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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 383/2017

UNION OF INDIA ..... Plaintiff
Through: Mr. Sanjay Jain, ASG with Mr. Sanjeev Narula, CGSC, Mr. Abhishek Ghai, Mr. Anshuamn Upadhyay, Ms. Rhea Verma, Ms. Adrija Thakur and Mr. Ruchir Bhatia, Advocates.

versus

VODAFONE GROUP PLC
UNITED KINGDOM & ANR ..... Defendants
Through: None.

% Date of Decision: 22nd August, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (oral):

I.A.9461/2017 in CS(OS) 383/2017

Keeping in view the averments in the application, plaintiff is exempted from filing the certified copies/originals of documents at this stage.

Needless to say, this order is without prejudice to the rights and contentions of the parties.

Accordingly, present application stands disposed of.

I.A.9462/2017 in CS(OS) 383/2017

Present application has been filed seeking extension of time in filing the court fees.

Learned counsel for the plaintiff prays for and is permitted to file the deficient court fees within two weeks.

Accordingly, the application stands disposed of.

CS(OS) 383/2017

Let the plaint be registered as a suit.

Issue summons in the suit to the defendants by all modes including dasti, returnable for 26th October, 2017.

The summons to the defendants shall indicate that a written statement to the plaint shall be positively filed within four weeks of the receipt of the summons. Liberty is given to the plaintiff to file a replication within two weeks of the receipt of the advance copy of the written statement.

The parties shall file all original documents in support of their respective claims along with their respective pleadings. In case parties are placing reliance on a document which is not in their power and possession, its detail and source shall be mentioned in the list of reliance which shall be also filed with the pleadings.

Admission/denial of documents shall be filed on affidavit by the parties within two weeks of the completion of the pleadings. The affidavit shall include the list of the documents of the other party. The deponent shall indicate its position with regard to the documents against the particulars of each document.

I.A.9460/2017 (U/o 39 Rules 1 & 2) in CS(OS) 383/2017

Issue notice to defendants by all modes including dasti, returnable for

26th October, 2017.

It is pertinent to mention that present suit has been filed for declaration and permanent injunction.

In the plaint, it is stated that M/s Hutchinson Telecommunications International Limited earned capital gains on the sale of stakes to Vodafone International Holdings B.V (VIHBV) in an Indian company by the name of Hutchinson Essar Limited (HEL) for a consideration of $11.1 Billion (Approx) on 8th May, 2007. The acquisition of stake in HEL by VIHBV was held liable for tax deduction at source under Section 195 of the Income Tax Act, 1961 and since VIHBV failed to honour its tax liability, a demand under Section 201(1)(1A)/220(2) for non-deduction of tax was raised on VIHBV. However, the Apex Court quashed the said demand.

Subsequently, a retrospective amendment to Section 9(1) and Section 195 of the Income Tax Act read with Section 119 of the Finance Act, 2012 re-fastened the liability on VIHBV.

It is stated in the plaint that aggrieved by the imposition of tax, VIHBV, the subsidiary of defendants No.1 and 2 invoked the arbitration clause provided under the Bilateral Investment Promotion and Protection Agreement (BIPA) between the Republic of India and the Kingdom of Netherlands for the promotion and protection of investments through a notice of dispute dated 17th April, 2012 and subsequent notice of arbitration dated 17th April, 2014.

While the said arbitration proceedings were pending, the defendants No. 1 and 2 served a notice of dispute dated 15th June, 2015 and notice of arbitration dated 24th January, 2017 upon the plaintiff for resolution of an alleged dispute under the India-UK BIPA primarily in respect of the same

income tax demand that VIHBV had identified as protected investment under the India-Netherlands BIPA and which is already under adjudication before the Arbitral Tribunal constituted under BIPA.

It is stated in the plaint that though the plaintiff had raised preliminary objections to the jurisdiction of the arbitral tribunal constituted under the India-Netherlands BIPA yet the tribunal vide order dated 19th June, 2017 ruled that the issue of jurisdiction and merits shall be heard together.

Learned ASG states that the two claims are based on the same cause of action and seek identical reliefs but from two different tribunals constituted under two different investment treaties against the same host-state. He contends that the arbitration proceedings now initiated by the defendants is an abuse of law. In support of his contention, he relies upon a recent award published in the matter of ***Orascom TMT Investments S.a r.l. v. People's Democratic Republic of Algeria [ICSID Case No.ARB/12/35, Award dated 31st May 2017]***. The relevant portion of the decision is as under:-

> *"In the words of Sir Hersch Lauterpacht, "there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".*
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> *In particular, an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate.....*
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> *Several corporate entities in the chain may be in a position to*

bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm.

In the Tribunal's opinion, this conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established."

Learned ASG for the plaintiff submits that disputes encompassing tax demands raised by a host state are beyond the scope of arbitration provided under the bilateral investment treaty as taxation is a sovereign function and the same can only be agitated before a constitutional court of the host state.

He lastly submits that under the constitutional scheme of India, laws passed by the Parliament cannot be adjudicated by an arbitral tribunal and do

not fall within the ambit of BIPA or any other international treaty.

