

# Unknown vs Jayesh H.Pandya And Another Reported In ... on 16 September, 2009

**Author: K.Chandru**

**Bench: K.Chandru**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2009

CORAM

THE HON'BLE MR. JUSTICE K.CHANDRU

APPLICATIONS NOS.4320, 4321, 4323, 4325,  
4327 AND 4328 AND 2940 OF 2008  
IN  
C.S.NO.626 OF 2008

ORDER

Original Application Nos.711 to 713 of 2008 were filed by the applicant, who is the plaintiff in the main suit.

2.O.A.No.711 of 2008 is filed seeking for an ad-interim injunction restraining the defendants/respondents from seeking assignments of all or any of the applicant's existing contracts with customer banks which contracts are detailed in schedule I annexed to the suit.

3.O.A.No.712 of 2008 is filed seeking for an ad-interim injunction restraining the respondents from in any manner restraining the applicant's from fulfilling its contractual obligations to the customer banks under the existing contracts including but not limited to providing license upgrades updates, modules, patches, annual maintenance services and such other services as detailed in Schedule I to the suit.

4.O.A.No.713 of 2008 is filed seeking for an order of ad-interim injunction restraining the respondents from using in any manner the confidential information as detailed in schedule III annexed to the plaint to the detriment of the applicant and to the benefit of the respondents.

5.The suit in C.S.No626 of 2008 was filed by the plaintiff for declaration that the defendants are any one claiming through them are not entitled to seek assignment of the plaintiff's existing contracts with customer banks, which contracts are detailed in schedule I annexed to the plaint. The plaintiff also sought for permanent injunction restraining the defendants from seeking assignment of all or any of the plaintiff's existing contracts with customer banks and also for permanent injunction restraining the defendants from in any manner restraining the plaintiff from fulfilling its contractual obligations to the customer banks under the existing contracts, including but not limited to providing licence upgrades, updates, modules, patches, annual maintenance services and such other services as detailed in schedule II to the plaint and for further injunction restraining the defendants from using in any manner the confidential information, as detailed in schedule III to the plaint and also for mandatory injunction directing the defendants to forthwith return all confidential information of the plaintiff obtained during due diligence conducted on the plaintiff.

6.The suit was admitted on 1.7.2008. Pending the suit, this Court granted an interim injunction in O.A.No.712 of 2008 on 3.7.2008. When the matter came up on 21.8.2008, as there was no representation on the side of the respondents, the injunction was made absolute. Subsequently, applications were taken out by the respondents in A.Nos.4319, 4322, 4324 and 4326 of 2008 to set aside the ex-parte order. This Court, by an order, dated 26.09.2008 set aside the ex-parte order of injunction. However, the Court directed the injunction granted on 3.7.2008 to continue.

7.The plaintiff also took out an application in O.A.No.919 of 2008 for the grant of an injunction against the defendants restraining them from attempting to deal with the existing customer banks as set out in the schedule attached to the suit. Likewise, similar injunction applications were filed in O.A.Nos.996 and 997 of 2008. Only notice was ordered by this Court on 21.8.2008 in O.A.No.919 of 2008. In the other applications, no orders have been passed.

8.The plaintiff also took out an application in A.No.2940 of 2008 for the grant of leave to initiate appropriate legal proceedings for damages against the defendants, in which also no orders have been passed.

9.Pending those O.As., the defendants have taken out different applications for rejecting the plaint. The first defendant has filed A.No.4325 of 2008 for rejecting the plaint as against the first defendant in C.S.No.626 of 2008. The second defendant has filed A.Nos.4327 and 4328 of 2008 to reject the plaint as against the second defendant and also to refer the disputes raised in the suit between the plaintiff and the defendants to arbitration. Similarly, the fourth defendant has filed A.No.4320 of 2008 to reject the suit as against the fourth defendant. The fourth defendant has also filed A.No.4321 of 2008 to refer the dispute for arbitration. The fifth defendant has filed an application under Order 7 Rule 11 in A.No.4323 of 2008 for rejecting the suit.

10.Heard the arguments of Mr.Arvind Datar, learned Senior Counsel and Mr.P.S.Raman, learned Additional Advocate General for M/s.R&P Partners, learned counsel appearing for plaintiff and Mr.T.R.Rajagopal, learned Senior Counsel leading Mr.T.K.Baskar for defendants 4 and 5 and Mr.V.C.Janardhanan, learned counsel for defendants 1 and 2.

