

Upaid Systems Limited Vs. Satyam Computer Services and anr.

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Court : Delhi

Decided On : Jul-17-2009

Reported in : 164(2009)DLT45

Judge : S. Ravindra Bhat, J.

Acts : Evidence Act; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 78 - Order 11, Rules 12 to 14 - Order 26, Rules 6, 15 to 18, 18B and 19 to 22; [Constitution of India](#) - Articles 15, 16, 17, 18, 23, 23A, 73 and 253

Appeal No. : O.M.P. 127/2009

Appellant : Upaid Systems Limited

Respondent : Satyam Computer Services and anr.

Advocate for Def. : Vivek Reddy, Adv. for Resp. No. 1, ; Sumit Bansal, ; Ateev

Advocate for Pet/Ap. : Amit Sibal,; Neel Mason,; Harsh Kaushik and;

Disposition : Petition allowed

Judgement :

S. Ravindra Bhat, J.

1. The petitioner, (hereafter 'Upaid') claims reliefs under Section 78 read with Order XXVI Rule 19 and 20 of the Code of Civil Procedure, 1908 (CPC) for

appointment of a local commissioner, further to a Letter of Request/ Letters Rogatory from the United States District Court for the Eastern District of Texas Marshall Division (hereafter 'the foreign court'), for recording deposition of witnesses, to written questions, which have been appended to the letter of request, and request for production of certain documents by National Association of Software and Services Company ('NASSCOM').

2. Upaid is a British Virgin Islands Corporation. It has filed a civil proceeding before the foreign court, for declaratory judgment alleging fraud, negligent misrepresentation, forgery and breach of contract, by the respondents (hereafter 'Satyam'). NASSCOM's testimony is important to Upaid, as it claims that Satyam's (first respondent) membership with NASSCOM, as well as industry customs, practices and standards that would have applied to the services that Satyam, performed on its (Upaid's) in connection with the intellectual property are in issue in the litigation pending before the foreign court. Upaid had earlier inadvertently assumed that NASSCOM was subject to Andhra Pradesh High Court jurisdiction and therefore sought the original letter of request to that Court. It is stated that various Letters Rogatory for other persons have already been filed and commissions issued by the said Court. Subsequently Upaid moved afresh for issuance of the Letters Rogatory to this Court, which was granted by the foreign Court.

3. Upaid relies on the text of Order 26, Rules 19 to 22 and contends that the requirements of law are fulfilled, since the proceeding pending before the requesting court is concededly civil; that the witnesses whose depositions are sought, live within jurisdiction of this Court, and that their testimony can be conveniently recorded through a commissioner appointed in that regard.

4. Upaid's counsel submits that the object of issuing letters of request by foreign courts is to facilitate recording of evidence, in foreign locales, where witnesses or evidence may be located, and which would otherwise not be possible for the litigants to secure. It is submitted that the import of Order 26 Rule is wide, to comprehend securing oral and documentary evidence. Upaid also argues that the court, at the stage of considering applications, does not concern itself with the

relevance or otherwise of the materials sought to be secured on commission, as that is within the domain of the tribunal, which is seized of the dispute, between the parties.

5. Satyam objects to the request firstly, disputing the jurisdiction of this Court to entertain the petition and secondly, stating that the letter of request was issued pursuant to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters 1970, (hereafter 'the Convention') to which India is a signatory, yet no law has been enacted by Parliament to give effect to this treaty under Article 253 of the [Constitution of India](#); the Court cannot, consequently, take cognizance and execute the letter of request issued by the foreign court. Satyam places reliance on *State of West Bengal v. Kesoram Industries* : [2004]266ITR721(SC) and *Maganbhai v. Union of India* : [1969]3SCR254 and contends that the Supreme Court has ruled that an international treaty cannot be enforced in Indian courts, unless Parliament makes a law giving effect to the treaty. The relevant extracts of the said two judgments are reproduced below:

In *Kesoram* (supra) it was observed that:

491. A treaty entered into by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as required under Article 253..

494. The learned Chief Justice also relied on the observation made by Lord Denning in *Corocraft v. Ram American Airways* (1969) All ER 82), that it is the duty of the courts to construe our legislation so as to be conformity with International Law and not in conflict with it. It is one thing to say that legislation may be interpreted in conformity with international principles but is entirely a different thing to give effect to a treaty provision in the absence of Municipal Laws.

