SUPREME COURT OF INDIA

Venture Global Engineering

Vs.

Satyam Computer Services Ltd.

C.A.No.309 of 2008

(Tarun Chatterjee and P. Sathasivam,JJ.)

10.01.2008

JUDGMENT

P. Sathasivam, J.

1. Leave granted.

2. Appellant - Venture Global Engineering (in short VGE), a company incorporated in the United States of America with its principal office at 33662, James J Pampo Drive, Fraser, Michigan, USA 48026 through its Constituted Attorney, Mr. Pradeep Yadav filed this appeal challenging the final order and judgment dated 27.2.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 26 of 2007 whereby the Division Bench of the High Court dismissed their appeal.

3. The facts, which are necessary for the disposal of this appeal, are as under:

> "On 20.10.1999, Appellant-Company and respondent No.1- Satyam Computer Services Limited (in short SCSL), a registered company having its office at Mayfair Centre, S.P. Road, Secunderabad entered into a Joint Venture Agreement to constitute a company named Satyam Venture Engineering Services Ltd. respondent No.2 herein (in short SVES) in which both the appellant and respondent No.1 have 50 per cent equity shareholding. Another agreement was also executed between the parties on the same day being the Shareholders Agreement (in short SHA) which provides that disputes have to be resolved amicably between the parties and failing such resolution, the disputes are to be referred to arbitration. Section 11.05 of the SHA provides for certain terms and conditions as regards the resolution of the disputes. In February, 2005, disputes arose between the parties. Respondent No.1 alleged that the appellant had committed an event of default under the SHA owing to several venture companies becoming insolvent and they had exercised its option to purchase the

appellant-companys shares in SVES at its book value. On 25.07.2005, respondent No.1 filed a request for arbitration with the London Court of International Arbitration which appointed Mr. Paul B Hannon as sole arbitrator on 10.9.2005. The sole Arbitrator on 3.4.2006 passed an award directing the appellant VGE to transfer the shares to respondent No.1. On 14.4.2006, respondent No.1 filed a petition to recognize and enforce the award before the United States District Court, Eastern District Court of Michigan (US Court)".

4. The appellant entered appearance to defend this proceeding before the US Court by filing a cross petition. In the said petition, it objected to the enforcement of the Award which ordered transfer of shares which was in violation of Indian Laws and Regulations specifically the Foreign Exchange Management Act, 1999 (in short FEMA) and its notifications. The appellant filed a suit being O.S. No. 80 of 2006 before the Ist Additional Chief Judge, City Civil Court, Secunderabad on 28.4.2006 seeking declaration to set aside the award and permanent injunction on the transfer of shares under the Award. On 15.6.2006, the District Court passed an ad-interim ex parte order of injunction, inter alia, restraining respondent No.1 from seeking or effecting the transfer of shares either under the terms of the Award or otherwise. Challenging the said order, respondent No.1 filed an appeal before the High Court of Andhra Pradesh. The High Court admitted respondents appeal and directed interim suspension of the order of the District Court but made it clear that respondent No.1 would not effect the transfer of shares until further orders. On 13.07.2006, in response to the summons served upon the respondents, respondent No.1 appeared in the Court and filed a petition under Order VII Rule 11 C.P.C. for rejection of the plaint. The appellant filed objection to the application. The trial Court, by its order dated 28.12.2006, allowed the said application and rejected the plaint of the appellant. Challenging the said order, the appellant filed an appeal before the High Court. On 27.2.2007, the High Court dismissed the appeal holding that the award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order, the appellant preferred the above appeal by way of special leave petition."

5. Heard Mr. K.K. Venugopal, learned senior counsel, appearing for the appellant and Mr. R.F. Nariman, learned senior counsel, appearing for respondent No.1.

6. After taking us through agreements entered into by both the parties, subsequent developments such as alleged violations, Award by an Arbitrator at U.K.,proceedings before the District Court, Michigan, USA and the impugned proceedings of the Ist Additional Chief Judge-City Civil Court, Secunderabad as well as the order of the High Court, Mr. K.K. Venugopal learned senior counsel appearing for the appellant has raised the following contentions:

(i) The claim that Part I of the Arbitration and Conciliation Act, 1996 (in short the Act) applies to foreign awards is covered by the judgment of this *Court in Bhatia International vs. Bulk Trading S.A. & Anr.*[1]

(ii) The first respondent - Satyam Computer Services Ltd. could not have pursued the enforcement proceedings in the District Court in Michigan, USA in the teeth of the injunction granted by the Courts in India which also, on the basis of the Comity of Courts should have been respected by the District Court in Michigan.

