



Indian Court dismisses the Anti- investment treaty arbitration suit of Government of India

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High Court of Delhi by a judgment dated 7th May 2018 dismissed the anti-arbitration suit filed by the Government of India (herein after GOI) challenging the 2nd investment treaty Arbitration proceedings initiated by Vodafone Group Plc (herein after VG) & Vodafone Consolidated Holdings Limited (here in after VCHL) seeking reliefs of declaration and permanent injunction against the notice of arbitration issued by both the above said parties initiating an investment treaty arbitration under India UK Bilateral Investment Protection Agreement on the grounds of abuse of process. While deciding the said Suit the court analyzed and decided that the 2nd Arbitration proceedings initiated by the same parties against Government of India is not an abuse of procedure and held that the National Courts can use their inherent jurisdiction to grant injunctions against foreign seated arbitrations if the said proceedings is found to be oppressive in nature.

Facts of the case: The Income Tax Department made a demand of 12000 Crores (200 Million USD) from VCHL claiming that the transfer Vodafone shares to Vodafone amounts to transfer of Capital assets under S.2(14) of the income Tax Act and hence the said transaction can be taxed. Vodafone challenged the said demand of the income tax department of India and succeeded in the case since the Supreme Court of India quashed the said demand vide its judgment dated 20th January 2012 in Civil appeal 733/2012 and held that the sale of shares in question does not amount to transfer of Capital assets under S.2(14) of the Income Tax Act. To nullify the above said Judgment Government of India brought in a retrospective Amendment to the Income tax Act., amending Sections 9(1) and 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012 to bring VCHL under the tax-liability net for acquisition of stake in an Indian company. Since the said retrospective amendment was carried out by the Indian Parliament after the Supreme Court of India quashed the tax-demand made by Government of India against VIHBV, on April 17, 2014, Vodafone International Holdings BV ("**VIHBV**") – a Dutch subsidiary of Vodafone Group Plc. - initiated an investment treaty arbitration against the Republic of India under the India-Netherlands BIT claiming that the retrospective amendment is oppressive in nature which is violating the provisions of the said BIT.

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After the said notice of Arbitration under India-Netherlands BIT, VG & VCHL initiated another arbitration under UK Bilateral Investment Treaty challenging the said Sections 9(1) and 195 of the Indian Income Tax Act read with Section 119 of the Indian Finance Act, 2012 to bring VCHL under the tax-liability net for acquisition of stake in an Indian company on the ground of oppression etc., Hence Government of India filed a Suit in High Court of Delhi seeking declaration to the effect that the 2nd Investment Treaty Arbitration as an abuse of procedure and also sought for an anti-arbitration injunction.

Contentions of the Parties: The Government of India contended that VG by issuing a notice dated April 2012 of dispute under India- Netherlands BIPA elected its remedy under India- Netherlands BIPA and hence VG must limit its remedy under the said treaty. Starting another Arbitration under India- UK BIPA is an abuse of process since it violates the principle of good faith and the doctrine of election. Moreover, since GOI raised jurisdictional objection in the first arbitration under India- Netherlands BIT, VG is initiating another arbitration for the same cause of action which is surely an abuse of the process.

VG contended that National courts inherently lacked jurisdiction to entertain any dispute arising out of an investment Treaty Arbitration. It was contended that Indian National Courts Indian national Courts have neither jurisdiction over the subject matter of the dispute (which is a dispute arising out of an alleged breach of a Treaty by the Union of India) nor did they have jurisdiction Ratione Personae (i.e., over the defendants).

Decision of the Court: While deciding the above and the other contentions of the parties, the court decided the following issues of importance as follows:

Investment Arbitration is not a Treaty Dispute: The Court held that an investment treaty arbitration between a private investor and the host state, which results because of the treaty cannot be said to be a treaty by itself, it is sui generis as recognised all over the world.

Powers of courts to grant anti-arbitration Injunctions: The Court held that the Courts in India have the powers under its inherent powers to grant such injunctions against such arbitrations. But it was also held that National courts will exercise this jurisdiction with great self-restraint and grant injunction only if there are very compelling reasons and the court has been approached in good faith and there is no alternative efficacious remedy available. It cited the Judgement of Court of Appeal in England in Republic

of Ecuador case², which rejected the argument that the courts have no jurisdiction to interpret or apply unincorporated international treaties between an investor and a host State. It also observed that it is not unknown for courts to issue anti arbitration injunction under their inherent power, especially when neither the seat of arbitration nor the crucial law has been agreed upon. It also cited the Judgment of the Court in Excalibur Ventures LLC³ where it was held tat where the foreign arbitration was oppressive or unconscionable, the court can exercise its power to grant an injunction.

Multiple claims by entities in the same vertical Corporate Chain regarding Same Measure: The Court also held that multiple claims by entities in the same vertical Corporate Chain with regard to Same Measure cannot *per se* vexatious. The Court cited the Judgment of Caribbean Court of Justice in British Caribbean Bank Limited case⁴, which held that there is no presumption that multiple proceedings is vexatious or oppressive or abuse of process in itself.

With the above findings, the suit filed by Government of India was dismissed with liberty to raise the issue of abuse of process before the tribunal formed under India UK BIPA investment Treaty. The Court also observed that the said tribunal would also consider consolidating both the proceedings, if Union of India gives a consent.

² Republic of Ecuador Vs Occidental Exploration and Production Co (2005) EWCA Civ 1116

³ Excalibur Ventures LLC Vs Texas Keystone Inc., (2011) 2 Lloyds Law Report 289

⁴ British Caribbean Bank Limited Vs The Attorney General of Belize (2013) CCJ4(AJ)