

Union Of India vs Vodafone Group Plc & Anr on 8 December, 2020

Equivalent citations: AIRONLINE 2020 DEL 1799

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw, Asha Menon

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA(OS) 38/2018 & CMs No.23348/2018 (for stay) & 14469/2020
(for directions)

UNION OF INDIA Appellant

Through: Mr. Chetan Sharma, ASG with Mr.
Kirtiman Singh, Mr. Ashutosh
Kumar, Mr. Prateek Dhanda, Mr.
Waize Ali Noor, Mr. Rohan Anand,
Mr. Taha Yasin and Mr. Akshay
Gadeock, Advs.

Versus

VODAFONE GROUP PLC & ANR. Respondents

Through: Ms. Anuradha Dutt, Ms. Fereshte
Sethna, Ms. Ekta Kapil, Ms. Gayatri
Goswami, Mr. Haaris, Fazili, Mr.
Kunal Dutt and Mr. Shobhit Ahuja,
Advs.

AND

+ 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,
Advs.

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UNION OF INDIA Respondent

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

CORAM:

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

% 08.12.2020
[VIA VIDEO CONFERENCING]

1. Both appeals arise from the judgment dated 7th May, 2018 of a Single Judge of this Court in CS(OS) No.383/2017 filed by Union of India (UOI) against (A) Vodafone Group PLC United Kingdom; and, (B) Vodafone Consolidated Holdings Limited United Kingdom (both collectively called as 'Vodafone'), seeking (i) declaration that Notice of Dispute dated 15th June, 2015 and Notice of Arbitration dated 24th January, 2017 issued by Vodafone to UOI; and, the proceedings initiated by Vodafone in pursuance to the said notices under the India-United Kingdom (UK) Bilateral Investment Promotion and Protection Agreement (BIPA) are an abuse of process and null and void; and, (ii) permanent injunction restraining Vodafone from taking any action in furtherance of the notices aforesaid and from initiating arbitration proceedings under the India-UK BIPA or continuing with it as regards the disputes mentioned in the notices.

2. Considering the nature of the disputes, the parties did not wish to lead any evidence and the Single Judge heard the counsels finally, treating all documents filed by the parties as admitted documents.

3. We may notice/record that the plea inter alia of UOI in the suit from which these appeals arise was, (a) that Vodafone having invoked arbitration against UOI under the India-Netherlands BIPA, was not entitled to also invoke arbitration under the India-UK BIPA on the same cause of action and for the same relief; and, (b) that Vodafone had resorted to invoke arbitration under the India-UK BIPA owing to the plea of UOI before the Arbitral Tribunal under the India-Netherlands BIPA, that the dispute and claim raised by Vodafone before the Arbitral Tribunal, fell in the category of disputes which could not be raised under the India-Netherlands BIPA and that continuation by Vodafone, of arbitration proceedings against UOI, under India-Netherlands BIPA as well as India-UK BIPA, was vexatious. We may further notice that Vodafone inter alia objected to the jurisdiction of this Court over the subject matter of the dispute. We may yet further notice that during the pendency of the suit before the Single Judge, vide order dated 26th October, 2017, as modified by order dated 14th December, 2017 of the Supreme Court in SLP(C) No.33885/2017, without prejudice to the rights and contentions of the parties, constitution of Arbitral Tribunal under the India-UK BIPA was permitted but the Tribunal so constituted was not to commence hearing.

