SUPREME COURT OF INDIA

Venture Global Engineering

Vs.

Satyam Computer Services Ltd

C.A.No._____ of 2010

(P. Sathasivam and Ashok Kumar Ganguly JJ.)

11.08.2010

JUDGEMENT

A.K.Ganguly, J.

1. Leave granted.

2. The judgment and order dated 19th February, 2010 of the Division Bench of the High Court of Andhra Pradesh in Civil Revision No.5712/2009 has been impugned in this appeal.

3. The material facts which are required to be considered to resolve the controversy in this appeal, are as follows.

4. The appellant, Venture Global Engineering, having its principal office in Michigan, USA, entered into a Shareholders Agreement and a Joint Venture Agreement on 20th October, 1999 with the first respondent, for establishing a company called Satyam Venture Engineering Services (hereinafter, "the second respondent"). As per the terms of the agreement, the appellant and the first respondent each held 50 per cent shareholding in the second respondent.

5. Article VIII of the Shareholders Agreement contemplates certain `events of default', and in the event of default, non-defaulting shareholder has the option to purchase the defaulter's shares at book value or cause immediate dissolution and liquidation of the second respondent.

6. In the year 2000, the second respondent entered into an agreement with TRW, a manufacturer and supplier of automotive equipments, to provide engineering and IT services. They agreed to sub-contract the automotive engineering works to the second respondent. The first respondent levied US $3 an hour towards administrative charges. According to first respondent, they retained US $859,899 from the TRW receipts. The appellant disputed the

same and alleged that Satyam retained a total of US $2,188,000, and also alleged concealment and dereliction of duty as a joint venture partner.

"Thus, disputes cropped-up and were referred to arbitration."

7. The sole arbitrator gave his award on 3rd April, 2006 whereby the appellant is to transfer its entire shareholding in the second respondent to the first respondent. The first respondent filed a petition for the recognition and enforcement of the award before the U.S. District Court, Eastern District Court of Michigan.

8. On 28th April, 2006, the appellant filed a suit (O.S. No. 80/2006) seeking a declaration to set aside the award and also prayed for a permanent injunction against the transfer of shares under the arbitral award, in the Court of Ist Additional Chief Judge, City Civil Court, Secundrabad. The Trial Court dismissed the suit of the appellant on the ground that a foreign award could not be challenged under Section 34 of the *Arbitration & Conciliation Act, 1996* (herein after, ABC, 1996).

9. The appellant appealed against the order of the Trial Court before the High Court of Andhra Pradesh at Hyderabad, and the said appeal was also dismissed on 27th February, 2007.

10. Thereafter, the appellant filed a special leave petition before this Court and this Court, vide its order dated 15th May, 2007, issued notice to the respondents and passed an interim order restraining the transfer of shares pending the disposal of the special leave petition.

11. This Court then finally heard the matter and allowed the special leave petition vide its Judgment and Order in *Venture Global Engineering vs. Satyam Computer Services Ltd. and another*[1] and held that a foreign award could be challenged under Section 34 of ABC, 1996. In the light of this finding, this Court remanded the case to the trial court and directed that the parties were to maintain status quo with respect to transfer of shares. Thus, the case of the appellant was transferred to the IInd Additional Chief Judge, City Civil Court, Hyderabad.

12. Meanwhile, on 7th January, 2009, Mr. Ramalinga Raju, Chairman and founder of the first respondent confessed that the balance sheets of the first respondent had been fraudulently inflated to the tune of Rs.7,080/- crores. As a result, Price Waterhouse Cooper (PWC), auditors of the first respondent, declared that the financial statements could no longer be considered accurate or reliable.

13. In the light of these developments regarding the first respondent, the appellant filed an interim application before the Trial Court (I.A. No. 1331/2009 dated 12th June, 2009) to bring certain facts on record and also filed additional pleadings in respect of the same under Order VIII Rule 9 of the *Civil Procedure Code, 1908*.

14. The Trial Court, vide its Order dated 3rd November, 2009, allowed the application of the appellant. The first respondent challenged the said order of the Trial Court by filing a civil revision before the High Court.

15. The High Court, vide its order dated 19th February, 2010, allowed the revision petition of the first respondent. The High Court, inter alia, held that a reading of Section 34(1) and (3) of the ABC, 1996 indicates that a party could only set aside the arbitral award if an application for the same is made within a period of 3 months (extendable by another 30 days) from the date of making the award; whereas in the present case the new grounds of challenge are sought to be brought after the limitation period.