(iii) The overriding Section 11.5 (c) of the SHA would exclude respondent No.1- Satyam Computer Services Ltd. approaching the US Court in regard to the enforcement of the Award.

7. On the other hand, Mr. R.F. Nariman, learned senior counsel, appearing for the first respondent, submitted that,

(i) In view of Section 44 of the Act and the terms of the agreement, no suit would lie in India to set aside the Award, which is a foreign Award.

(ii) No application under Section 34 of the Act would lie to set aside the Award.

(iii) In view of the provisions of the Act and the terms of the agreement, the first respondent rightly sought enforcement of the Award in Michigan, USA, hence the
civil suit filed at Secunderabad is not maintainable.

(iv) Section 11.5(c) of the SHA only deals with the rights and obligations of the appellant and the first respondent while acting as shareholders of the 2nd respondent it has nothing to do with the enforcement of foreign Award.

(v) In terms of the agreement, having participated in the arbitration proceedings in UK, filed cross-suit/objection in the District Court, Michigan opposing the Award, the appellant cannot agitate the very same issue in the Indian Courts namely, District Court, Secunderabad. In other words, the appellant, VGE, cannot ride two horses at the same time.

8. We perused all the relevant materials, Annexure and considered the rival contentions.

9. Since both Mr. K.K. Venugopal, learned senior counsel for the appellant and Mr. R. F. Nariman, learned senior counsel, for respondent No.1 heavily relied on a judgment of this Court in Bhatia International (supra), in support of their respective stand, let us consider the facts in that case and ultimate conclusion arrived at therein.

10. Bhatia International filed an Appeal before this Court against the judgment of the M.P. High Court in W.P. No. 453 of 2000. The appellant-Bhatia International entered into a contract with the first respondent Bulk Trading on 9.5.1997. This contract contained an arbitration clause which provided that arbitration was to be as per the Rules of the International Chamber of Commerce (for short ICC). On 23.10.1997, the Ist respondent made a request for arbitration with ICC. Parties had agreed that the arbitration be held in

Paris, France. ICC has appointed a sole arbitrator. The first respondent filed an application under Section 9 of the Act before the 3rd Additional District Judge, Indore, M.P. against the appellant and the 2nd respondent. One of the interim reliefs sought for was an order of injunction restraining these parties from alienating, transferring and/or creating third-party rights, disposing of, dealing with and/or selling their business assets and properties. The appellant raised the plea of maintainability of such an application. The appellant contended that Part I of the Act would not apply to arbitrations where the place of arbitration was not in India.

11. The application was rejected by the 3rd Additional District Judge on 1-2-2000. It was held that the court at Indore (M.P.) had jurisdiction and the application was maintainable. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench and the same was dismissed by the impugned judgment dated 10-10-2000. Several contentions have been raised on behalf of the appellant, namely, Part I of the Act only applies to arbitrations where the place of arbitration is in India and if the place of arbitration is not in India then Part II of the said Act would apply. Sub-section (2) of Section 2 of the Act makes it clear that the provisions of Part I do not apply where the place of arbitration is not in India. The Court at Indore could not have entertained the application under Section 9 of the Act as Part I did not apply to arbitrations which had taken place outside India. On the other hand, on behalf of respondent No.1, it was submitted that a conjoint reading of the provisions shows that Part I is to be applied to all arbitrations. It was further submitted that unless the parties by their agreement exclude its provisions, Part I would also apply to all International Commercial arbitrations including those that take place out of India.

12. The above contentions were considered in detail. In view of the assertion of both the senior counsel, the decision in Bhatia International (supra) has very much bearing on the issue raised in this case. The relevant paragraphs are reproduced hereunder:

> "At first blush the arguments of Mr. Sen appear very attractive. Undoubtedly sub-section (2) of Section 2 states that Part I is to apply where the place of arbitration is in India. Undoubtedly, Part II applies to foreign awards. Whilst the submissions of Mr. Sen are attractive, one has to keep in mind the consequence which would follow if they are accepted. The result would:
>
> (a) Amount to holding that the legislature has left a lacuna in the said Act. There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called a non-convention country). It would mean that there is no law, in India, governing such arbitrations.
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> (b) Lead to an anomalous situation, inasmuch as Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

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(c) Lead to a conflict between sub-section (2) of Section 2 on one hand and sub-sections (4) and (5) of Section 2 on the other. Further, sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.

