Dispute Resolution Hotline

February 08, 2018

INDIA: REWINDING TO THE ERA OF 'PUBLIC POLICY' MANDATES IN FOREIGN-SEATED ARBITRATIONS (VENTURE GLOBAL ENGINEERING V TECH MAHINDRA)

This article was originally published in the 17th January 2018 edition of

LexisNexis®

Arbitration analysis: Moazzam Khan, Head of Global Litigation Practice and Shweta Sahu, Member at Nishith Desai consider the Indian Supreme Court's decision in Venture Global Engineering LLC v Tech Mahindra, on the challenge to a foreign award India under Part I of the Arbitration and Conciliation Act, 1996.

ORIGINAL NEWS

Venture Global Engineering LLC v Tech Mahindra, formerly Satyam Computer Services, 2017 SCC Online SC 1272 (not reported by LexisNexis® UK)

WHAT IS THE BACKGROUND TO THIS DECISION?

Amidst all the criticism hovering over enforcement of arbitral awards in India, courts have begun to maintain a consistent approach in liberalising enforcement of such awards with an equivalent sternness in not giving way to objections such as 'the award is in violation of public policy of India'. This case note briefs upon the case of *Venture Global Engineering LLC v Tech Mahindra*, formerly Satyam Computer Services 2017 SCC Online SC 1272 (Venture III), wherein the Supreme Court (SC) has sought to re-visit the dimensions of 'public policy' to set aside a foreign award.

This analysis does not discuss the cases pending against or by either party in USA.

Venture Global Engineering LLC (the Appellant), a US-registered company and Tech Mahindra, formerly Satyam Computer Services (the Respondent), an Indian company, entered into a Joint Venture and Shareholder Agreement (the Agreement) for incorporating the joint venture (the JV) (also a party to the proceedings). Per the terms of the Agreement, in case of an 'event of default', the non-defaulting shareholder would have an option to either purchase the defaulting shareholder's shares at book value or cause the immediate dissolution and liquidation of the JV. The Agreement stipulated laws of Michigan, USA as the law governing the Agreement, and in case of unsettled disputes, the same would be referred to arbitration to the London Court of Arbitration. The Agreement also ensured compliance with the laws in force in India including the Companies Act.

Pursuant to a dispute arising out of the Agreement, arbitral proceedings were invoked by the Respondent and an award was passed in favour of the Respondent on 3 April 2006. Per the terms of the Agreement, the award recognized the breach by the Appellant, rendering it liable to transfer its interest in the JV to the Respondent (i.e. 50% of shareholding in the JV would be transferred by the defaulting shareholder to the non-defaulting shareholder pursuant to the bankruptcy of the Appellant, which was an event of default under the Agreement).

POST-ARBITRAL LITIGATION

Subsequent to a civil suit being filed by the Appellant in Secunderabad on 28 April 2006, the Respondent was restrained from enforcing the award in India. On an appeal made against this order, the High Court of Andhra Pradesh (the High Court) remitted the matter for fresh adjudication. However, as prayed by the Respondent, the plaint for injunction, filed by the Respondent was rejected by the trial court. Challenging this order, the Appellant appealed before the High Court, which was later dismissed. This led to the judgment of the SC in *Venture Global Engineering v Satyam Computer*

Proud Moments

IFLR 1000 Asia Pacific 2018: Ranked in **Tier 1** for **TMT, Private Equity**

Legal 500 2018: Ranked in **Tier 1** for **Dispute Resolution**, **Labour & Employment**, **Investment Funds**, **TMT** and **Tax**

Chambers and Partners Asia Pacific 2018: Ranked in **Tier 1** for **Tax**, **Labour & Employment** and **TMT**

Nishith Desai Associates announced '**Most Innovative Law Firm in Asia-Pacific**' by **Financial Times** in its FT Asia-Pacific Innovative Lawyers 2016 report

Research Papers

Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals
June 30, 2018

Enforcement of Arbitral Awards and Decrees in India: Domestic and Foreign
June 30, 2018

The Future is here: Artificial Intelligence and Robotics
May 31, 2018

Research Articles

Evolving HR Law: Giving GCs Sleepless Nights?
June 01, 2017

India confirms intent to sign BEPS multilateral instrument curbing tax avoidance
May 17, 2017

Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India
May 08, 2017

Audio

Webinar: NDA Series on Insolvency and Bankruptcy Code: Innovative Acquisition Structures – Part V
August 02, 2018

Services Ltd. and Anr (2008) 4 SCC 190 (Venture I) (not reported by LexisNexis® UK), wherein it was held inter alia that the foreign award may be challenged in India under Part I of the Arbitration and Conciliation Act 1996 ('Act') (following *Bhatia International v Bulk Trading S.A. and Anr.* (2002) 4 SCC 105) (not reported by LexisNexis® UK). The matter was, thereafter, brought before the trial court for adjudication on merits.