4. Vide the impugned judgment, it was held (i) that this Court has jurisdiction over Vodafone in personam and over the subject matter of the dispute; (ii) that an agreement to arbitrate between an investor and a host State is contractual, inasmuch as it is not itself a treaty but flows from the treaty provisions, and is justiciable in accordance with the principles of international law and there is no threshold bar or inherent lack of jurisdiction in the Court to deal with BIPA arbitrations; (iii) that a National Court would generally not exercise jurisdiction where the subject matter of the dispute

would be governed by an investment treaty having its own dispute resolution mechanism, except if there are compelling circumstances and the Court has been approached in good faith and there is no alternative efficacious remedy available; (iv) that the entire scheme of BIPA is contractual and it is clear that UOI consented to the international investment arbitration under principles of international law, as the method of dispute resolution under the BIPA, and in view of Vodafone's undertaking/offer before the Court, to consolidate the arbitration under the India-UK BIPA with the arbitration under the India-Netherlands BIPA, the likelihood that the Arbitral Tribunal would make an order that would afford Vodafone double relief or impose a double jeopardy on UOI or pass conflicting awards, was remote; (v) that UOI had not wilfully indulged in suppression and its conduct was not vitiated by malice; (vi) that with the constitution of Arbitral Tribunal under the India-UK BIPA, the suit had become infructuous; (vii) that under the principle of 'kompetenz-kompetenz', India-UK BIPA Arbitral Tribunal would be better placed to assess the scope of the two BIPA arbitration proceedings and the likelihood of parallel proceedings and abuse of process; (viii) that UOI, after having elected its remedy of agitating the issue of abuse of process before the Netherlands-India BIPA Arbitration Tribunal, could not have approached the National Court on the same ground and that too, without waiting for the award being rendered by the India-Netherlands BIPA Tribunal; and, (ix) that the suit could not be an appeal against the India-Netherlands BIPA Tribunal. Resultantly, the suit was dismissed with liberty to UOI to raise the issue of abuse of process before the Arbitral Tribunal, under the India-UK BIPA, which stood constituted; the said Tribunal, while deciding the said issue to take into account Vodafone's undertaking to the Court that if UOI consented, Vodafone would agree to consolidation of the two BIPA arbitration proceedings, before the India-UK BIPA Tribunal.

5. RFA(OS) No.38/2018 came up first before the Court on 31st May, 2018, when the same was admitted for hearing and an oral statement was made on behalf of Vodafone, to keep the arbitration proceedings under the India-UK BIPA in abeyance, till the decision of the appeal. Thereafter, RFA(OS) No.45/2018, by way of cross-objections, was filed by Vodafone, with respect to the finding of the Single Judge holding this Court to have jurisdiction to entertain the suit. Thereafter, the matters were adjourned from time to time. CM No.49319/2019 in RFA(OS) No.38/2018 was filed by Vodafone inter alia praying for withdrawal of oral statement given on behalf of Vodafone on 31st May, 2018 to the effect that they were agreeable to keep in abeyance, steps in furtherance to the arbitration proceedings under the India-UK BIPA, during the pendency of these appeals. The said application came up for hearing on 20th November, 2019, when reply therefor was called. Vide subsequent order dated 15th January, 2020, it was directed that Vodafone shall remain bound by the statement made on 31st May, 2018. Vide subsequent order dated 11th February, 2020, CM No.49319/2019 in RFA(OS) No.38/2018 was dismissed and Vodafone was held to be bound by the statement made on 31st May, 2018.

6. Vodafone, during the prevalent pandemic, filed CM No.14469/2020 in RFA(OS) No.38/2018, for early hearing and in the alternative to be relieved of the undertaking for interim arrangement and which application came up before us on 9th July, 2020. After hearing the counsels, the appeals were ordered to be listed for final hearing via video conferencing.

7. The Additional Solicitor General (ASG) for UOI and the senior counsel for Vodafone were heard on 14th August, 2020, 1st September, 2020, 7th September, 2020 and 14th September, 2020.

8. We may at this stage further notice, that during the pendency of these appeals, the Arbitral Tribunal constituted under the India-Netherlands BIPA concluded the hearing and in February, 2019 reserved award and it was the repeated contention of the ASG before us that since the Arbitral Tribunal under the India-Netherlands BIPA had reserved award and which was to be pronounced at any time, there was no need for Vodafone to proceed with the arbitration of the same claim and relief before the Arbitral Tribunal under the India-UK BIPA.