(d) Leave a party remediless inasmuch as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all. 16. A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1) (f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called the convention country). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only applies to arbitrations which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes lace in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country"

13. Section 1 of the said Act reads as follows:

"1.Short title, extent and commencement. (1) This Act may be called the Arbitration and Conciliation Act, 1996. (2) It extends to the whole of India: Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration or, as the case may be, international commercial conciliation. The words this Act mean the entire Act. This shows that the entire Act, including Part I, applies to the whole of India. The fact that all Parts apply to the whole of India is clear from the proviso which provides that Parts I, III and IV will apply to the State of Jammu and Kashmir only so far as international commercial arbitrations/conciliations are concerned. Significantly, the proviso does not state that Part I would apply to Jammu and Kashmir only if the place of the international commercial arbitration is in Jammu and Kashmir. Thus if sub-section (2) of Section 2 is read in the manner suggested by Mr. Sen there would be a conflict between Section 1 and Section 2(2). There would also be an anomaly inasmuch as even if an international commercial arbitration takes place outside India, Part I would continue to apply in Jammu and Kashmir, but it would not apply to the rest of India. The legislature could not have so intended. 21. Now let us look at sub-sections (2), (3),

> (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will only apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

14. Mr. Sen had also submitted that Part II, which deals with enforcement of foreign awards does not contain any provision similar to Section 9 or Section 17. As indicated earlier, Mr. Sen had submitted that this indicated the intention of the legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all Chapters or Parts. The general provisions will apply to all Chapters or Parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part. Part II deals with enforcement of foreign awards. Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of foreign awards which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to foreign awards. The opening words of Sections 45 and 54, which are in Part II, read notwithstanding anything contained in Part I. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II.

15. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derivable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

16. Lastly, it must be stated that the said Act does not appear to be a well-drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law.

17. Mr. K.K. Venugopal, learned senior counsel, has pointed out that paragraph 14 of the judgment of Bhatia International (supra) sets out four independent reasons for arriving at the conclusion that Part I would apply to foreign Awards that are as follows:

> "(i) To hold to the contrary would result in a lacunae as Non-Convention country awards cannot be enforced in India.
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> (ii) Section 1(2) expressly extends Part I to the State of Jammu and Kashmir so far as it relates to international commercial arbitration giving rise to an anomaly so far as the rest of India is concerned unless Part I applies to international commercial arbitrations in the other States as well.
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> (iii) If the word only is read into Section 2(2), it would then render the sub-section inconsistent with sub-sections (4) and (5) of Section 2 which apply Part I to all arbitrations, meaning thereby, including foreign international arbitrations.
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> (iv) As otherwise, no relief can be sought in India even though the properties and assets are situated in India, merely because the arbitration is an international commercial arbitration.Further, by drawing our attention to the specific conclusion arrived in paragraphs 32 and 35, he reiterated that the issue has been very well concluded and the argument based on paragraph 26 is not acceptable."

18. Mr. Nariman heavily relied on paragraph 26 of the judgment in Bhatia International which we have extracted supra. According to him, the said paragraph contains not only the submissions of Mr. Sen, who appeared for Bhatia International therein but also the ultimate conclusion of the Bench. He reiterated that the Court concluded Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign Awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of foreign awards which necessarily would be different. For that reason, special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded, the provisions of Part I will also apply to foreign awards. The opening words of Sections 45 and 54, which are in Part II, read notwithstanding anything contained in Part I. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II.

19. According to Mr. K.K. Venugopal, paragraphs 26 and 27 start by dealing with the arguments of Mr. Sen who argued that Part I is not applicable to foreign awards. He further pointed out that it is only in the sentence starting at the bottom of para 26 that the phrase it must immediately be clarified that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. He further pointed out that the finding specifically states that, But if not so excluded, the provisions of Part I will also apply to all foreign awards.

20. This exception which is carved out, based on agreement of the parties. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied. He further pointed out the very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, according to him, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. He very much

relied on the judgment of this *Court in Oil & Natural Gas Corporation Ltd. vs. Saw Pipes*[2] *Ltd.* wherein particularly, in paragraphs 30 and 31, the public policy of India has been defined to include-

(a) The fundamental policy of India; or

(b) The interests of India; or

(c) Justice or morality; or

(d) in addition, if it is patently illegal.

