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

Reserved on: March 15, 2017
Date of decision: April 28, 2017

O.M.P.(EFA)(COMM.) 7/2016 & IAs 14897/2016, 2585/2017

NTT DOCOMO INC. ..... Petitioner

Through: Mr. Kapil Sibal, Mr. Rajiv Nayar and Mr. Ciccu Mukhopadhaya, Senior Advocates with Mr. Sanjeev Kapoor, Mr. Rajat Jariwal, Ms. Saman Ahsan, Mr. Aayush Jain and Mr. Akshay Mahajan, Advocates.

versus

TATA SONS LIMITED ..... Respondent

Through: Mr. Darius Khambata, Mr. Sandeep Sethi, Mr. Mustafa Doctor, Senior Advocates with Mr. Rajendra Barot, Mr. V.P. Singh, Ms. Anindita Roychowdhury, Mr. Ratnadeep Roychowdhury, Ms. Vatsala Rai, Mr Aditya Mehta, Mr. Ashim Sood, Mr. Abhinav Jha and Mr. Sidharth Sharma, Advocates.

Mr. C. Mukund, Mr. S.M. Vivek Anandh and Mr. Shaunak Kashyap, Advocate for Applicant/RBI in IA No. 14897/2016.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

% 28.04.2017

1. NTT Docomo Inc. ('Docomo'), a company incorporated in Japan, has filed OMP (EFA) (Comm.) No. 7 of 2016 under Sections 44, 46, 47 and 49 of the Arbitration and Conciliation Act, 1996 ('Act') and under Order XXI of the

Code of Civil Procedure, 1908 read with Section 151 thereof seeking the enforcement and execution of the final Award dated 22nd June 2016 passed by the Arbitral Tribunal ('AT') in London, United Kingdom in LCIA Case No. 152896 under the London Court of Arbitration ('LCIA') Rules.

2. The specific prayer in the petition is for the recognition and enforcement of the aforementioned Award made in favour of Docomo and against the Respondent Tata Sons Ltd. ('Tata'), as a decree of this Court, execution of the decree, and pending such execution and satisfaction of the decree, to pass appropriate interim orders of injunction.

Background Facts

3. A Shareholder Agreement ('SHA') was entered into on 25th March 2009 between Docomo, Tata and Tata Teleservices Ltd. ('TTSL'). Clause 5.7 of the SHA *inter alia* stated that if TTSL failed to satisfy certain 'Second Key Performance Indicators' stipulated in the SHA, Tata would be obligated to find a buyer or buyers for Docomo's shares in TTSL at the Sale Price i.e., the higher of (a) the fair value of those shares as of 31st March 2014, or (b) 50% of the price at which Docomo purchased its shares.

4. Since TTSL did not deliver evidence to Docomo of its compliance of the Second Key Performance Indicator by 30th May 2014, a Trigger Notice was deemed to have been delivered by Docomo to Tata in terms of Clause 5.7.1 of the SHA.

5. In accordance with Clause 5.7.2 of the SHA, Docomo issued a Sale Notice to Tata and TTSL on 7th July 2014 calling upon Tata to find a buyer

or buyers to acquire the Sale Shares during the Sale Period in terms of Clause 5.7.2. The Sale Period terminated on 3rd December 2014.

6. As a result, disputes arose between the parties. In accordance with Clause 12.1.2(a) of the SHA, the disputes were referred to the senior officers duly designated by Docomo and Tata. However, they failed to reach any resolution.

7. By letter dated 3rd January 2015, Docomo commenced the arbitration proceedings by submitting its request for arbitration on 3rd January 2015 to the LCIA. By the said letter, Docomo nominated its Arbitrator. On 28th January 2015, Tata filed its response and counter-claim and also nominated its Arbitrator. The two Arbitrators jointly nominated the Chairman of the AT on 18th March 2015. On 23rd March 2015, the LCIA notified the parties that the LCIA Court had appointed the AT comprising the two respective nominees of the parties and the Chairman jointly appointed by them.

Issues before the AT

8. Before the AT, the issues submitted by Tata were as under:

> "(i) Whether special permission from RBI was required to perform the Sale Option at a price in excess of the NPR Fair Value without violating Indian law?
>
> (ii) Whether Tata had an "absolute" obligation to perform the Sale Option under Clause 5.7.2 of the SHA?
>
> (iii) Whether Tata and Docomo were obliged to make reasonable endeavours to obtain such special permission of RBI, and if so whether Tata made reasonable endeavours to obtain RBI's special permission?

(iv) What is the consequence in law, and under the contract, of the refusal of RBI to grant special permission?

(v) Whether Tata's non-acquisition of the Sale Shares at the Sale Price paid directly or indirectly constituted a breach of the SHA by Tata?

