

Venture Global Engineering Company Vs. Satyam Computer Services Ltd. and anr.

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Court : Andhra Pradesh

Decided On : Feb-27-2007

Reported in : 2007(3)ALD433; 2007(3)ALT471; 2007(3)ARBLR150(AP); [2007]138CompCas779(AP)

Judge : D.S.R. Varma and ;D. Appa Rao, JJ.

Acts : [Foreign Exchange Management Act, 1999](#); [Arbitration and Conciliation Act, 1996](#) - Sections 2(2), 33, 34, 34(2), 36, 44, 46, 48, 48(1), 48(2), 75 and 81; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9 and 151 - Order 7, Rules 9 and 11; Foreign Exchange Management Regulations

Appeal No. : C.C.C.A. No. 26 of 2007

Appellant : Venture Global Engineering Company

Respondent : Satyam Computer Services Ltd. and anr.

Advocate for Def. : Vedula Venkataramana, Adv. for Respondent No. 1

Advocate for Pet/Ap. : Prakash Reddy, Sr. Counsel and ;S. Niranjan Reddy, Adv.

Disposition : Appeal dismissed

Judgement :

D.S.R. Varma, J.

1. Heard both sides.

2. This City Civil Court Appeal is directed against the order and decree, dated 28-12-2006, passed by the Additional Chief Judge, City Civil Court, Secunderabad, allowing the application .A. No. 2042 of 2006 in O.S. No. 80 of 2006, and rejecting the plaint, while exercising its jurisdiction under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure.

3. Appellant is the plaintiff and the respondents are the defendants, in the suit, before the Court below.

4. For the sake of convenience, in this judgment, the parties will be referred to as per their array in the suit.

5. The basic facts, which are relevant, are that the plaintiff - Venture Global Engineering, is a registered company, having its principal offices at 33662, James J Pampo Drive, Fraser Michigan, United States of America (for brevity 'the U.S.A'). The defendant No. 1-Satyam Computer Services Limited, is also a registered company, having its office at Mayfair Centre, S.P. Road, Secunderabad. These two companies constitute the defendant No. 2, which is a joint venture company, under the name and style of 'M/s Satyam Venture Engineering Services Private Limited', is a registered company, having its office at 1 -8-301 -306, III Floor, Ashoka My Home Chambers, S.P. Road, Secunderabad, having 50 per cent shareholders each. The said joint venture was originated by way of a joint venture agreement and a shareholders agreement, dated 20-10-1999, admittedly, governed by the Laws of 'the State of Michigan, U.S.A, where by there is an arbitration clause to the effect that the disputes are to be resolved by way of arbitration before the London Court of International Arbitration (for brevity 'the LCIA'). The Section 11.05 of the shareholders agreement provides for certain terms and conditions as regards the resolution of the disputes.

6. Be that as it may, the defendant No. 1 had issued a notice, in the month of February, 2005, to have shares of the plaintiff transferred on its name, in view of

the alleged bankruptcy of the plaintiff and invoked the arbitration clause and submitted to the jurisdiction of the LCIA, wherein the arbitration proceedings were held at London and an order was also passed on 3-4-2006, granting a relief as under:

A. I order VGE to deliver to Satyam share certificates in form suitable for immediate transfer to Satyam or its designed evidencing all of VGE's ownership (legal and/or beneficial) in SVES. further order it to do all that may otherwise be necessary to effect the transfer of such ownership to Satyam or its designee.

B. Concurrently with the transfer of ownership described in Section 6.1 A above, order Satyam to pay VGE US \$ 622, 656 such sum being the net difference between the amount payable by Satyam to VGE for the book value of the shares of SVES (plus interest) and the amount payable by VGE to Satyam for the disgorgement of royalties paid to VGE by SVES (plus interest).

C. order VGE to pay Satyam GBP 48, 777.48, the costs of the Arbitration, as determined by the LCIA Court.

D. I order VGE to pay to Satyam US \$1,488,454.11 Satyam's additional costs as determined in Section 5.12 hereof.

E. I order VGE to pay Satyam interest at the rate of 5 per cent per annum compounded annually on the unpaid balance of the sums set forth in Section 6.1 C and D hereof until such sums are paid.

F. I declare that Satyam is released from its obligation under the (Non Compete Agreement) not to compete with SVES or VGE with respect to engineering services to the automotive industry (Award Clause 6.1).