In *Maganbhai* (supra) it was observed that:

81. The Judicial Committee in *Attorney-General for Canada v. Attorney-General for Ontario* and Ors. made some observations in the context of a rule applicable within the British Empire, which are pertinent:

It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.... Parliament, no doubt,...has a Constitutional control over the executive : but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default.

These observations are valid in the context of our Constitutional set up. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.

6. It was also argued by Satyam that Order XXVI Rules 19 to 22 exclusively deal with situations where commissions may be issued at the instance of foreign tribunals, and that these provisions are a self-contained code. While dealing with letters of request issued by a foreign court the Courts in India have no power to traverse beyond the four corners of the Order XXVI Rules 19 to 22. Rule 19 specifically deals with cases in which a High Court may issue commission to examine witness. It was emphasized that under this provision discovery/production of documents cannot be ordered and that only witness examination may be permitted, on the High Court being satisfied that the conditions stipulated are satisfied. The three conditions in this regard are:

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, In such cases, the High Court may, subject to the provisions of the Rule 20, issue a commission for the examination of such witness.

7. According to Satyam, Rule 19 nowhere hints at the Court's discretion extending to issue commissions for discovery or production of documents. It was also argued that even while signing the Hague Convention of 1970 on 07.02.2007 India had spelt out its reservations (hereafter referred to as 'declaration', which is the term used in the convention), in the following terms:

All requests under the Convention shall be in the English language, or accompanied with an English translation.

Subject to prior authorization of the Central Authority and the concerned court, members of the judicial personnel of the requesting Contracting Party may be present at the execution of a letter of request.

Evidence by diplomatic officers or consular agents of Indian nationals or nationals of a third State under Article 16 of the Convention can be taken with the prior permission of the Central Authority.

In accordance with Article 18, a diplomatic or consular officer or a commissioner authorized under Article 15, 16 and 17 may apply for appropriate assistance to obtain the evidence by compulsion to the District Court within whose territory the evidence is to be taken.

The Republic of India will not execute Letters of Request issued in pursuance of Article 23 of the Convention for the purpose of obtaining pre-trial discovery of documents, which requires a person to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

Article 23 of the Convention provides as under:

Article 23- A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

8. On the strength of the above plea it was asserted that the Court has no power to entertain the letter of request, since Parliament has not enacted any law to execute the convention, and even if it is assumed that this power may be located in Order XXVI Rules 19 to 22 of the Code of Civil Procedure yet, the Court cannot order discovery/production of documents by mandate of Rule 19 and in light of the specific declaration by the India while signing the treaty.

9. Upaid, in response, submits that if discovery/production of documents is not permitted under Rule 19, the whole purpose of the provision will be defeated as most of the times documents are incidental to the questions put to a witness. It was further emphasized that Rules 15 to 18, which are general provisions under Order XXVI are applicable when commissions are issued at the instance of foreign tribunals and Rule 16 provides for the powers of the Commissioner: which includes calling for documents. That rule reads as follows:

16. Powers of Commissioners.- Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

It is stated that this power conferred upon the Commissioner is wide and Clause (b) specifically provides that the Commissioner may call for and examine documents and other things relevant to the subject of inquiry. Thus, if the Commissioner in a particular case feels that certain documents are germane to the subject of inquiry he may call for and examine them. Further, the scope of this clause is not merely limited to documents but it stretches to other things as well. The degree of relevance of the particular document or thing called for and required to be examined by him during the execution of the Commission is for the Court, before which the inquiry or cause is pending, to decide. The Commissioner is not required to delve deep into the question of relevance.