16. Further, the High Court also held that an application under Order VIII Rule 9 of the Civil Procedure Code, 1908 for bringing additional pleadings on record would not lie. The High Court held, relying on Rule 12(1) of the *Andhra Pradesh Arbitration Rules, 2000*, that Rule VIII of Civil Procedure Code is not applicable, so a petition for additional pleading is not maintainable under Order VIII of Civil Procedure Code. Therefore, the High Court did not allow the appellant to file additional pleadings on record.

17. Aggrieved by the impugned judgment and order of the High Court, the appellant has approached this Court by way of filing a special leave petition.

18. In the course of argument before this Court, Mr. Harish N. Salve, learned senior counsel appearing for the respondents did not make any attempt to defend the order of the High Court on the question of limitation as the learned counsel was obviously conscious of the decision of this Court in the *State Company Ltd.*[2].

19. This Court In M/s. Hindustan Construction (supra) made it clear that it cannot be the intention of the Legislature to shut out amendments, as a result of which incorporation of relevant materials in a pending setting aside proceeding is prevented.

20. In M/s. Hindustan Construction (supra) this Court considered the provision in Section 34(2)(b) of ABC, 1996 and while considering the ambit of the expression "the Court finds that" in Section 34(2)(b), this Court opined that where application under Section 34 has been made within the prescribed time, leave to amend grounds, in such an application, if the peculiar circumstances of the case and the interest of justice so warrant, can be granted.

21. In saying so, this Court in paragraph 25 of the report, relied on the decisions of this Court in the *Jardine Skinner and Co.*[3] *and and ors.*[4] and held where it is required in the interest of justice, the Court always has the power to grant leave to amend and this power to grant an amendment is not affected under Section 34.

22. We are of the opinion that in dealing with a prayer for amendment, Courts normally prefer substance to form and techniques and the interest of justice is one of most relevant considerations. Therefore, if a party is entitled to amend its pleadings, having regard to the

justice of the case, the right of the party to amend cannot be defeated just because a wrong Section or a wrong provision has been quoted in the amendment petition. The approach of the High Court in this case, in rejecting the appellant's prayer for amendment, inter alia, on the ground that a wrong provision has been quoted in the amendment petition, is obviously a very hyper technical one.

> "Mr. Salve rightly did not even try to defend the impugned order on the aforesaid technical ground adopted by the High Court."

23. Mr. Salve, learned senior counsel argued on a different line. The learned counsel submitted that the grounds which are sought to be incorporated by way of amendment are not relevant and do not come within the concept of public policy which has been explained in the Explanation to Section 34 of ABC, 1996. The learned counsel took us through the award and tried to demonstrate that the facts which are sought to be brought on record, even if they are accepted to be true, have no bearing on the material facts on which the award is based. The learned counsel urged that the Explanation under Section 34 of ABC, 1996 has to be strictly construed and the expression "in the making of the award" must be confined to mean any fraud committed before the arbitrator in the course of the arbitral proceedings. According to the learned counsel that expression will not take within its sweep anything which happened after the making of the award. In other words the learned counsel repeatedly urged that the expression "making of the award" must be confined to facts anterior to the delivery of the award and not anything which happened subsequent to that.

24. Mr. K.K. Venugopal, learned senior counsel appearing for the appellant and contradicting the aforesaid contentions submitted that facts which are sought to be incorporated by amendment are only those which have been disclosed by the first respondent on its own. Prior to such disclosure, they were not in public domain and naturally could not be included in the original petition to set aside the award.

> "Without disclosure of those facts by the first respondent, the appellant could not have known them.
>
> It is submitted that in any event those facts are relevant for the purpose of being put on record by amendment."

25. Learned counsel further submitted that the award has been obtained by the first respondent by suppressing those facts, which on disclosure show a clear connection with the facts in issue, in the award.

> "In such a case fraud as is understood in civil law, has been committed in the making of the award. It was further submitted that the interest of justice in such a case would demand that amendment should be allowed."