7. On 14-4-2006, the defendant No. 1 had filed a petition, seeking enforcement of the Foreign Arbitration Award, passed by LCIA in the United States District Court for the Eastern District of Michigan. Pursuant to the said proceedings, on July 31, 2006, the U.S. District Court passed its final Judgment.

8. From the plaint averments, it is further seen that a cross-petition, to refuse and deny the enforcement of the Award, was also filed before the said Court and as on the date of filing of the present suit, hearing of the said petition was pending and they were scheduled to be heard on 4-5-2006.

9. The suit came to be filed, as already noticed, before the Court below, when the petitions filed by the plaintiff as well as the defendant No. 1, for enforcement and refusal, are pending. The above are the facts, which are not in dispute.

10. The plaint averments, which are relevant, for disposal of the present appeal, are that the defendant No. 1 had sought for enforcement of the Award insofar as it relates to the transfer of the shares from the plaintiff, which cannot validly be enforced, without violating the provisions of the [Foreign Exchange Management Act, 1999](#) (for brevity 'the FEMA'), and the Regulations and without seeking prior approval of the Reserve Bank of India, that in the event of enforcement of transfer of shares of the plaintiff in favour of the defendant No. 2, as per the award passed by the Arbitrator, the plaintiff would be compelled to take action, since the substantial provisions of the Indian Law, including the FEMA and the Regulations notified thereunder, are violated on various grounds. Therefore, it is the contention of the plaintiff that there is no Court where a remedy is available for the plaintiff to seek redressal, except to file the suit before the I Additional Chief Judge, City Civil Courts, Secunderabad.

11. It is further averred in the plaint that the Award was made in the United Kingdom and both India and U.S.A., as well as the United Kingdom are signatories to convention on the recognition and enforcement of Foreign Arbitral awards, then the New York Convention Awards, which are incorporated in Chapter-1 of Part-II of the [Arbitration and Conciliation Act, 1996](#) (for brevity 'the Act, 1996') will be applicable and that the Award is a Foreign Award within the meaning of Section 44 of the Act, 1996.

12. After the institution of the suit, the defendant No. 1 filed an application I.A. No. 2042 of 2006, under Order VII Rule 11 of the Code of Civil Procedure, to reject the plaint on various grounds.

13. It is settled law that the Courts while exercising their jurisdiction, provided under Order VII Rule 11 of the Code of Civil Procedure, no other material can be looked into, except the averments of the plaint and the material documents supplied along with the plaint. In other words, the plaint and the material annexed thereto constitute the plaint and, as such, the plaint alone has to be examined by the Court as to whether there is any justification to interfere with the same exercising the jurisdiction vested with the civil Court under Order VII Rule 11 of the Code of Civil Procedure. Therefore, we are restraining ourselves from entering into other areas of controversy, which are incidentally referred to by the learned Counsel appearing on behalf of the plaintiff.

14. The Court below, having considered the entire material, available on record, particularly upon appreciation of the facts and law, allowed the said application, filed by the defendant No. 1 and, eventually, rejected the plaint. Aggrieved by the same, the plaintiff has preferred the present appeal.

15. Sri Prakash Reddy, the learned Senior Counsel appearing for the plaintiff, submits that since the defendant Nos. 1 and 2 carry on business at Secunderabad, the suit is maintainable inasmuch as the same is within the jurisdiction of the Court below. Since, no other remedy is available to the plaintiff to challenge the award, passed by the LCIA, the same would cause definitely hardship, inasmuch as, the implementation of the award would result in violation of FEMA Rules and Regulations, that the suit can be maintained inasmuch as the factum of bankruptcy also is a disputed fact, and that the plaintiff was aggrieved by the finding, recorded against the plaintiff in this regard. In this connection, he further submits that Sub-section (2) of Section 2 of the Act, 1996, expressly prohibits an application challenging the award, to be made in India, inasmuch as, the place of arbitration is not in India. Hence, the nonavailability of a provision like Section 34 of the Act, 1996, compelled the plaintiff to file the present civil suit.

16. In this regard, it is the further submission of the learned Senior Counsel appearing for the plaintiff that Section 34 of the Act is available to the provisions of Part-I of the Act only and since the present suit falls within the category of foreign award, which is under Part-II, there is no alternative efficacious remedy available

under the Act to the plaintiff, except to file a suit under Section-9 of the Code of Civil Procedure.