> "He pointed out that this extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement. In such circumstances, according to him, there is nothing inconsistent between Section 48 which deals with enforcement and Section 34 which deals with a challenge to the Award. He also relied on a decision of the Division Bench of the *Calcutta High Court in Pratabmull Rameshwar vs. K.C. Sethia Ltd.*[3] In paragraphs 45 and 63, the Calcutta High Court while dealing with Arbitration Act of 1940 sets out the reasoning in support of a challenge being permissible in India to a foreign award."

21. In order to find out an answer to the first and prime issue and whether the decision in Bhatia International (supra) is an answer to the same, let us go into the details regarding the suit filed by the appellant as well as the relevant provisions of the Act. The appellant VGE filed O.S. No. 80 of 2006 on the file of the Ist Additional District Court, Secunderabad, for a declaration that the Award dated 3.4.2006 is invalid, unenforceable and to set aside the same. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. The Scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act. Section 2(5) which falls in Part I, specifies that this part shall apply to all arbitrations and to all proceedings relating thereto. It is useful to refer Section 45 which is in part II of the Act which starts with non obstante clause namely, Notwithstanding anything contained in Part I or in Code of Civil Procedure Section 52 in Chapter I of Part II of the Act provides that Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies. As rightly pointed out, the said section does not exclude the applicability of Part I of the Act to such awards.

22. Part II of the Act speaks about the enforcement of certain foreign awards. Section 48 speaks about conditions for enforcement of foreign awards. Section 48(1) (e) read with Section 48(3) of the Act specify that an action to set aside the Award would lie to the competent authority. Mr. Nariman, after taking us through the relevant provisions of Chapter I Part II submitted that Section 48(1)(e) read with Section 48(3) of the Act specifies that an

action to set aside a foreign award within the meaning of Section 44 of the Act would lie to the competent authority of the country in which, or under the law of which, that award was made. According to him, the phrase the countryunder the law of which, that award was made refers to the country of the curial law of arbitration, in the extremely rare situation where the parties choose a curial law other than the law of the country of the seat of arbitration. He further pointed out that therefore such a challenge would lie only to the competent Court of the country in which the foreign award was made. He also submitted that the said principle is recognized internationally by Courts in US and UK as well as by several High Courts in India. The US decisions which support/recognize the above principle are:

(1) International Standard Electric *Corp. vs. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*[4]

(2) M *& C Corporation Vs. ERWIN BEHR Gmbh & Co., KG, a foreign corporation*[5]

(3)*Yusuf Ahmed Alghanim & Sons vs. Toys R US. INC. Thr*[6]

(4) *Karaha Bodas Co. L.L.C. vs. Perusahaan Pertambangan Minyakdan Gas Bumi Negara*[7]

23. Apart from the above US decisions, Mr. R.F. Nariman, pointed out that all the Indian High Courts except the *Gujarat High Court in Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, German*[8]have taken this consistent view in the following judgments:

(a) *Bombay Gas Company Limited vs. Mark Victor Mascarenhas & Ors*[9].

(b) *Inventa Fischer Gmbh & Co., K.G. vs. Polygenta Technologies Ltd.*[10]

(c) *Trusuns Chemical Industry Ltd. vs. Tata International Ltd*[11]

(d) *Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services*[12]

(e) *Bulk Trading SA vs. Dalmia Cement (Bharat) Limited*[13].

24. On close scrutiny of the materials and the dictum laid down in three-Judge Bench decision in Bhatia International (supra), we agree with the contention of Mr. K.K.Venugopal and hold that paragraphs 32 and 35 of the Bhatia International (supra) make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear

that even in the case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International (supra).

25. Learned senior counsel for the respondent based on para 26 submitted that in the case of foreign award which was passed outside India is not enforceable in India by invoking the provisions of the Act or the CPC. However, after critical analysis of para 26, we are unable to accept the argument of learned senior counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr. Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase it must immediately be clarified that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: But if not so excluded, the provisions of Part I will also apply to all foreign awards. This exception which is carved out, based on agreement of the parties, in para 21 (placitum (e) to (f) is extracted below: By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.

26. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement.