10. NASSCOM, whose testimony and documents which are said to be in its possession, was represented through Counsel and has furnished written submissions in this case objecting to the petition. It is urged that the request for documents mentioned below, i.e:

1. Documents under NASSCOM control related to assessing, enhancing or otherwise promoting strong intellectual property and data protection laws.

2. Documents evidencing or referring to NASSCOM's services that provides its members with 'excess to world-class...counsel...and consultants' and

4. All documents evidencing and referring to NASSCOM's code of conduct.

are vague and are at pre-trial discovery stage in a civil suit before a foreign court and this Court cannot be asked to accede to them. It does not object to the item

requested at Sl. No. 3. i.e. 'documents evidencing or Satyam's membership in NASSCOM'. It was also submitted that under Article 9 of the convention the method applicable for recording NASSCOM's testimony would be in accordance with Indian law as the evidence is required to be recorded in terms of the Indian Evidence Act, which provides that evidence may be given of facts in issue and relevant facts. Thus vague and unspecific documents cannot be elicited, as is sought to be done by Upaid. It is urged out that a plain reading of information supplied under Clauses 7 (b), 8 (b), 10 and 11 reveals that there has been a deliberate attempt to conceal the respective contentions of the parties in relation to the dispute before the foreign court, and therefore the Letters Rogatory in whole should have been more specific.

11. It is further submitted that the Letters Rogatory would not be binding if it tantamounts to a fishing inquiry into the affairs of the person from whom the testimony is sought and who is connected with the dispute and is not a party. Placing reliance on *Wooster Products Inc. v. Magum International* : AIR1989 Delhi6 and *Re Asbestos Insurance Coverage Cases* (1985) 1 ALL ER 716, it was argued that the requests specified in the order are to be construed strictly in order to preclude fishing expeditions. The request of documents in the Letters Rogatory fails the test of specificity as it does not refer to any particular document at all. Lastly, it was submitted that in case the said document requests are to be allowed, it may result in their usage to the detriment of NASSCOM, which is neither the intent nor the scope of the Letters Rogatory.

12. The questions which this Court has to consider are:

(1). Whether in absence of a municipal law specially enacted for facilitate obligations under the 1970 Hague Convention, can the court give effect to its terms;

(2). Does Order XXVI Rule 19 bar discovery/production of documents;

(3). Is the request for documents in the Letters Rogatory such as may be allowed by this Court.

Re Point No. I

13. Before proceeding to discuss the merits, it would be necessary to extract the relevant provisions of the CPC, which are as follows:

Section 78: Commissions issued by foreign courts. Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of:

- (a) Courts situate in any part of India to which the provisions of this Code do not extend; or
- (b) Courts established or continued by the authority of the Central Government outside India; or
- (c) Courts of any State or country outside India.

The detailed procedure in this regard is prescribed in Order 26 Rule 19 of the Code of Civil Procedure. Rule 19 states that:

19. Cases in which High Court may issue Commission to examine witness-(1) If a High Court is satisfied:

- (a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceedings before it,
- (b) that the proceeding is of a civil nature, and
- (c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of Rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of Sub-rule (1):

- (a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central

Government, or

(b) by a letter of request issued by the foreign court and transmitted to the High Court through the Central Government, or

(c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceedings.

Rules 20, 21 and 22 of Order 26 of the Code of Civil Procedure read as follows:

Rule 20: Application for issue of commission- The High Court may issue a commission under Rule 19

(a) upon application by a party to the proceedings before the foreign court, or

(b) upon an application by a law officer of the State Government acting under instructions from the State Government

Rule 21: To whom commission may be issued. A commission under Rule 19 may be issued to any court within the local limits of whose jurisdiction the witness resides, or where the witness resides within the local limits of (the ordinary original civil jurisdiction of the High Court) to any person whom the court thinks fit to execute the commission.

Rule 22: Issue, execution and return of Commissions and transmission of evidence of foreign court.