On 7 January 2009, the Chairman and founder of the Respondent, Mr Ramalinga Raju made a disclosure and confessed in writing that the balance sheets of the Respondent had been manipulated, inflating the profits to INR 7080 crores. The auditors were compelled to declare that the Respondent's financial statements could no longer be considered accurate or reliable.

To bring this fact on record, the trial court allowed the application filed by the Appellant for amending the pleadings challenging the award. However, the High Court set aside the order owing to the application being time-barred (new grounds for attacking an award could not be taken up after the lapse of the time period stipulated under s 34 of the Act, ie after 3 months extendable by 30 days).

However, on an appeal being preferred against the High Court's order, the Supreme Court allowed the new grounds of challenge to the award, as pleaded by the Appellant (in *Venture Global Engineering v Satyam Computer Services Ltd. and Anr* (2010) 8 SCC 660 (Venture II) (not reported by LexisNexis® UK)).

In the challenge proceedings before the trial court, the Respondent objected to the additional grounds of fraud by Mr Raju for setting aside the award, since there was no causative link between the said events and the award. However, the trial court allowed the challenge application filed by the Appellant and observed that—the transfer of 50% of shareholding in the JV by the Appellant to the Respondent would be against foreign exchange laws of India (ie FEMA), thus, against the public policy of India, and the fraud or misrepresentation by the Respondent had a causative link with the facts forming basis of the award. Allowing the appeal made before the High Court, it inter alia held that the award is not contrary to the public policy of India and the allegations of fraud and misrepresentation neither satisfy legal requirements nor were they proved by evidence.

WHAT DID THE SUPREME COURT DECIDE IN VENTURE III?

Aggrieved by the High Court's judgment, the Appellant sought restoration of the trial court's order which set aside the award. The Respondent also appealed against the impugned judgment wherein the High Court had upheld the jurisdiction of the trial court to decide the application filed to challenge the award.

The Honourable judges in the Supreme Court pronounced separate dissenting judgments, as below:

Justice J Chelameswar

WHETHER THE AWARD IS CONTRARY TO PUBLIC POLICY OF INDIA SINCE COMPLIANCE WITH THE AWARD WOULD AMOUNT TO VIOLATION OF THE PROVISIONS OF THE FEMA?

As provided in section 34(2)(b)(ii) of the Act, an award which is in conflict with the public policy of India, is liable to be set aside, which includes instances where the award was induced or affected by fraud. However, in the given case, the trial court had failed to sustain its conclusion that the transfer of shares at book value results in violation of FEMA in India. More importantly, even the relevant provision of FEMA had not been identified.

WHETHER THE AWARD IS REQUIRED TO BE SET ASIDE BECAUSE OF THE FRAUDULENT ACTS OF THE CHAIRMAN AND FOUNDER OF THE RESPONDENT, AS DISCLOSED SUBSEQUENTLY?

As provided in s 34(2)(b)(ii) of the Act, an award which is in conflict with the public policy of India, is liable to be set aside, which includes instances where the award was induced or affected by fraud. However, in the given case, the trial court had failed to sustain its conclusion that the transfer of shares at book value results in violation of FEMA in India. More importantly, even the relevant provision of FEMA had not been identified.

Whether the award is required to be set aside because of the fraudulent acts of the Chairman and founder of the Respondent, as disclosed subsequently?

Section 34(2) of the Act provides that an award is liable to be set aside if it is either 'induced or affected by fraud'. Since Mr Raju's letter did not specify the exact period when the Respondent's accounts had been fudged, it was not conclusive if such fraud would amount either to (a) to 'inducing' the making of the award; or (b) the award made by virtue of non-disclosure of those facts by the Respondent would be an 'award affected by fraud'. Even the trial court did not record any reason to justify that the concealed facts are material to the arbitration, apart from relying on the SC's observations in Venture (II) that the facts concealed by Mr Raju are relevant.