9. After the hearing of these appeals on 14th September, 2020, we read in the newspapers that the arbitral award under the India-Netherlands BIPA had been published and was against the UOI. Therefrom it appeared that the Arbitral Tribunal under the India-Netherlands BIPA had not accepted the plea of UOI before it, that the relief claimed by Vodafone fell in the category of disputes which could not be raised under the India-Netherlands BIPA. Therefrom it also appeared that the reason for which Vodafone had invoked the arbitration under the India-UK BIPA, had disappeared. Thus, on 7th October, 2020, when the appeals next came up before us, we enquired, whether not in view of the said developments, the suit from which these appeals arise, had become infructuous.

10. The counsel for UOI, on 7th October, 2020 stated that Vodafone should make a statement that in view of arbitral award pronounced since then, Vodafone would not be pursuing the arbitration under the India-UK BIPA. On the contrary, the senior counsel for Vodafone stated that it is the UOI which should inform whether it intended to be bound by the arbitral award already published under the India-Netherlands BIPA or intends to take up further proceedings with respect thereto.

11. Thereafter, on 17th November, 2020, the ASG stated that his instructions were still awaited as the decision was to be taken by the Inter- Ministerial Committee/Group of the Cabinet which had not met till then. On 17th November, 2020, the senior counsel for Vodafone, under instructions stated that Vodafone shall proceed with the arbitration commenced under the India-UK BIPA, only if the award already published under the India- Netherlands BIPA, was set aside. Expressing our view, that recording the said statement on behalf of Vodafone, the appeals could be disposed of, on request of ASG for time to consider, the matters were adjourned to today.

12. Today, the ASG states that no decision has been taken by the Inter- Ministerial Committee/Group as yet on challenging the award under the India-Netherlands BIPA.

13. The counsel for Vodafone however affirms the statement made on 17th November, 2020 and as recorded in the order of that date, that Vodafone shall proceed with the arbitration commenced under the India-UK BIPA, only if the award under the India-Netherlands BIPA already published, was set aside.

14. In view of the statement aforesaid on behalf of Vodafone, there is no need to keep these appeals pending. The grievance of UOI in the suit from which these appeals arise as well as in these appeals, was of Vodafone making the same claim under two separate BIPAs i.e. under the India- Netherlands

BIPA, first invoked, and also under the India-UK BIPA, subsequently invoked and which was labelled as vexatious. On the contrary, it was inter alia the plea of Vodafone that in view of objection taken by UOI before the Arbitral Tribunal under the India-Netherlands BIPA, it had become incumbent on Vodafone to, without wasting time, by way of abundant caution, invoke India-UK BIPA also for the same claim. Now, on publication of the award under the India-Netherlands BIPA, the said objection of UOI has not been sustained and the claims of Vodafone have been allowed. Further, now in view of the statement made on 17th November, 2020 and reiterated today on behalf of Vodafone, there is no occasion for arbitration under the India-UK BIPA proceeding, unless the award under the India-Netherlands BIPA, is set aside.

15. Hearing of these appeals has already consumed sufficient time of different Benches of this Court. Though it was the contention of the senior counsel for Vodafone that Vodafone was entitled, in law, to by way of abundant caution, invoke arbitration under India-UK BIPA also and that Vodafone still remains so entitled, till the arbitral award under the India- Netherlands BIPA is complied with by UOI, but in view of subsequent developments aforesaid, need is not felt for this Court to spend any more time on these appeals.

16. The appeals are disposed of as infructuous, for the time being, in view of aforesaid developments and binding Vodafone to the statement made on 17th November, 2020 and today and with liberty to the parties to apply for revival of these appeals, if and when the cause of action arises/again arises and at which stage, all pleas available in law, shall remain open to the parties.

No costs.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

DECEMBER 8, 2020/'bs'