26. These are basically the rival contentions of the parties.

27. Now let us consider the facts which the appellant wanted to incorporate by way of amendment in the petition for additional pleading filed in the Court of Additional Chief Judge, City Civil Court at Hyderabad (I.A. No. 1331/2009). Those facts are:

> "a) On or after 7th January, 2009, a letter was written by B. Ramalinga Raju, CEO of respondent no. 1 to the Board of respondent no. 1, wherein Mr. Raju confessed that the financial statements and books of accounts of respondent no. 1 were exaggerated and overstated. Along with the application for additional pleading, relevant paragraphs of Raju's statements have been enclosed.
>
> b) On 7.1.2009, it was reported that the Securities and Exchange Board of India (SEBI) directed an investigation in the entire matter. Along with the additional pleadings were annexed extracts from press clippings about the said investigation by SEBI.
>
> c) On 8.1.2009, Government of India directed an inspection of the financial statements and books of 8 subsidiaries of first respondent. Such inspection was to be conducted in accordance with section 209A of the Companies Act, and the second respondent is one of those subsidiaries in respect of which inspection was thus ordered.
>
> d) On 13.1.2009, Price Waterhouse Coopers (PWC), which acted as the statutory auditor of the first respondent, wrote to the Board of the first respondent that in the light of statements made by Mr. Raju, the financial statements for the period from June 2000 to 30th September, 2008 could no longer be considered reliable. Extracts from the said opinion of PwC are also enclosed with the additional pleading.
>
> e) On 13.1.2009, the Government of India directed the Serious Fraud Investigation Office (SFIO) to investigate the matter. SFIO is a multi-functional investigating agency representing the Ministry of Home Affairs, Enforcement Directorate and the Intelligence Department.
>
> f) Such order by Government of India came on the basis of a report from the Registrar of Companies, Hyderabad.
>
> g) On 21.1.2009, Mr. Raju reportedly admitted diversion of funds from the first respondent, which was widely published in newspapers across India. Mr. Raju confessed diversion of funds of the first respondent to two real estate firms held by his family and others.
>
> h) On being questioned by criminal investigation department of the Andhra Pradesh police, Mr. Raju reportedly admitted to using Satyam (respondent no.1) money for buying prime land in and around Hyderabad and Mr. Raju admitted in answer to

interrogation that funds of the first respondent were being diverted for the last 4-5 years.

i) It was reported on 25.1.2009, that partners of PWC (statutory auditors of the first and second respondent) were arrested for their alleged role in the misstatement of the accounts of the first respondent.

j) On 27.1.2009, the Income Tax department reportedly directed an investigation in the operations of the first respondent. In this matter the Income Tax department was making an independent probe about the alleged fraud of about Rs. 7800 crores in the first respondent.

k) On 8.2.2009, it was reported that a confession was made by PWC before the police that Mr. Raju employed an elaborate scheme to exaggerate the accounts of the first respondent.

l) Mr. Talluri Srinivas and S. Gopalakrishnan, two persons associated with PWC, and arrested in connection with the Satyam scam, admitted to the police that meetings were arranged at the instance of the first respondent with the motive of falsifying accounts, and such meetings were chaired by Mr. Raju himself.

m) On 17.2.2009, Central Bureau of Investigation (CBI) was asked to probe the Satyam scam.

n) On 22.3.2009, it was reported that the extent of fraud relating to the first respondent could be over Rs. 9600 crores.

o) On 5.4.2009, it was reported that the Enforcement Directorate also directed an investigation in the matter for alleged money laundering.

p) On 7.4.2009, CBI filed its charge sheet against several persons, including Mr. Raju, Mr. Gopalakrishnan and Mr. Talluri.

q) Mr. Gopalakrishnan is alleged to be a partner of the firm PWC Bangalore.

r) On 13.4.2009, SFIO submitted its report to the Government of India.

s) On 17.4.2009, it was reported in the press that PwC is guilty of wrong doing in the multi-crore Satyam scam.

t) On 20.4.2009, SFIO alleged to have found evidence that the first respondent diverted foreign earnings even before they reached India. Such diversion was made to tax havens like Mauritius before routing it back to Maytas Infrastructure and other entities owned by Mr. Raju and his relations."

28. Relying on the aforesaid materials which were sought to be incorporated by way of amendment, it was urged by the appellant that the aforesaid materials go to show that the very basis of the fiduciary duties of the first respondent to the appellant was breached, even prior to the Shareholders Agreement between the parties. The first respondent on concealment of these facts induced the appellant to enter into an agreement with it.

29. It appears that the first respondent did not make available to the appellant verified financial statements to show the amount of TRW revenue which was diverted, and the appellant was thus left to assess such amount based on various representations of the financial statements made by the first respondent to the appellant. But the facts which the appellant wanted to bring on record by way of amendment would show that the representations made by the first respondent about its financial position were prima facie unreliable.