(vi) Whether, (payment of any amount in excess of the FEMA Pricing Guidelines is prohibited, such excess amount can be indirectly made good by way of an award of damages or restitution?

(vii) Whether in any event Docomo is entitled to restitution of 50% of its investment?"

9. The issues submitted by Docomo were more or less similar and read as under:

"1. What were Tata's obligations under Clause 5.7.2?

2. Did Tata perform its obligations under Clause 5.7.2?

3. Was Tata excused from performing its obligations under Clause 5.7.2 on the grounds that such performance was illegal under Indian law?

In particular,

(a) Were methods of performance available to Tata to which there was no legal impediment?

(b) Was RBI's permission required:

(i) for a sale of the Sale Shares at the Sale Price to a third party?

(ii) in order to allow Tata to make payment by way of indemnity?

(iii) for a sale of the Sale Shares to a foreign affiliate(s) of Tata?

(c) Even if RBI permission was required for Tata to purchase the Sale Shares at the Sale Price or to indemnify Docomo up to the Sale Price following a sale to a third party at any price, is Tata liable for its failure to perform?

In particular,

(i) did Tata bear the risk of not obtaining any necessary regulatory permission?

(ii) if the alternative methods of performance could not legally be performed, did Tata have an absolute obligation to find a buyer or buyers for the Sale Shares at the Sale Price by 3rd December 2014?

(d) Can Tata rely upon the defence of illegality under Clause 2.2.2?

In particular, was Tata reasonably diligent:

(i) if it did not seek permission from RBI in sufficient time to enable such permission (if required) to be granted by 3rd December 2014? and/or

(ii) if it failed to seek a buyer or buyers for the Sale Shares at any price other than the Sale Price prior to 3rd December 2014? and/or

(iii) if it limited its application to RBI so as only to encompass a purchase of the Sale Shares by Tata at the Sale Price and it did not apply for permission (if required) to pay an indemnity and/or have its foreign affiliate(s) acquire the Sale Shares? and/or

(iv) if it did not attempt to use good faith efforts to agree on an

alternative structure to afford Docomo the substantial benefits intended by Clause 5.7.2?

4. Were the representations given by Tata in Clauses 10.1.1(b) and/or (d) correct? If not, what are the consequences?

5. To what damages or other form of relief including restitution is Docomo entitled?

6. To what interest is Docomo entitled?

7. What is the correct order as to costs?"

The Award of the AT

10. A unanimous Award was announced by the AT on 22nd June 2016. The AT considered the above issues under the following heads:

"(1) The scheme of the SHA

(2) Indian exchange control laws

(3) The claim for breach of Clause 5.7

(4) The claim for breach of Clause 2.2.2

(5) The claim for breach of Clause 10.1.1 (b) and (d)

(6) The restitution claim

(7) Tata's counterclaim

(8) Relief

(9) Interest

(10) Costs"

11. The conclusions reached by the AT in the impugned Award may be summarised as under:

(i) The object of Clause 5.7.2 was to guarantee Docomo an exit at a minimum of 50% of the subscription price. This was not seriously challenged by Tata. It was drafted in the way that it was because "the Parties knew that exchange control regulations and other considerations might prevent performance under a simple put." (para 108)

(ii) Under Clause 5.7.2 of the SHA, the primary obligation of Tata was to find a buyer or buyers of the Sale Shares on the terms that Docomo receives the Sale Price. That obligation was not qualified in any respect. It was in that sense an absolute obligation. (para 121)

(iii) "The parties provided for alternative methods of performance because they knew there might be restrictions on performance; Tata might not find a buyer at the Sale Price because a 26% holding in an unlisted company is illiquid; licensing restrictions might prevent Tata from increasing its holding in TTSL; or there might be a requirement for special permission from RBI." The parties must have intended that Tata could only avail itself of those alternatives if it could perform in fact and in law. (para 121 (2))

(iv) The parties had agreed that at least one purpose of the clause was to provide stop loss protection. It followed that performance might be required at a time when the market value of the Sale Shares was below the Sale Price, so that a buyer might not be willing to pay the Sale Price; but the clause did not expressly relieve Tata from liability in that event. Instead, it provided Tata with alternative methods of performance.

(v) Tata's 'waterfall' analogy was rejected. This would have the effect that if the value of the Sale Shares fell so that Docomo chose to exercise its option to dispose of the Sale Shares in return for the Sale Price, the first part of the clause would cease to operate just when it was needed. It was unlikely that the parties intended such a result in a clause which had this purpose. Although the second part of the clause began by providing that Tata "shall acquire or shall procure", this was merely an alternative method by which Tata could perform its primary obligation under the first part.