27. Mr. K.K.Venugopal also highlighted that in Company Law, the word transfer has a definite connotation which would require the ownership of the shares to be transferred to the transferee, which would involve the following steps being taken under the Companies Act

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and the rules and regulations there under, as well as the Foreign Exchange Management Act, 1999 (FEMA):

> "(i) Obtaining a Share Transfer Form 7-B and having it endorsed by the prescribed authority under the Companies Act, 1956 in compliance with Section 108.
>
> (ii) Execution of Share Transfer Form 7-B by the appellant and respondent.
>
> (iii) Payment of stamp duty on the transfer of shares.
>
> (iv) Sending duly executed Share Transfer Form 7-B and the share Certificates to SVES, the respondent No.2 herein under Section 110 of Companies Act.
>
> (v) Respondent No.2 appoving the transfer of shares and causing alternation in its Register of Members under Section 111A.
>
> (vi) Compliance with Rules and Regulations, completing prescribed forms, giving relevant undertakings in accordance with Indian foreign exchange laws and Regulations such as the Foreign Exchange Management Act, 1999 and its notifications, given that the transaction involved transfer of shares from a non-resident to a resident. By pointing out, he submitted that respondent No.1, in enforcing the Award in the US District Court instead of Indian Courts was motivated by the intention of evading the legal and regulatory scrutiny to which this transaction would have been subject to had it been enforced in India. In the light of the statutory provisions as provided in the Companies Act and FEMA, we agree with the submission of Mr. K.K.Venugopal."

28. As rightly pointed out the effort of respondent No.1 was to avoid enforcement of the Award under Section 48 of the 1996 Act which would have given the appellant herein the benefit of the Indian Public Policy rule based on the judgment in the Saw Pipes case (supra) and for avoiding the jurisdiction of the Courts in India though the award had an intimate and close nexus to India in view of the fact that, (a) the company was situated in India; (b) the transfer of the ownership interests shall be made in India under the laws of India as set out above; (c) all the steps necessary have to be taken in India before the ownership interests stood transferred. If, therefore, respondent No.1 was not prepared to enforce the Award in spite of this intimate and close nexus to India and its laws, the appellant herein would certainly not be deprived of the right to challenge the award in Indian Courts.

29. Mr. R.F. Nariman by placing the factual details, namely, filing of petition before the Michigan Court for execution of the Award the objection petition filed by the first respondent herein as well as the orders passed by the Court of Michigan, US submitted that the appellant having participated and consented in those proceedings is precluded from re-opening the very same issue by filing a suit in a court at Secunderabad which is not permissible either under law or in terms of their conduct. In view of the legal position derived from Bhatia

International (supra), we are unable to accept Mr. Narimans argument. It is relevant to point out that in this proceeding, we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the appellant-herein for setting aside the award. It is for the concerned court to decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Section 9/34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in Bhatia International (supra) the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case.

30. Mr. K.K. Venugopal, learned senior counsel, next contended that the overriding section 11.05 (c) of the Shareholders Agreement would exclude respondent No.1 approaching the US Courts in regard to enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties read as follows:(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 Companies Act and other applicable Acts/Rules being in force, in India at any time.It was pointed out that the non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration. It was further pointed out that sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force in India at any time. In such circumstances, it is the claim of the appellant that necessarily enforcement has to be in India, as mentioned in sub-section (c) which overrides every other section in the Shareholders Agreement. Mr. K.K. Venugopal further pointed out that respondent No.1 totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Court in the United States. On the other hand, Mr. Nariman pointed out that Section 11.05 (b) of the Shareholders agreement alone governs the rights and obligations between the appellant and the first respondent inter se and dispute resolution thereof. In view of our discussion supra, we agree with the stand of the learned senior counsel for the appellant.

31. Coming to the other contentions particularly the fact that the suit has been filed before the trial Court which is a court of competent jurisdiction under Section 2(e) of the Act and not an application under Section 34 of the Act, *Mr. K.K. Venugopal* pointed out that it would not affect the issue of jurisdiction as this Court has upheld the conversion of a suit into a Section

9 petition under the Act. (*vide Sameer Barar and Ors. Vs. Ratan Bhushan Jain & Ors*[14]and in another instance, converted a writ petition into a first appeal under the Civil Procedure Code. *(vide Ajay Bansal vs. Anup Mehta & Ors*[15] *(*Even otherwise, if the Court in question is not having jurisdiction in the interest of justice the suit/proceeding has to be transferred to the court having competent jurisdiction.

