application is registered as C.A. no. 209 of 2006.

(v) On May 10, 2006 CML filed an application for implementation of the said scheme. The application was tendered under C.A. Tender no. 209 of 2006. The said application has, since, been registered as C.A. no. 667 of 2006. (w) On February 6, 2007 CML and the said Anup Agarwalla filed an application, inter alia, for taking note of subsequent events and for leave to 9

rely upon certain documents in support of their application. The said application has been registered as C.A. no.96 of 2007. (x) On February 26, 2009 the Under Secretary, Ministry of Coal, Government of India, intimated the Deputy Secretary, Department of Mining and Geology, Government of Jharkhand, that there was no provision in the Mines and Mineral (Development and Regulation) Act, 1957, requiring prior approval of the Central Government for the purpose of carrying out the orders of this Court as prior approval of the Central Government was not provided in the aforesaid Act. It was added, further, that the Central Government, therefore, could not have any objection to the implementation of the order of this Court.

(y) On May 27, 2009 the Deputy Secretary, Department of Mining and Geology, Government of Jharkhand, informed the Deputy Commissioner, Giridih that the State Government took the decision for substituting the mining lease held by CTL in favour of CML.

However, it was stipulated that all the terms and conditions of the said contract with CTL should remain as it was with CML. (z) On June 8, 2009, the State of Jharkhand executed a deed of rectification substituting the name of CML instead of and in place of CTL concerning the mining lease dated June 18, 2002.

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(aa) On November 16, 2009 CML and the said Anup Agarwalla filed an application seeking to rely upon the said letter dated February 26, 2009, letter dated May 27,

2009 and the said deed of rectification dated June 8, 2009 being annexures 'A', 'B' and 'C' respectively to the said application. Mr. Soumendra Nath Mukherjee, learned senior advocate, appearing in support of the application for the re-calling of the order dated May 13, 2003, argues that the order was passed in contravention of the provisions of Rule 37 of the Mines and Minerals Rules, 1960 (the said Rules in short) and, therefore, the scheme could not have been sanctioned by this Court. He submits that by sanctioning this scheme, this Court sanctions a voluntary transfer of the mining lease in violation of the provisions of the said Rules and, therefore, CML is not entitled to get the benefits under the scheme. He submits that, in the absence of previous consent in writing from the authorities concerned the scheme could not have been sanctioned.

The scheme was not for implementation of a family arrangement. Moreover, the family arrangement cannot be the basis for sanctioning the scheme.

Mr. Anindya Kumar Mitra, learned senior advocate, appearing for CML submits that the application filed under Sections 391 and 392 of the Companies Act, 1956 is not maintainable. Mr. Mitra submits that the 11

application for re-calling is a mala fide application. This application is not moved in the aid of the scheme, but for destruction of the scheme. Mr. Mitra submits that already the authorities have granted permission for such transfer; the State of Jharkhand has executed a deed of rectification substituting the name of CML instead of and in place of CTL. Mr. Mitra, finally, submits that the contract to transfer the mining lease is not invalid between the parties subject, however, to sanction from the proper authorities. Moreover, authorities have already granted sanction to such transfer.

Rule 37 of the said Rules, runs as under: -

"Rule 37. (1) The lessee shall not, without the previous consent in writing of the State Government and in the case of mining lease in respect of any mineral specified in (Part A and part B) of the First Schedule to the Mines and Minerals (Development and Regulation) Act, 1957 without the previous approval of the Central Government -

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or (b) enter into or make any bona fide arrangement, contract or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or 12

undertakings will or may be substantially controlled by, any person or body of persons other than the lessee:

Provided further that where the mortgagee is an institution or a Bank or a Corporation specified in Schedule V, it shall not be necessary for the lessee to obtain any such consent of the State Government. (1A) The State Government shall not give its consent to transfer of mining lease unless the transferee has accepted all the conditions and liabilities which the transferor was having in respect of such mining lease. (2) Without prejudice to the provisions of Sub-rule (1) the lessee may, transfer his lease or any right, title or interest therein to person who has filed an affidavit stating that he has filed an up-to-date income-tax on the basis of self-assessment as provided in the Income-tax Act, 1961 (43 of 1961), on payment of a fee of five hundred rupees) to the State Government: Provided that the lessee shall make available to the transferee the original or certified copies of all plans of abandoned workings in the area and in a belt 65 metres wide surrounding it:

Provided further that where the mortgagee is an institution or a Bank or a Corporation specified in Schedule V, it shall not be necessary for any such institution or Bank or Corporation to meet with the requirement relating to income-tax:

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Provided further that the lessee shall not charge or accept from the transferee any premium in addition to the sum spent by him, in obtaining the lease, and for conducting all or any of the operations referred to in rule 30 in or over the land leased to him.

(3) The State Government may, by order in writing determine any lease at any time if the lessee has, in the opinion of the State Government, committed a breach of any of the provisions of Sub-rule (1) or Sub-rule (1A) or has transferred any lease or any right, title, or interest therein otherwise than in accordance with Sub-rule (2):

Provided that no such order shall be made without giving the lessee a reasonable opportunity of stating his case."