11.It is the case of the applicant/plaintiff that the third respondent is authorised by the developer and owner of software products which includes mainly the BASE24 and BASE24 eps software and the same is used worldwide for operating network payment systems, automated teller machines (ATMs) to enter into distribution agreements with the distributors and authorise the distributors to sub-license the software products to the end users. The second respondent is the holding company and the other respondents are the subsidiaries of the second respondent. The applicant/plaintiff had a reseller relationship with the third respondent from 1991 to 1997 and had entered into an International Distribution Agreement (IDA), dated 29.4.1998 with the third respondent to distribute the software products including BASE 24/BASE24 eps software in India. Pursuant to the IDA, the applicant had entered into sub license agreements with various banks in India for the use of software products of ACI. The Banks would sent a request for proposal to the applicant which covered not only the software products but also a list of support services like customization and production support.

12.It was stated that in order to expand the user base of the software, the applicant had to offer the software products as a comprehensive package comprising not only of software license and maintenance, but also the other value additions like onsite technical support, customization, production support, etc. As a consequence, the consideration agreed between the applicant and its customers under the sub licence agreements also included payments for other value additions like onsite technical support, customization, production support etc. This was necessitated for the reason that the customer banks wanted a one-stop solution and did not want the software products without the other services that was to be rendered by the plaintiff. The plaintiff is the pioneer in the implementation of payment solutions in India having entered the Indian market at a nascent stage and built the market painstakingly over a period of more than 17 years. Most of the contracts were obtained by competitive process with strict stipulations for qualification criteria in terms of domain, technical expertise and support capabilities. The plaintiff was also authorized to enter into software licence and maintenance agreements with the customer of the third respondent. The software procured by the applicant from the respondents is a standard software. The implementation of the software requires detailed understanding of the customer environment and carrying out significant modifications to the software to operate in customer specific environment. The efforts involved are substantial and ensure significant enhancement of the utility value of the software to the customer, The applicant was able to demonstrate and achieve significant value addition to the customers and thereby command better commercials on a consistent and recurring basis.

13.It was further stated that the comprehensive package consists of software licence, maintenance and other value additions as part of the sub-license and other related agreements. The fees payable by the customer banks for the value additions was included in the total license fees for the products covered under the sub license agreements. In order to meet the customer requirements, an integrated payments solutions system was made. The single window systems integrated approach has been the key for creation of the market for ACI products solutions in India. The ACI has also recognized the efforts put in by the applicant and value additions. As a part of its ambitious plans to have direct presence in India, the defendants devised a plan to deny the benefit of applicant's efforts in India and attempted to put wrongful pressure on the applicant to compel them to succumb to their efforts. Initially, all the software licence agreements entered into with the customer banks were

endorsed by ACI. By a letter, dated 12.6.2003 sent by the third respondent's corporate counsel, the ACI had permitted the applicant to enter into agreements with the customer banks without having to obtain ACI's endorsements.

14.It was further stated that by the vigorous marketing and technical support to its customers, the applicant became the market leader in India with around 75 to 80% of market share. The applicant has been the successful distributor for ACI products in the entire Asia-Pacific region. 75% to 80% of all ATMs and swipe card machines in India are run on software provided by ACI customized and maintained by the applicant. There are about 200 employees of the applicant working in active coordination and also operate through the help desk set up by the applicant. During the year 2005, the ACI evinced interest in buying the entire business of the applicant and signed a non disclosure agreement on 18.1.2005, whereby confidential information in relation to the business of the applicant would be provided to the second respondent or its affiliates and that should not be disclosed to any third party. Apart from that, the confidential information are also to be used only to facilitate the aforesaid buyout of the applicant's business. In the guise of buying out the ACI related business of the applicant, the defendants obtained all proprietary information of the applicant including its business model, pricing, etc. The respondent ACI entered into an IOI with the applicant on 3.12.2007 for buying out the ACI related business of the applicant, but they went back to their commitments agreed to in the IOI and illegally attempted to seek assignment of contracts entered into with the customer banks. Therefore, the applicant had filed the suit.