32. Learned senior counsel for the appellant submitted that the first respondent - Satyam Computer Services Ltd. could not have pursued the enforcement proceedings in the District Court in Michigan, USA in the teeth of the injunction granted by the Courts in India which also, on the basis of the Comity of Courts, should have been respected by the District Courts in Michigan, USA. Elaborating the same, he further submitted that the injunction of the trial court restraining the respondents from seeking or effecting the transfer of shares either under the terms of the Award or otherwise was in force between 15.06.2006 and 27.06.2006. The injunction of the High Court in the following terms appellant (i.e. respondent No.1) shall not effect the transfer of shares of the respondents pending further orders was in effect from 27.06.2006 till 28.12.2006. The judgment of the US District Court was on 13.07.2006 and 31.07.2006 when the Award was directed to be enforced as sought by respondent No.1, notwithstanding the injunction to the effect that the appellant (respondent No.1 herein) shall not effect the transfer of shares of the respondents pending further orders. The first respondent pursued his enforcement suit in Michigan District Courts to have a decree passed directing VGE shall deliver to Satyam or its designee, share certificates in a form suitable for immediate transfer to Satyam evidencing all of the appellants ownership interest in Satyam Ventures Engineering Services (SVES), the partys joint venture company. Further, the VGE (appellant herein) shall do all that may otherwise be necessary to effect the transfer of its ownership interest in SVES to Satyam (or its designee). It is pointed out that obtaining this order by pursuing the case in the US District Courts, in the teeth of the prohibition contained in the order of the High Court, would not only be a contempt of the High Court but would render all proceedings before the US courts a brutum fulmen, and liable to be ignored. Though Mr. R.F.Nariman has pointed out that the High Court only restrained the respondent from effecting transfer of the shares pending further orders by the City Civil Court, Secunderabad, after the orders of the trial Court as well as limited order of the High Court, the first respondent ought not to have proceeded the issue before the District Court, Michigan without getting the interim orders/directions vacated.

33. Finally, the overriding section 11.5 (c) of the SHA cannot be ignored lightly. As pointed out, the said section would exclude respondent No.1- Satyam Computer Services Ltd. approaching the US Courts in regard to the enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties which is relevant has already been extracted in para 23.The non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration. Sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies

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Act and other applicable Acts/Rules being in force in India at any time. Necessarily, enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement. Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Courts in the United States.

34. The claim of the first respondent that the section, namely, 11.05 (c) of the SHA cannot be construed to mean that Indian law is a substantive law of the contract or that Indian law would govern the dispute resolution clause in Section 11.05(b) are not acceptable. As rightly pointed out and observed earlier, the non obstante clause would over ride the entirety of the agreement including sub-section (b) which deals with the settlement of the dispute by arbitration and, therefore, section 3 would apply to the enforcement of the award. In such event, necessarily enforcement has to be in India as declared by the very section which over rides every other section.

35. The above-mentioned relevant aspects, the legal position as set out in three-Judge Bench decision in Bhatia International (supra), specific clause in the Shareholders Agreement (SHA), conduct of the parties have not been properly adverted to and considered by the trial Court as well as the High Court. Accordingly, both the orders passed by the City Civil Court and of the High Court are set aside.

36. In terms of the decision in Bhatia International (supra), we hold that Part I of the Act is applicable to the Award in question even though it is a foreign Award. We have not expressed anything on the merits of claim of both the parties. It is further made clear that if it is found that the Court in which the appellant has filed a petition challenging the Award is not competent and having jurisdiction, the same shall be transferred to the appropriate Court. Since from the inception of ordering notice in the special leave petition both parties were directed to maintain status quo with regard to transfer of shares in issue, the same shall be maintained till the disposal of the suit. Considering the nature of dispute which relates to an arbitration Award, we request the concerned Court to dispose of the suit on merits one way or the other within a period of six months from the date of receipt of copy of this judgment. Civil appeal is allowed to this extent. No costs.

Cases Referred

[1]*(2002) 4 SCC 105*
[2]*(2003) 5 SCC 705*
[3]*AIR 1960 Cal. 702*
[4]*745 F.supp.172*
[5]*87 F.3d 844*
[6]*HK. Ltd. 126 F.3d 15*
[7]*364 F.3d 2745 C v. D (2007) EWHC 1541*
[8]*AIR 2003 Guj.145*
[9]*(1998) 1 LJ 977*

[10] *200)5 2 Bom. C.R.364*
[11] *AIR (2004) Guj.274*
[12] *AIR (2005) Chhat.21*
[13] *2006) 1 Arb.LR 38*
[14] *(2006) 1 SCC 419)*
[15] *(2007) 2 SCC 275)*