The provisions of Rules 6, 15, Sub-rule (1) of Rules 16-A, 17, 18 and 18-B of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Central Government, along with the letter of request for transmission to the foreign court.

14. Satyam is undoubtedly correct in asserting that treaties do not have the force of law, and cannot, without legislative sanction, be enforced in Indian Courts. The judgments cited are sufficient authority; Article 253 empowers Parliament,

exclusively with the right to make laws to give effect to treaties. Equally, there is no doubt that Parliament has not enacted a special law to give effect to the convention. However, this cannot be dispositive of the case, because the CPC itself provides the manner in which letters of request are to be dealt with, under Order 26, Rules 19 to 22. These provisions were brought in by way of amendment, in 1932.

15. It had been argued, at one stage that the letter of request explicitly refers to the Convention, to which India is a signatory, with express declaration, and, consequently, the court cannot give effect to it. The court finds this argument insubstantial. As observed earlier, so long as there is an enabling power in Indian law to give effect to letters of request issued by foreign courts, the fact that the foreign court refers to a convention to which India is a limited signatory is not relevant, or determinative of the question. Accepting Satyam's contention in fact would result in this Court giving effect to a treaty declaration, which finds no expression in enacted Indian law, contrary to the ruling of the Supreme Court. So long as there is power to appoint a commissioner, as facially, Order 26, Rule 19 undoubtedly establishes, that a treaty is not made the subject of a special law would not constitute a fetter on such power of the court, to issue letters of request.

Re Point No. 2

16. This aspect was the principal bone of contention between the parties. Satyam contends that the power to issue commissions to give effect to letters of request does not comprehend the power to permit production of documents. For this, a textual interpretation of Order 26, Rule 19 (which talks of deposition of witness) is pressed into service. Reference is also made to Order 26 Rule 22, which states that provisions of 'Rules 6, 15, Sub-rule (1) of Rules 16-A, 17, 18 and 18-B of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions'. It was urged that the omission to mention Rule 16, was deliberate, since that is the only express provision enabling a commissioner to call for relevant documents.

17. A textual reading of Order 26, Rule 19 would reveal that the domestic court, in India, upon receiving a request from a foreign court for assistance ('request') has

to satisfy itself about three conditions, i.e. that the proceeding is in the foreign court; it is a 'civil' (as opposed to a criminal proceeding) proceeding and; that the witness whose deposition is sought lives within its jurisdiction. The question is whether the mention of few provisions (Rule 6,15, 16-A (1); 17; 18(1) and 18-A(1)) and omission to refer to Rule 16 has any significance, since the last rule expressly empowers a local commissioner to call for relevant documents.

18. Now, Rule 16 no doubt refers to express powers of a commissioner to (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom he thinks proper to call upon to give evidence in the matter referred to him; and (b) call for and examine documents and other things relevant to the subject of inquiry. There is significantly, no reference to this provision, in relation to the commissioner, appointed further to a letter of request. This rule itself talks of 'evidence' of a witness as contradistinguished with the power to 'call for' documents. On the other hand, Rule 19 does not mention that commissioners appointed under letters of request have the power to require production of documents.

19. The object of Section 78(c) - the effectuation of which is through rules, framed under the Schedule to the CPC, is to facilitate evidence collection requested by foreign courts. While no doubt the omission to confer all powers which other categories of commissioners appointed under the code, is textually discernable, that ipso facto cannot be determinative, of the issue. One, it cannot be anyone's case that all categories of commissioners are empowered to rule on 'relevance' of documents; that is within the domain of the court. This power, in Rule 16, has to be read in conjunction with a class of commissions where the court appointee is required to carry out specific tasks, such as scientific investigation, adjusting accounts, etc. Any other interpretation would be conferring overbroad powers upon the commissioners, a consequence beyond the contemplation of the legislature.