15.It was further stated that the defendant despite prohibitory order given by the court is circumventing the order by interfering with the provision of services by the applicant by creating confusion among the customer banks. The applicant also sent a letter/email, dated 22.7.2008 and informed the ACI that the direct meetings of ACI with customer banks will create confusion and thereby, hinder the rendering of services to its customer banks. The act of the defendants were also in flagrant violation of the order of this court.

16.The defendants in opposition to these averments in the affidavits filed in support of their applications, stated that the first defendant was an entity incorporated in accordance with the Laws of the State of Nebraska, USA. It has changed its name from ACI Worldwide Inc. to ACI Worldwide Corp. The first defendant has no business operations and branch office or liaison office within the jurisdiction of this Court. The suit has been filed against the first defendant only to harass them. Therefore, without submitting to the jurisdiction to this court, the application is filed seeking for rejecting the suit as against the first defendant. It was also stated that no grievance is projected against the first defendant. By a letter, dated 6.6.2006, the first defendant informed the plaintiff that the agreements between the first defendant and FSS and the IDA would be terminated if certain events mentioned in the letter were to occur. It was also stated on behalf of fourth defendant that the agreements of fourth defendants including the IDA would be terminated if there was a change in control of FSS.

17.It was further stated that the letters, dated 20.7.2005 and 6.6.2006 did not give rise to any legal rights or cause of action against the first defendant. The first defendant is not a signatory to the non disclosure agreement. The IDA also contains a specific arbitration agreement in relation to any

dispute. Prima facie, the governing law of IDA is the law of Nebraska, USA. The governing law of NDA is the law of India. Therefore, this court cannot apply the two governing laws in the same suit. The conduct of the plaintiff is a clear case of misuse of the process of the law and it is a blatant attempt to coerce the first defendant to accede to the illegal and unjust demands. Any relief and issue relating to the customer banks should only be dealt with by the fourth defendant and the suit cannot be allowed. If it is done, it will result in misjoinder of cause of action. Therefore, it was prayed by them that the plaint as it did not disclose any cause of action, should be rejected.

18.The second defendant (Transaction Systems) had stated that the second defendant is a Delaware corporation with its office at New York, USA. It had changed its name from Transaction Systems Architects inc to ACI Worldwide Inc. It has no business operations and branch office in India and the suit is not maintainable. Therefore, for the very same reasons set out for the first defendant, the second defendant wanted to reject the plaint as against the second defendant and also to refer to the dispute for arbitration.

19.The fourth defendant (ACI Worldwide (Asia) Pte. Ltd.) had stated that they are an entity and are incorporated in accordance with the laws of Singapore and is having its office at Singapore. It was earlier operating in the name of ACI (Singapore) Pte. Limited, but had changed its name to ACI Worldwide (Asia) Pte. Limited in the year 1999. He had also raised a similar ground of no cause of action against them. Further, they referred to clause 24 of the agreement providing for arbitration for settling the disputes. Hence they filed two applications for rejecting the plaint and for referring to the dispute for arbitration.

20.The fifth defendant has also filed a similar application for rejecting the plaint and has stated that the suit is not maintainable. They have been wrongly impleaded as party. The issues raised in the suit are only between the plaintiff and the defendant No.4.

21.Mr.P.S.Raman, learned Additional Advocate General appearing for plaintiff placed reliance upon the judgment of the Supreme Court in Sukanya Holdings (P) Ltd. Vs. Jayesh H.Pandya and another reported in 2003 (5) SCC 531 for contending that if all the defendants in the suit are not parties to the arbitration clause, the arbitration clause are not binding on them. In which case, only a part of the subject matter could at the most be referred for an arbitration. There is no power conferred on the court to add parties who are not parties to the agreement in an arbitration proceeding. If some of the parties to the suit are not parties to the agreement, then it will be difficult to bifurcate the cause of action. Sending one set of parties to arbitration and retaining the other dispute in the court will be a new procedure not contemplated under the Act. Two parallel proceedings one by the arbitrator and one by the suit will lead to further delay the proceedings.

22.The learned Additional Advocate General further relied upon the judgment of the Supreme Court in India Household and Healthcare Ltd. And LG Household and Healthcare Ltd. reported in 2007 (5) SCC 510 and contended that if certain reliefs claimed by the parties fall outside the arbitration agreement and necessary parties affected by such claim are not parties to the arbitration agreement and the subject matter of arbitration also overlapping with the subject matter of the suit filed by the party, in such a case, the matter cannot be referred to arbitration as the subject matter of the suit

and the parties cannot be split up.

