

(For Condonation Of 13 Days' Delay In ... vs Vodafone Group Plc & Anr on 1 September, 2020)

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw, Asha Menon

\$~VC-6 & 7

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ RFA (OS) 38/2018, C.M. No.23348/2018 (stay) & C.M.No.519/2020
(for condonation of 13 days' delay in filing reply to
C.M.No.49319/2019), C.M. No.49319/2019 (of the respondents for
withdrawal of oral statement) & C.M.No.14469/2020 (for directions)

UNION OF INDIA Appellant
Through: Mr.Chetan Sharma, ASG with
Mr.Kirtiman Singh, CGSC, Mr.Amit
Gupta, Mr.R.V. Prabhat, Mr.Sahaj
Garg and Mr.Anish Roy, Advocates

Versus

VODAFONE GROUP PLC & ANR. Respondents
Through: Ms. Anuradha Dutt, Ms.Fereshte
Sethna, Ms.Ekta Kapil, Mr.Haaris
Fazili, Mr.Kunal Dutt and Mr.Shobhit
Ahuja, Advocates

+ RFA (OS) 45/2018
VODAFONE GROUP PLC UNITED KINGDOM & ANR. Appellants
Through: Ms. Anuradha Dutt, Ms.Fereshte
Sethna, Ms.Ekta Kapil, Ms.Gayatri
Goswami, Mr.Haaris Fazili, Mr.Kunal
Dutt and Mr.Shobhit Ahuja,
Advocates

Versus

UNION OF INDIARespondent
Through: Mr.Chetan Sharma, ASG with
Mr.Kirtiman Singh, CGSC, Mr.Amit,
Mr.R.V.Prabhat, Mr.Sahaj Garg and
Mr.Anish Roy, Advocates

RFA (OS) Nos. 38/2018 & 45/2018

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CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON
ORDER

% 01.09.2020

1. The Additional Solicitor General (ASG) has been heard for two and half hours; on the basis of a note of submissions emailed today. The said note be tagged to the miscellaneous paper folder in the miscellaneous portfolio.

2. We deem it apposite to record the questions we have asked from the ASG during the hearing, also indicating our thoughts during the hearing. We have asked, (a) if not the domestic law of the countries privy to a investment treaty between two countries, what law governs arbitration provided for in such treaty; (b) what is the effect of the clause in the said treaty, permitting investor of one country, for whose benefit treaty is entered into by that country, to invoke arbitration against the country in which it has invested; (c) without any arbitration agreement between the investor and the country in which it has invested, can there be a binding arbitration agreement between them, under the said law; (d) what is the effect of such investor having option to arbitrate or to sue the other country in its domestic courts; is it not the law that clauses whereunder there is a choice to arbitrate or not to arbitrate, are not considered to constitute binding arbitration agreement; (e) who is an 'investor' within the meaning of such investment treaty; (f) whether not 'investment' means bringing in money into the country and in consideration whereof the investment treaty is entered into; if it is so, whether it is only the entity which has brought the money, who is the investor or its shareholders/principals would also be treated as 'investor'; if it were to be so, whether not the same will open the country privy to the treaty, to multiple claims; (g) since the right to invoke arbitration is of the investor only, who should determine whether the party invoking the arbitration is the investor or not i.e. the courts of either of the contracting countries or the Arbitral Tribunal; on a reading of Article 9 of the U.K. India Treaty it does not appear that the said dispute is arbitrable; if it is so, whether not the country of investment is the more appropriate country to decide the said dispute; (h) whether answer to any of the said questions is to be found in the Arbitration Rules of the United Nations Commission on International Trade Law;

(i) whether any recourse, against the arbitral award under the Investment Treaty, is available and if so under which law; (j) what is the law applicable to multiple invocations of arbitration by persons claiming to be investor with respect to the same investment; (k) if the domestic courts have jurisdiction, what law is to be applied to adjudication; (l) under the Constitution of India, whether the State action of entering into the Investment Treaty, affects jurisdiction of courts in any way; taking into consideration that under the Constitution, judiciary is distinct from State/Executive; and, (m) where is the admission of facts in this regard, for the suit to have been finally decided on the premise that there are no disputed questions of facts.

3. Hearing to continue as already scheduled on 7th September, 2020.

RAJIV SAHAI ENDLAW, J ASHA MENON, J SEPTEMBER 01, 2020 ck/pkb