20. The second reason why Satyam's contention cannot, here, be accepted is that the reference to payment of Commissioner's fee is in Rule 15; yet that does not find any mention in Order 26, Rule 19. It cannot be urged that this omission

amounts to a fetter upon the Court's power to direct payment of Commissioner's fees. The most important reason, in the opinion of the court, for declining Satyam's request is that the expression 'evidence' in the said Rule 19 is sufficiently wide to comprehend oral as well as documentary evidence. In this context, it would be useful to refer to a Canadian Supreme Court decision, where an almost identical question had arisen. It was urged that the term 'testimony' was confined to oral testimony. Rejecting the argument, the Court held, in *United States of America (District Court) v. Royal American Shows, Inc. et al.*, [1982] 1 S.C.R. 414 that:

providing concurrently or separately for viva voce testimony and for testimony by way of documentary evidence. The word 'such' is merely a referent and not a restriction, once it is conceded that 'testimony' includes both oral and documentary evidence. The section speaks of ordering examination upon oath upon interrogatories or otherwise 'and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents.

(The underlining of the word 'same' is mine.) As this Court has indicated in *Zingre v. The Queen*, [1981] 2 S.C.R. 392, comity dictates that a liberal approach should be taken to requests for judicial assistance, so long at least as there is more than ephemeral anchorage in our legislation to support them. I am of the view that s. 43 is wide enough to support the request here for production of documents alone.

It was held, upholding a letters rogatory, that documents required in foreign proceedings, cannot be expected to walk unescorted (*Penn-Texas Corporation v. Murat Anstalt and Ors.* (No. 2), [1964] 2 All E.R. 594). Here too, the consideration would be the same. There is nothing in Order 26 Rule 19 to limit the language to only 'oral evidence' and eschew documentary evidence which may come within the expression 'evidence'; nor is there any warrant to interpret the provision in the light of subsequently ratified convention, with declaration, by India. To borrow the Canadian Court's phrase there is 'more than ephemeral anchorage' in Rule 19 to enable Commissioners to require production of and take into custody documentary evidence. Further Indian law even permits through Order 11 Rules 12 to 14 CPC, Courts to direct disclosure/discovery of documents which may later be determined

to be inadmissible or irrelevant (M.L. Sethi v. R.P. Kapoor : [1973]1SCR697). This point is accordingly held in favour of the petitioner, Upaid.

Re Point No. 3

21. The answer to Point No. 2 should also have been determinative for this point. Yet, this specific question has to be considered, since NASSCOM stated that in the absence of specificity, the documents cannot be inspected, or allowed to be seen.

22. The parties do not dispute that questions of relevance are not decided by the commissioner, while complying with courts' orders. Therefore, apart from that limitation, there is practically no restriction in regard to the nature of evidence, or the kind of person who can be examined. If the court were to import considerations such as specificity of queries, or documents, it would be for more than one reason, 'getting round' the letter of request; a process that would be impermissible, and imprudent. After all, letters of requests are issued by foreign courts who cannot access evidence which is beyond their territorial limits. If the requested court were to technically interpret such provisions, their object would be defeated. Besides, at this stage, the court merely enables a local commissioner to 'take evidence'; if any party or witness has reservations about production of any document, or answering any question, it is for such party to apprise the Commissioner, or the foreign court of its entitlements, appropriately claiming whatever reservations it has.

23. It is therefore, held that the respondents' objections are meritless. The petition deserves to be and is accordingly allowed. Mr. Jayant Tripathi, Advocate (Mobile No. 9891871186 9891871186) is hereby appointed to examine the witness(es) of NASSCOM and secure the documents sought for, as required by the letter of request. The learned commissioner's fee is fixed at Rs. 1,00,000/-; he shall prepare the report, and ensure that the depositions recorded, and copies of documents furnished to him, are kept in a sealed cover. The report along with such enclosures shall be filed in court, within a week.

24. The copies of this judgment be given Dasti under signatures of the Court Master to the parties, and the learned commissioner; a copy of the letter of request

issued by the foreign court shall also be furnished to the commissioner by the Registry.

List before Court, on 27th July, 2009 for reporting compliance. O.M.P. 127/2009 is allowed in the above terms. No costs.

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