23.Mr.Arvind Datar, learned Senior Counsel brought to the notice of this court the judgment of the Bombay High Court in Indian Organic Chemicals Ltd. Vs. Chemtex Fibres Inc and others reported in AIR 1978 BOMBAY 106 and contended that Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 has application only to a case where there exist one agreement, which provides for a particular arbitral forum and a suit is commenced by a party to such an agreement. He placed reliance upon the following passage found in paragraph 46 of the said judgment, which is as follows:

"46.In my opinion, however, there is another obstacle in the way of the defendants in so far as their contentions based on the provisions of S.3 of the 1961 Act are concerned. S.3 of the 1961 Act refers to 'an agreement'. The words are 'an agreement'. The use of the article 'an' indicates the intendment of the section. The section, in my view, deals with a situation where there exists an agreement and the party to such an agreement commences legal proceedings in a Court in respect of a matter covered by the said arbitration agreement. The section does not contemplate plurality of agreements impinging upon a dispute or a set of disputes. The section has no application to a situation where plurality of agreements converge on disputes and differences which arise out of a single transaction or a series of transactions which are inextricably linked with each other. This interpretation of the provisions of the section is in consonance with the intendment, purposes and scheme of the 1961 Act. The 1961 Act is calculated to provide for speedy and effectual settlement of international disputes arising out of international trade. The complications which normally arise from the applicability of the principles of Private International Law by reason of plurality of agreements impinging on a dispute will result in a very unsatisfactory situation. It will not only complicate the matters but will also fail to resolve the conflict that may arise as a result of the application of multifarious and often conflicting principles of Private International Law to a particular set of disputes. The conflicting awards resulting from the multiple arbitral fori contemplated by the multiple agreements, in my opinion would not subserve the intendment of or the purpose contemplated by, the Act. It would thwart the achievement of objectives sought to be served by the 1961 Act. It will, therefore, have to be opined that S.3 of the 1961 Act has application only to a case and only to such a case, where there exists one agreement which provides for a particular arbitral forum and a suit is commenced by a party to such an agreement or by a person claiming through him in respect of a matter which is covered by such an agreement. Any other interpretation would not only ignore the significance of the use of the word "an" in S.3 but would make its machinery unworkable and thus defeat the purposes sought to be subserved by the provisions of the 1961 Act."

24.Per contra, Mr.T.R.Rajagopalan, Senior Counsel appearing for the defendants referred to the following judgments:

1)2007 (4) CTC 186 (Andritz Oy Vs. Enmas Engineering Pvt. Ltd.)

2)2008 (4) CTC 1 (Kotak Mahindra Bank Ltd. Vs. Sundaram Brake Lining Ltd. and 2 others)

3)153(2008) DLT 250 (Virender Yadav Vs. Aerosvit Airlines and others)

25.In the first case relating to Andritz Oy, the learned Senior counsel placed reliance upon the following passage found in paragraph 83, which is as follows:

"83.In any case, it is clear from Section 45 that this Court is entitled to reject a request to refer the parties to Arbitration, only if it finds that the agreement is null and void, inoperative or incapable of being performed. Any ground other than those specifically enumerated in Section 45, is not available to this Court to reject a request for referring the parties to Arbitration. In simple terms, the non-availability of the original Arbitration Agreement, the non signing of the agreement by the plaintiff or the first defendant, the non-availability of Exx.1,2 and 3 to the agreement, are all not matters which would fall within the scope of an enquiry under section 45 for the purpose of deciding whether to refer the parties to Arbitration or not."

26.In the second judgment relating to Kotak Mahindra Bank case, the learned Senior Counsel placed reliance upon the following passages found in paragraphs 64,67 and 68, which are as follows:

"64.Therefore, if by agreement, parties could have disputes where allegations of fraud, misrepresentation etc., are made, referred to arbitration, it is certainly possible for the legislature to bring them within the purview of arbitration. This is what the 1996 Act has done by virtue of Section 16 of the Act. In so far as domestic arbitration is concerned, what a court can do at the pre reference stage, is restricted to what is prescribed under Sections 8,9 and 11. That it cannot traverse beyond what is provided therein, is also stated in Section 5. Similarly what an Arbitral Tribunal can do is spelt out in Section 16. If the deletion in Section 8, of the rider contained in Section 45 is a case of omission, the insertion of a similar rider in Section 16 empowering the Arbitral Tribunal to go into the question, is a case of commission. This, therefore, is a clear signal to the fact that in so far as domestic arbitration is concerned, the question as to whether an Arbitration Agreement is vitiated by fraud etc., are also to be determined only by the Arbitral Tribunal. It does not fall under the exception to the rule of casus omissus and hence the court cannot supply the same by resorting to the maxim "ex nihilo nihil fit".