30. It was also urged that the valuation of the shares of the second respondent is fundamentally important in the decision-making process relating to the award. Such valuation is based on unreliable financial statements.

31. Under these circumstances, a prayer was made in the amendment petition to bring the aforesaid facts on record in the pending proceeding for setting aside the award.

32. Learned counsel for the appellants also urged that in the statement of claim filed by the first respondent, it has been stated that the first respondent is a "solvent shareholder" as defined in the agreement, and on that statement, the first respondent claimed that they have either: (a) the right of purchasing the shares held by the appellants, or (b) causing immediate liquidation of the second respondent.

33. Learned counsel contended that the aforesaid claim of the first respondent that it is a solvent shareholder is based on concealment of the facts stated above. He further submitted that any person, on a bonafide consideration of the facts stated above would prima facie form an opinion that the claim of the respondents as a solvent shareholder is fraudulent. The award has been obtained by the first respondent on the basis of such fraudulent claim.

> "Therefore, in the interest of justice and having regard to the public policy of India, the High Court should have allowed the appellant to bring those facts on record by way of amendment, in the pending proceeding for setting aside the award."

34. In the context of the aforesaid issues involved in this appeal, the provision of Section 34 of ABC, 1996, especially explanation to Section 34(2)(b)(ii), calls for interpretation by this court.

35. Section 34 of ABC, 1996, has four sub-sections.

"In this case we are not concerned with sub-sections (3) and (4)."

36. Sub-section (1) provides for an application for setting aside arbitral award. Sub-section (2)(a) provides for the grounds for setting aside an arbitral award as grounds (i) to (v).

37. Section 34(2)(b), with which we are concerned here, provides as follows:

> "34. Application for setting aside arbitral award.- (1) xxx (2) xxx (a) xxx (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) 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 or section 81."

38. The explanation is very crucial in the context of the present case.

39. The concept of public policy, in view of century old decision of Lord Justice Burrough in *Richardson vs. Mellish*[5], conjures up to our mind an equine image of a high and unruly horse. The consensus of opinion amongst judges is that concept of public policy is incapable of precise definition.

40. In *Central Inland Water Transport Corporation Ltd. and another vs. Brojo Nath Ganguly and another*[6], this Court discussed the concept of public policy elaborately in the context of Section 23 of the Contract Act.

> "The discussion, however, was not confined to Section 23 of Contract Act alone but was on a general jurisprudential concept of public policy, and it referred to the opinion of Lord Denning, where the Master of Rolls said with characteristic clarity- "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles."
>
> (See *Enderby Town Football Club Ltd. vs. Football Association Ltd.*[7]."

41. A three judge Bench in *Renusagar Power Co. Ltd. vs. General Electric Co.*[8], after referring to Brojo Nath (supra), dealt with the concept of public policy while construing the provisions of *Foreign Awards (Recognition and Enforcement) Act, 1961*.

42. It may be mentioned in this connection that the present ABC, 1996 is a consolidating statute and it has also repealed the aforesaid 1961 Act (Section 85 of ABC, 1996). Therefore, the discussion on public policy in Renusagar (supra) is of some relevance in the present context.

43. In Renusagar (supra), after a fairly elaborate consideration of concept of public policy in various jurisdictions, this Court came to hold that an award is considered contrary to public policy if it is opposed to: (a) fundamental policy of India law, (b) interests of India and (c) justice or morality (See paragraph 86 on page 888).

44. This concept of public policy, in the realm of arbitration law, is a rather vexed concept, in the sense that different countries have different concepts of public policy. Say for instance, some countries which do not countenance gambling, an award arising out of a gambling dispute may be set aside on the ground that it offends public policy of the State. But in a country where gambling is legalized in some form, the award will not offend public policy. Similarly, a dispute between a producer of wine and its distributor is arbitrable in countries which are not governed by a strict Islamic Code. But a country with such a Code may hold the award contrary to public policy.

45. In view of such varying standards of public policy in different countries, an attempt is made to arrive at a somewhat acceptable standard by construing that something is opposed to public policy where there is an excess of jurisdiction and a lack of due process.

> "(See Redfern and Hunter on International Arbitration, 5th Edition, paragraphs 10-80 to 10-86)."