Having heard the learned counsel for the parties, this court is of the view that the Courts have to exercise great caution, while restraining foreign arbitration and apply the same principle as they apply to the grant of injunctions restraining foreign court proceedings.

The Indian Supreme Court in ***Modi Entertainment Networks v. WSG Cricket Pte. Ltd: (2003) 4 SCC 341***, after referring to a large number of foreign judgments, has held that a court of natural jurisdiction may issue anti-suit injunction even against foreign court having exclusive jurisdiction if the said forum is oppressive or vexatious.

This Court is of the prima facie view that in the present case, there is duplication of the parties and the issues. Prima facie, this Court is also of the view that India constitutes the natural forum for the litigation of the defendants' claim against the plaintiff.

In fact, the reliefs sought by the defendants under the India-UK BIPA and by the VIHBV the subsidiary of defendants under the India-Netherlands BIPA are virtually identical. The reliefs sought by the VIBHV under the India-Netherlands BIPA are reproduced hereinbelow:-

> *"(a) A declaration that the Respondent is in breach of its obligations under the BIT, including its obligations under Articles 4(1), 4(2), 4(5) and 5(1) of the BIT;*
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> *(b) A permanent injunction prohibiting the Respondent from acting in breach of its obligations under the BIT, in particular prohibiting the Respondent from enforcing the 2012 Amendments (i.e. sections 2(14), 2(47), 9(1)(i) and 195 of the Income Tax Act, 1961, introduced with retrospective effect by the Finance Act 2012) against the Claimant and/or the Claimant's investments in respect of*

any events occurring prior to 28 May 2012, including the Transaction;

(c) an award of damages in respect of all loss caused as a result of the Respondent's breaches of the BIT, in an amount to be quantified by the Tribunal, together with pre- and post-award interest on any sums so awarded (at a rate to be determined by the Tribunal);

(d) an order that the Respondent pays all costs of, and associated with, these arbitration proceedings including the fees and expenses of the Tribunal and the legal and other expenses of the Claimant, including but not limited to the legal fees and expenses of their legal counsel, the fees and expenses of witnesses, experts and consultants, plus post-award interest on those costs so awarded; and

(e) such other and further relief as the Tribunal considers appropriate in the circumstances."

The reliefs sought by the defendants under the India-UK BIPA are reproduced hereinbelow:-

"(a) A declaration that the acts of the Respondent, in particular by virtue of the enactment and/or enforcement of the amendments contained in the Finance Act, 2012 in respect of the Claimants and/or their Investment, are in breach of Articles 3(1), 3(2), 4(1), 4(2) and 5(1) of the Treaty;

(b) A permanent injunction enjoining the Respondent (including organs and instrumentalities for which the Respondent is responsible, such as the Income Tax Department or ITA) from enforcing the amendments contained in the Finance Act, 2012 against the Claimants or their Investment by way of the Tax Demands (including any demands for interest and penalties imposed in connection with the Tax Demands), any

further demands for taxes, interest and penalties, or otherwise;;

(c) *alternatively to (b) damages plus interest upon such damages (both pre-award and post-award) at a reasonable commercial rate to be determined by the Tribunal;*

(d) *An order that the Respondent pay the costs of these arbitration proceedings, including the costs of the Tribunal, as well as the legal and other expenses incurred by the Claimants (including but not limited to the fees of their legal counsel, experts and consultants), plus interest thereon (both pre-award and post-award) at a reasonable commercial rate to be determined by the Tribunal; and*

(e) *Any alternative or other relief that the Tribunal may deem appropriate in the circumstances."*

This Court in ***Pankaj Aluminium Industries Pvt. Ltd. Vs. M/s. Bharat Aluminium Company Ltd., 2011 IV AD (Delhi) 212*** after relying upon ***DHN Food Distributors Ltd. and Others v. London Borough of Tower Hamlets [1976] 3 ALL ER 462 at Page 467*** has recognised the doctrine of single economic entity. In ***DHN Food Distributors Ltd.*** (Supra), it was held as under:-

".....We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says : 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every

movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdworth & Co. (Wakefield) Ltd. v. Caddies. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it."

Consequently, the defendants No.1 and 2 as well as their subsidiary VIHBV, prima facie, seem to be one single economic entity.

This Court is of the prima facie opinion that as the claimants in the two arbitral proceedings form part of the same corporate group being run, governed and managed by the same set of shareholders, they cannot file two independent arbitral proceedings as that amounts to abuse of process of law.

This Court is further of the prima facie view that there is a risk of parallel proceedings and inconsistent decisions by two separate arbitral tribunals in the present case.

In the prima facie opinion of this Court, it would be inequitable, unfair and unjust to permit the defendants to prosecute the foreign arbitration.

Consequently, defendant No.1 and 2, their servants, agents, attorneys, assigns are restrained from taking any action in furtherance of the notice of dispute dated 15th June, 2015 and the notice of arbitration dated 24th January, 2017 and from initiating arbitration proceedings under India-UK Bilateral

Investment Protection Agreement or continuing with it as regards the dispute mentioned by the defendants in the Notice of Arbitration dated 24th January, 2017.

Let the provisions of Order 39 Rule 3 CPC be complied with within a week.

MANMOHAN, J

AUGUST 22, 2017
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