.....

67.There is one last issue raised by the respondent/plaintiff, namely that the defendants 2 and 3 are not parties to the Arbitration Agreement and that therefore when a comprehensive suit is laid, as against persons who are, as well as who are not, parties to the Arbitration Agreement, the parties

cannot be referred to arbitration. This argument is based upon the ratio laid down by the Apex Court in *Sukanya Holdings (P) Ltd. V. Jayesh H. Pandya and Anr.* {(2003) 5 Supreme Court Cases 531}. The relevant portion of the said decision is as follows:

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the Arbitration Agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

68. But the above decision is of no assistance to the respondent/plaintiff. The said decision, does not lay down as a proposition of law that the moment a person who is not a party to an Arbitration Agreement is roped in, the jurisdiction of the Arbitral Tribunal stands ousted. In a Civil Suit, the plaintiff is the dominus litis and he may cite any one as a party, at the time of institution. Such a privilege granted to a plaintiff cannot be (mis)used as a gate pass to avoid an Arbitration Agreement. In the present suit, the defendants 2 and 3, who were only Officers of the plaintiff, have been cited as defendants 2 and 3, without any relief being sought against them. They are impleaded only in view of the allegations made against them that they exceeded the authority conferred upon them to enter into derivatives transactions. In other words, the plaintiff requires their presence as witnesses and not as parties against whom any relief is sought for. In paragraph-30 of the plaint, it is made clear by the plaintiff that no specific relief has been sought against defendants 2 and 3. In such circumstances, their impleadment in the suit, cannot ensure to the benefit of the plaintiff to avoid the Arbitration Agreement."

27. The third decision of the Delhi High Court is more or less on similar lines. In the light of the same, the learned Senior Counsel submitted that in view of the arbitration clause, the parties should be sent for an arbitration. In any event, in the absence of a cause of action, the plaint will have to be rejected.

28. With reference to the rejection of plaint, it must be stated that the applications are filed under Order 7 Rule 11 stating that there was no cause of action in the suit. The Supreme Court had laid down a test for rejecting the plaint in *Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I* and another reported in (2004) 9 SCC 512. In paragraphs 139, 140, 146, 147 and 149, it had been held as follows:

#### "Rejection of plaint

139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.



## Cause of action

140. A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence.

"146. It may be true that Order 7 Rule 11(a) although authorises the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

147. In *D. Ramachandran v. R.V. Janakiraman* this Court held : (SCC p.271, para 8) "It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter."

149. In *D. Ramachandran v. R.V. Janakiraman* it has been held that the court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action.

29. For rejecting the plaint under Order 7 Rule 11, the averments in the plaint alone will have to be looked into and not the defence raised by the defendants. In any event, to decide the cause of action issue, it requires evidence to be let in after necessary pleadings are filed by the respondents. In the light of the same, this court is not inclined to reject the plaint. Hence A.Nos.4327, 4320, 4323 and 4325 of 2008 will stand dismissed. No costs.

30. With reference to relegating parties to an arbitration, it is stated by some of the defendants that they themselves are not parties to arbitration agreement. Therefore, in the light of the decisions relied on by the learned Senior Counsel for the plaintiff, there cannot be a reference for arbitration. Hence, the applications in A.Nos.4321 and 4328 of 2008 stand dismissed. No costs.

31. But in so far as application in A.No.2940 of 2008 for the grant of leave to initiate legal proceedings, that application is not opposed. Hence, A.No.2940 of 2008 is ordered. No costs.

32. Since no arguments were addressed on the injunction applications and no counter has been filed, the Original Applications in O.A.Nos.711, 712, 713 and 996, 997 and 919 of 2008 will stand posted

before the appropriate court after the respondents filed their counter affidavits in those applications.

vvk