(vi) Tata was committed to perform the first part of Clause 5.7.2. "In the absence of any contrary provision, it bore the risk that at the time of performance it was unable to find a willing buyer at the Sale Price because the market value of the Sale Shares had fallen. In that event, Tata might have been able to avoid a breach of its primary obligation by availing itself of one of the alternative methods of performance provided for in the second part of the clause; but if it was not able to do so, it remained in breach and was liable to pay Docomo damages."

(vii) The background to the SHA established that both parties recognised that the FEMA Regulations might affect the ability of Tata to perform one way or another. The parties could have provided that Tata would be obliged to perform only if it obtained any necessary regulatory approval ("Subject to RBI consent"), as they did elsewhere in the SHA, but they chose not to. It was unlikely that the parties intended the obligation in the first part of Clause 5.7.2 to be discharged because an Indian buyer could not lawfully pay the Sale Price. There was no basis for implying such a provision.

(viii) Clause 2.2.2 was not intended to relieve Tata of the obligation to perform if it obtained any necessary regulatory approvals because it was primarily concerned to safeguard the License Agreements; but it was not necessary to decide the point in the light of the findings set out above. Docomo had an unqualified right to a method of performance that admittedly did not violate applicable law.

12. The AT then discussed the Indian Exchange Control Laws in considerable detail. It analysed the Foreign Exchange Management Act, 1999 ('FEMA') and in particular the provisions concerning Current Account Transactions (Section 5 FEMA) and Capital Account Transactions (Section 6 FEMA) and the penalties (Section 13(1) FEMA). It also discussed the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (FEMA 20), RBI Circular No. 16 dated 4th October 2004, ('October 2004 Guidelines'), Circular No. 49 dated 4th May 2010 ('the 2010 Circular'), the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Seventeenth Amendment) Regulations, 2013 ('the December 2013 Regulations'), RBI Notification dated 23rd May 2014 ('the new Pricing Regulations') and came to the following conclusions:

(i) The performance of TTSL's obligation under Clause 5.7.2 was subject to a general permission from the Reserve Bank of India ('RBI') in two respects. First, a non-resident purchaser was always able to buy the same share at the sale price in accordance with Regulation 9(2)(i) of FEMA 20; second, a purchaser resident in India including Tata was also able to buy the

Sale Shares at their fair market value, determined in accordance with the pricing guidelines in force from time to time, in accordance with Regulation 10(B)(2) of FEMA 20.

(ii) The impediment to performance was therefore factual rather than legal. The only reason why the aforementioned two methods of performance were not available to Tata after the delivery of the Trigger Notice in 2014 was that the market value of the Sale Shares had fallen, so that no non-resident buyer was willing to pay the Sale Price; and the fair market value was a fraction of the Sale Price.

(iii) The question whether a contractual obligation remains enforceable if it is subject to a requirement for special permission under the FEMA Regulations does not, therefore, arise. Nor was it necessary for the AT to decide whether special permission was required in order for Tata to make payment under the indemnity in the second part of Clause 5.7.2, or the effect in law of RBI's refusal of special permission.

13. The AT then discussed the claim for breach of Clause 5.7.2 of the SHA. It rejected Tata's case on the construction of Clause 5.7.2 and found that:

> "(1) Clause 12.3.1 did not qualify the obligations of Tata under Clause 5.7.2.
>
> (2) The first part of that clause imposed on Tata an unqualified obligation to find a buyer of the Sale Shares on terms that Docomo received the Sale Price by 3rd December 2014.
>
> (3) Tata has admittedly failed to perform that obligation.

(4) Tata cannot rely on its purported performance under the second part of Clause 5.7.2. The alternatives provided for in the second part were only available to Tata if it was able to perform in fact and law.

(5) The FEMA Regulations do not excuse non-performance. It is common ground that there were methods of performance of the obligation in question which were covered by general permissions under FEMA 20."

14. The AT rejected Tata's argument that under Clause 5.7.2 its obligation became void pursuant to Section 56 of the Indian Contract Act, 1956 ('ICA'). It held that "RBI's refusal of special permission did not render performance impossible. There were other methods of performance which were unaffected by the refusal. Tata might or might not have been in a position to perform in ways which were the subject of a general permission in practice, but that is a different matter." It categorically held that "Tata is liable for breach of contract." There was no question of "invalidity or unenforceability attaching to the obligations of Tata under the first part of Clause 5.7.2." As regards Clause 12.10 of the SHA, the AT was of the view that it had no obligation. Its reasoning was as under:

"The Tribunal has accepted Docomo's case that the alternative methods of performance in the second part of Clause 5.7.2 are only available to Tata if it is able to perform as a matter of fact and law. Assuming, in Tata's favour, that the consequence of RBI's refusal of special permission in its letter of 20th February 2015 was to render invalid or unenforceable performance under the second part of Clause 5.7.2, the effect was that that alternative was not available to Tata. The effect was not to extinguish Docomo's rights under Clause 5.7.2; the first part remained valid and enforceable. Clause 12.10 therefore has no application."