17. In other words, it is the contention of the learned Senior Counsel appearing for the plaintiff that the party, aggrieved by the Award of Arbitrator, cannot be left with no remedy, particularly, in a case, where the specific remedy available for challenging the Awards of Indian Arbitrators, is not available to the plaintiff and, in other words, the Foreign Awards are expressly prohibited from the challenge under the Act, 1996.

18. Repelling the said submissions, Sri V. Venkataramana, the learned Counsel appearing for the defendant No. 1, submits that since the Award had been passed, as agreed, steps have already been taken for its enforcement before the District Court, Michigan. He further submits that it is not in dispute that the plaintiff had already moved the said Court, seeking to refuse such enforcement, as sought for by the defendant No. 1, and therefore, it is not open for the plaintiff to file a civil suit in India i.e., at Secunderabad.

19. In view of the rival contentions of the respective parties, the only point that arises for consideration in this appeal is as to whether the Court below was justified in rejecting the plaint, exercising its jurisdiction under Order 7 Rule 11 of the Code of Civil Procedure?

20. It is apt to extract Order VII Rule 11 of the Code of Civil Procedure, for ready reference and better appreciation, which is thus:

11. Rejection of plaint:

The plaint shall be rejected in the following cases:

a. Where it does not disclose a cause of action;

b. Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

- c. Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- d. Where the suit appears from the statement in the plaint to be barred by any law;
- e. Where it is not filed in duplicate;
- f. Where the plaintiff fails to comply with the provisions of Rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and the refusal to extend such time would cause grave injustice to the plaintiff.

21. For better appreciation and ready reference, it is apt to extract Sub-section (2) of Section 2 of the Act, 1996, which is thus:

(2) This Part shall apply where the place of arbitration is in India.

22. From the above provision, it is no doubt true that the Part-II, read with Sub-section (2) of Section 2 of the Act, 1996, can be treated as express prohibition for the plaintiff, to challenge a Foreign Award in India and Section 34 of the Act, 1996, being a part of the Act, is also not available to the plaintiff, to challenge such a Foreign Award.

23. We feel it expedient for ready reference and better appreciation, to extract Section 34 of the Act, 1996, which deals with the recourse against the Arbitral Award, to the extent relevant, which is thus:

34. Application for setting aside arbitral award:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if,-

(a) the party making the application furnishes proof that,--

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the compensation of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that,-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation:- Without prejudice to the generality of Sub-clause (ii), of Clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by

fraud or corruption or was in violation of Section 75 of Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral Tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.

24. The said provision also deals with various contingencies under which Arbitral Award can be interfered with and set aside. Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 34 is more relevant. The said relevancy would be dealt with at a later stage of this Judgment.

25. However, a separate provision in the shape of Section 36 has been provided dealing with the enforcement.

26. For better appreciation and ready reference, it is relevant to extract Section 36 of the Act, 1996, which is thus:

36 Enforcement: Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

27. In such a case, the incidental question that imperatively falls for consideration in the Appeal is, under what law, the plaintiff, in the circumstances, placed in, has the remedy.

28. In this regard, it is apt to extract the relevant averments in the plaint, for convenience and ready reference, which are thus:

The Plaintiff submits that the Award has been made in the United Kingdom and both India and USA as well as the UK are signatories to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and therefore Chapter-1 of Part II of the [Arbitration and Conciliation Act, 1996](#) (the Act) will be applicable. The award is a foreign award within the meaning of Section 44 of the Act.

29. From the above averments in the plaint, it appears that it was expressly agreed by the parties to the agreement that the Award should be made by the competent Court at United Kingdom and are governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is also not in dispute that the Award is a Foreign Award, within the meaning of Section 44 of the Act, 1996. In view of the above specific plaint pleadings, it is relevant to look into Chapter-1 of Part-II of the Act, 1996.

30. Section 46 of the Act, 1996, deals with the binding nature of the Foreign Award between the parties. It further makes clear that the defence, set off or otherwise in any legal proceedings in India can be taken into consideration, while enforcing the Foreign Award.

31. For convenience and ready reference, it is relevant to extract Section 46 of the Act, 1996, which is thus:

46. When foreign award binding:- Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

32. The other relevant provision that is necessary to be looked into is Section 48 of the Act, 1996, which deals with the conditions for enforcement of Foreign Awards.