The appeals would, accordingly, be set aside.

The appeal made by the Respondent was dismissed considering that the law was settled on the aspect of applicability of Part I of the Act to an international commercial arbitration.

Justice Abhay Manohar Sapre

Webinar: New Law on Data Privacy Proposed: India takes a leaf from the GDPR book (August 01, 2018)
August 01, 2018

Webinar: New Law on Data Privacy Proposed: India takes a leaf from the GDPR book (July 31, 2018)
July 31, 2018

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Webinar : NDA Series on Insolvency and Bankruptcy Code: Innovative Acquisition Structures – Part V

Webinar: New Law on Data Privacy Proposed: India takes a leaf from the GDPR book

Bloomberg: Is gambling in sports a good idea?

WHETHER THE ACTS OF MR RAJU AMOUNT TO MISREPRESENTATION/SUPPRESSION OF MATERIAL FACTS AND, IF SO, WHETHER THEY COULD BE MADE BASIS TO SEEK QUASHING OF AN AWARD?

The learned Judge opined that the letter in question was rightly received in evidence, without requiring any further corroboration, especially because the existence of the confessional letter, its contents, author or his signature had never been doubted. In establishing 'notorious and widely known facts', the letter was superior to formal means of proof (following, *Onkar Nath & Ors v Delhi Administration* (1977) 2 SCC 611 (not reported by LexisNexis® UK)). Thus, the acts stated therein were prima facie acts of misrepresentation and suppression of material facts and in breach of section 209 and 211 of the Companies Act 1956 (CA 1956) and related statutes.

WHETHER SUCH ACTS HAVE ANY CAUSATIVE LINK TO THE ARBITRAL PROCEEDINGS, AND CONSTITUTE AN 'EVENT OF DEFAULT' UNDER THE AGREEMENT? WOULD THIS NULLIFY THE AWARD?

Following, the above conclusion, Sapre J appreciated that the Agreement was wide enough to include the acts of Mr Raju, which were sufficient for its termination attracting the remedies provided therein. These acts as contained in the confessional letter were prior in point of time as compared to the breach committed by the Appellant (i.e. its bankruptcy). Since, the Agreement required compliance with the Indian laws, such acts which were in grave violation of the provisions of the Companies Act 1956, triggered an 'event of default' of the Agreement with the recourse to the remedies under the Agreement.

Considering the nature of the arrangement between the parties, the affairs of the Respondent had a direct bearing over the rights of the parties, since the affairs of both the companies and the JV were intrinsically connected. Had Mr Raju brought his fraudulent acts to the notice of the JV or the Appellant, the latter too would have been able to get first right to terminate the Agreement and claim appropriate reliefs against the Respondent because, as stated above, such breach by the Respondent was prior in point of time.

Further, as is the settled law of the land, existence of fraud/misrepresentation/suppression of material facts, which continued during the pendency of arbitral proceedings but without any knowledge to the Appellant and the learned Arbitrator, would render such proceedings void ab initio. Thus, in the given case where the award had been obtained by misrepresentation and suppression of material facts having bearing over the proceedings, involving acts in violation of Indian law (i.e. Indian Penal Code, Companies Act and FEMA), the award is liable to be set aside for being in violation the public policy of India under s 34(2)(b)(ii) read with Explanation 1 of the Act.

WHAT ARE THE PRACTICAL IMPLICATIONS?

In light of the dissenting views of the Division Bench, this matter has now been referred to a larger Bench and awaits the final verdict of the Supreme Court. Nonetheless, this case belongs to an era when foreign awards could be challenged under Part I of the Act. Thus, with the Supreme Court's judgment in *Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 649 ('BALCO') and the subsequent amendments to the Act in 2015, Part I of the Act (including s 34 of the Act) would not be applicable to arbitrations seated outside India.

Thus, the judgment would have a limited application going further, and would gain relevance only in case of arbitration agreements executed in the pre-BALCO era, considering its prospective applicability.

The views expressed are not necessarily those of the proprietor.

– Shweta Sahu & Moazzam Khan
You can direct your queries or comments to the authors