Mr. Mukherjee, learned senior advocate, appearing in support of this application, strenuously argues that the scheme is in violation of the said rules and hence, it could not have been sanctioned. Thus, the order sanctioning the scheme has to be recalled.

Mr. Mukherjee placed strong reliance in the case of *Miheer H. Mafatlal -versus- Mafatlal Industries Limited* reported in 1997 (1) SCC 579 in support of his submission that the proposed scheme of compromise and arrangement is violative of the provisions of the said Rules and is, therefore, 14

contrary to public policy. This Court could not have sanctioned the scheme of arrangement.

Mr. Mukherjee, also, strongly relied upon the decision in the case of *Sudhansu Kanta -versus- Manindra Nath* reported in AIR 1965 Patna

144. In my view, *Sudhansu Kanta* (supra) is clearly distinguishable in the facts and circumstances of the case. It was dissolution of partnership action; one of partners brought a mining lease to the hodgepodge, without any document; there was no intention to transfer of the mining lease. An order of the Court sanctioning this scheme becomes binding on all the shareholders and a shareholder cannot, afterward, question it. The sanction of the Court operates as a judgment in rem.

In this company proceeding, however, the Central Government decided not to oppose the prayer for sanctioning of the scheme of amalgamation/arrangement. The application was filed in anticipation of getting consent or approval from the authorities.

In fact, both the Central Government and the State Government acted upon the scheme. The parties, also, acted upon the scheme. CTL, by letter dated July 2, 2004 requested the State Government to grant permission for transferring the mining leases in terms of the order of this Court. CML 15

transferred the employees in March 2005, submitted mining returns and paid surface rent.

In the balance sheet of CTL, it was shown that the mining division of CTL has been transferred and vested in CML as a going concern with effect from October 31, 2001.

Therefore, at least the scheme is binding between CTL and CML. I find substance of arguments of Mr. Mitra, the learned senior advocate, appearing for CML that the provisions of Sections 391 and 392 of the Companies Act can be invoked for the purpose of proper working of the compromise or arrangement. The power conferred by the said Sections on the Court is a power of superintendence, which may be exercised by issuing appropriate directions or effecting necessary modification so as to ensure the proper working of such compromise or arrangement. Therefore, direction or modification, whatever is necessary, is only to ensure proper working of the compromise or arrangement only to achieve that object and no other.

Mr. Mitra very rightly relied upon the decisions in the cases of S.K. Gupta and another -versus- K.P. Jain and another reported in 49 Company Cases 342 (Supreme Court) and Maddi Lakshmaiah and others -versus- 16

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The Supreme Court of India in the case of Boothalinga Agencies - versus- VTC Poriaswami Nadar reported in AIR 1969 Supreme Court 110 holds that the doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and, hence, comes within the purview of Section 56 of the Indian Contract

Act, 1872. However, the provisions of the said Section cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event, which is alleged to have frustrated the contract, arises from the act or election of a party.

In this case, CTL, unilaterally, moved an application for withdrawal of the application for transfer of the mining lease and, thereafter, filed a writ petition in the High Court of Jharkhand at Ranchi, to frustrate the arrangement. The transfer of mining lease by CTL to CML is complete. The consent of the State Government has, since, been obtained. Therefore, in no case, the scheme could be frustrated.

Moreover, in between CTL and CML, the transaction is valid. CTL cannot, now, turn round and throw out CML on the plea of the transaction 17

being unauthorised when CTL in the balance sheet admitted that the mining division of CTL has been transferred and vested in CML. The application for re-calling is filed under the signature of Mahendra Kumar Agarwalla, both on behalf of CTL and CML. It is, now, crystal clear that CML has never authorised Mahendra Kumar Agarwalla to move the application.

The application was jointly moved by CTL and CML. The order is a consent order. Therefore, it cannot be re-called at the instance of one of the party.

When there is no apparent legal or jurisdictional error on the part of this Court at the time of passing the order dated May 13, 2003, the order need not be re-called. I am of the opinion that the order sanctioning this scheme was passed with jurisdiction and cannot, also, be termed unfair. I am of the considered opinion that the order dated May 13, 2003 could not be recalled at the instance of CTL. The basic objection that the agreement was arrived at between the parties in violation of the provisions of the said Rules, has lost its significance in view of the execution of the document by the State of Jharkhand on June 8, 2009 substituting the name of CML instead of and in place of CTL in respect of the mining lease. 18

I, also, hold that the application is not maintainable under the provisions of Sections 391 and 392 of the Companies Act because this application for re- calling

was not in the aid of the scheme, but for frustrating the scheme. The application for re-calling filed under C.A. No. 209 of 2006, therefore, stands rejected. The application for C.A. Tender No. 209 of 2006, which has, since, been registered as C.A. No. 667 of 2006, is allowed. The authorities are directed to take steps for implementation of the scheme in accordance with law.

In view of the disposal of the said two applications, the other applications, also, stand disposed of accordingly. I make no order as to costs.

(Subhro Kamal Mukherjee, J.)

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