Clauses (a), (b), (c), (d) and (e) of Sub-section (1) of Section 48 of the Act, 1996, which deals with those conditions for enforcement of the foreign awards, are not referred to since not relevant. However, since Sub-section (2) of Section 48 is more relevant, the same is extracted, which is thus:

48, Conditions for enforcement of foreign awards:

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that-

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication there on, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that -

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Clause (e) of Sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

33. From the above, it is clear that Section 48 of the Act, 1996 deals with two situations. Sub-section (1) deals with the conditions of enforcement; and Sub-section (2) deals with the power of the Court to refuse enforcement of the award. It is also significant to note here that Section 48(2)(a) is akin to Section 34(2)(b)(i), so also Section 48(2)(b) is akin to Section 34(2)(b)(ii).

34. A conjoint reading of Sections 36 and 34 would reveal that Section 36 deals with the enforcement of the Arbitral award and Section 34 provides for the recourse for challenging the arbitral award. Whereas Section 48 of the Act, 1996 is a comprehensive provision, dealing with a foreign award, like the present one, which can be invoked for enforcement of the arbitral award or be subjected to challenge by the aggrieved party.

35. If, we put it in a different way, a Foreign Award can be subjected to challenge in any appropriate Court in India, having jurisdiction, subject to the presence of the above contingencies or the circumstances, as enumerated in Sub-section (2) of Section 48 of the Act.

36. But, the settled law is that as and when, or where the parties expressly agreed, conferring the jurisdiction on any Court belonging to any country and submitted to the law of such particular country to which either party belongs to, shall be governed by such law.

37. In other words, it is both the Indian Courts under the Act, 1996, and any other Court of any foreign country, as agreed by the parties to the agreement, have the

jurisdiction for enforcement of the Arbitral Award or for rejection, on contest by the other side.

38. This position necessitates this Court to look into the actual agreement entered into between the parties. In the present case, Section 11.05 of the Shareholders Agreement is relevant, which is extracted for ready reference:

(a) In the event of a dispute between the parties to this Agreement regarding the terms and conditions of this Agreement or any of the transaction documents, the Parties shall negotiate in good faith for a period of 30 days in an effort to resolve the issues causing such disputes. If such negotiations are not successful, the Parties shall submit the disagreement to the senior officer VENTURE and the senior officer of SATYAM or their designees for their review and resolution in such manner as they deem necessary or appropriate. Compliance with this Section 11.5(a) shall be a condition precedent to the commencement of any judicial or other legal proceedings.

(b) This Agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.

(c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Company's Act and other applicable Acts/Rules being in force, in India at any time.

39. Clause (b), which is more relevant, makes it clear that the laws of the State of Michigan, United States, subject to other conditions mentioned therein, shall govern the agreement. Clause (c) makes it clear that the Shareholders shall at all times act only in accordance with the Company's Act and other applicable Acts or Rules that are in force, in India, at any time, notwithstanding anything to the contrary in the said agreement.

40. The Act, 1996, is a self-contained enactment, capable of meeting different contingencies, including the present one.

41. If we put it in a different way, Section 34 is not available, admittedly, since the award being a 'foreign award'. In fact, admittedly, the plaintiff has invoked the jurisdiction of the Foreign Court and resisted enforcement of the Award. Since the plaintiff has already invoked the alternative efficacious remedy, it cannot file a suit and resist the enforceability of the award.

42. Furthermore, continuation of the proceedings by way of a suit would again mean that the very fundamental object of the Act, 1996, in the nature of 'alternative disputes redressal system' is being defeated. Therefore, the plaintiff, appellant in the present suit, having accepted the matter to be arbitrated and having been submitted to arbitration clause and that too after passing of the award, cannot be permitted to avail the procedure under the Code of Civil Procedure.

43. In other words, when the alternative mechanism has been agreed to specifically in the agreement, the further grievance after the passing of the award shall always be under the Act, 1996, only. We are, therefore, of the considered view that the plaintiff, appellant in the present appeal, cannot ride two horses at a time.

44. For the foregoing, the Appeal fails and is liable to be dismissed.

45. In the result, the Appeal is dismissed, confirming the impugned order of the trial Court rejecting the plaint as not maintainable, invoking the jurisdiction under Order VII Rule 11 of C.P.C. However, there shall be no order as to costs.

46. The order of status quo, dated 12-2-2007, passed by this Court, in the application C.C.C.A.M.P. No. 85 of 2007, as extended from time to time, is hereby vacated.