46. The concept of public policy in ABC, 1996 as given in the explanation has virtually adopted the aforesaid international standard, namely if anything is found in excess of jurisdiction and depicts a lack of due process, it will be opposed to public policy of India. When an award is induced or affected by fraud or corruption, the same will fall within the aforesaid grounds of excess of jurisdiction and a lack of due process. Therefore, if we may say so, the explanation to Section 34 of ABC is like `a stable man in the saddle' on the unruly horse of public policy.

47. It is well known that fraud cannot be put in a strait jacket and it has a very wide connotation in legal parlance.

48. In the decision of the *House of Lords in Frank Reddaway and Co. Ltd. vs. George Banham*[9], Lord Macnaghten explained the multifarious aspects of fraud very lucidly, and which we quote: "But fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."

> "(Page 221 of the report).

49. The aforesaid elucidation by the learned Law Lord has also been accepted in celebrated treaties on fraud (see Kerr on Fraud and Mistake, 7th Edition, pg. 1). Kerr has also referred

to Story's Equity Jurisprudence and defined fraud as: "Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another."

50. In Indian law, namely the Indian Contract Act, the said common law doctrine of fraud has been assimilated in Section 17 of the said Act. A very wide definition of fraud has been given, which is as under:

> "17. `Fraud' defined.-`Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it;
>
> (4) any other act fitted to deceive;
>
> (5) any such act or omission as the law specially declares to be fraudulent.
>
> Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech."

51. Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression `fraud in the making of the award' has to be narrowly construed. This Court cannot do so primarily because fraud being of `infinite variety' may take many forms, and secondly, the expression `the making of the award' will have to be read in conjunction with whether the award `was induced or affected by fraud'.

52. On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the making of the award, but have a nexus with the facts constituting the award, are not relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an award against another party who has concealed facts and obtained an award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the award. Concealed facts in the very nature of things surface

subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the explanation.

53. In English Arbitration Law, a somewhat similar provision for challenging an award is contained in Section 68(2)(g) of the 1996 Arbitration Act, which reads as follows:

> "68(2)(g).- The award being obtained by fraud or the way in which it was procured being contrary to public policy."

54. Commenting on the said provision, Russell (Russell on Arbitration, 23rd Edition) stated that an "award will be obtained by fraud if the consequence of deliberate concealment is an award in favour of the concealing party." (P. 497, Para 8-100)

55. In *Elektrim S.A. vs. Vivendi Universal S.A. and Ors.*[10], Mr. Justice Aikens held that the words `obtained by fraud' must refer to an award being obtained by the fraud of the party to the arbitration or by the fraud of another to which the party to the arbitration was a privy. The learned Judge at page 82 of the report held that "an award will only be obtained by fraud if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour. The party relying on Section 68(2)(g) must therefore also prove a causative link between the deliberate concealment of the document and a decision in the award in favour of the other successful party."

56. In *Profilati Italia S.R.L. vs. Painewebber Inc. and Anr.*[11], while construing Section 68(2)(g) of the English Arbitration Act, it has been held that where an important document which should have been disclosed has been deliberately withheld resulting in the party withholding obtaining the award, the Court may consider that the award was `procured' in a manner contrary to public policy and such conduct is not far removed from fraud. (para 19, pg. 720)

57. This Court also holds that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and award may be set aside as affected or induced by fraud.

58. The question in this case, is therefore one of relevance of the materials which the appellant wants to bring on record by way of amendment in its plea for setting aside the award.

59. Whether the award will be set aside or not is a different question and that has to be decided by the appropriate Court. In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting aside proceeding.

60. Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award.

61. Nothing said in this judgment will be construed as even remotely expressing any opinion on the legality of the award. That question will be decided by the Court where setting aside proceeding is pending.

> "The proceeding for setting aside the award may be disposed of as early as possible, preferably within 4 months."

62. For the reasons aforesaid, this appeal succeeds. The order of the High Court is set aside and that of the court below is restored. No order as to costs.

[1](2008) 4 SCC 190 *[2]AIR 2010 SC 1299* *[3]AIR 1957 SC 357*
[4]AIR 1957 SC 363 *[5](1824-34) All E.R. 258* *[6]AIR 1986 SC 1571 at 1612*
[7]1971 Chancery Division 591 at 606 *[8]AIR 1994 SC 860* *[9] 1896 Appeal Cases 199*
[10](2007) EWHC 11 (Comm) *[11][(2001) 1 Lloyd's Law Reports 715]*