15. The AT rejected Docomo's claims for breach of Clause 2.2.2 of the SHA, for breach of Clause 10.1.1(b) and (d), for restitution as well as Tata's counter-claim concerning the validity and enforceability of alternative methods of performance under Clause 5.7.2.

16. The AT's conclusions in paras 169, 170 and 171 of the Award were as under:

> "169. The Tribunal's conclusions on Tata's arguments are as follows:
>
> (1) The Tribunal rejects the argument that an award of damages for breach of Clause 5.7.2 would amount to a circumvention of the relevant FEMA Regulations.
>
> The essence of the Tribunal's analysis of Clause 5.7.2 is that Tata was under an unqualified obligation to perform. Performance did not necessarily require special permission from RBI because certain methods of performance were already covered by general permissions.
>
> (2) The Tribunal also rejects the argument based on the use of the term "indemnity" in Clause 5.7.2. The Tribunal has found that Docomo is entitled to damages for breach of the primary obligation in Clause 5.7.2. The measure of damages applicable to a breach of contract is therefore appropriate. The amount due under the indemnity is not relevant for present purposes.
>
> (3) The Tribunal also rejects Tata's argument that Docomo acted in breach of its duty to mitigate. This argument is based on Tata's offers to pay Docomo the NPR Fair Value in its letters of 8 August 2014, 24 October 2014 and 23 February 2015. Tata does not challenge Docomo's citation of authority for the proposition that a party is not discharged of its contractual obligations, even when the other party refuses to accept its performance on the basis of a bona fide dispute concerning the

> parties' contractual rights. Tata claims to distinguish these authorities on the basis that in the present case "it is obvious that there is not a bona fide dispute as Docomo insists that Tata perform the Sale Option without RBI's permission". The Tribunal is satisfied that Docomo was in good faith. It has found that Docomo was fully entitled to insist on performance and it acted reasonably in declining to accept the amount on offer.
>
> 170. The Tribunal therefore finds that, upon tendering the Sale Shares to Tata or its designee, Docomo is entitled to damages in the amount claimed, namely US$ 1,172,137,717. Tata should pay Docomo the amount due within 21 days.
>
> 171. Tata is liable for its failure to perform obligations which were the subject of general permissions under FEMA 20. The FEMA Regulations do not therefore excuse Tata from liability. The Tribunal expresses no view, however, on the question whether or not special permission of RBI is required before Tata can perform its obligation to pay Docomo damages in satisfaction of this Award."

17. The AT held that interest was payable on the full amount of the Sale Price i.e., US$ 1,172,137,717. It awarded Docomo compound interest with quarterly rests and gave detailed reasons therefor. It concluded that Docomo should receive a rate which is approximately 17 basis points in excess of the average of the US prime rate during the relevant period. The AT found that the most appropriate rate which met the justice of the case was 3.5% per annum. Interest at that rate on the aforementioned sum was awarded to Docomo from 3rd December 2014 till the date of the Award compounded with quarterly rests that worked out to US$ 65,276,963. Docomo was further held entitled to interest at the same rate on the amount outstanding from 21

days after the date of the Award till the date of payment compounded with quarterly rests.

18. Importantly, in Footnote 259, the AT observed as under:

> "As noted above, Tata submits that it may require several regulatory approvals to comply with any payment obligations under an award. It should not therefore be penalised with post award interest accruing in a period where regulatory approval is pending: see Rejoinder at para 220, Bundle A-6 at page 461. The Tribunal rejects this submission. The Tribunal considers it appropriate that, subject to a 21 day grace period, Docomo should be compensated for being out of its money."

19. As far as costs are concerned, it was held that Tata should pay all the arbitration costs and also all of Docomo's recoverable legal costs. On this score, Docomo was held entitled to JPY 1,067,670,175.

20. The operative portion of the Award of the AT read as under:

> "After consideration of all of the factual and legal submissions which have been presented to us and for the reasons set out in full above, we the Tribunal hereby unanimously award, declare and adjudge as follows:
>
> (1) We order the Respondent to pay the Claimant within 21 days of the date of this Award US$ 1,172,137,717 upon tender of the Sale Shares.
>
> (2) We order the Respondent to pay the Claimant within 21 days US$ 65,276,963, being interest on the said USS 1,172,137,717 from 3 December 2014 to the date of this Award, calculated at 3.5% per annum compounded with quarterly rests.

(3) We order the Respondent to pay the Claimant within 21 days GBP 119,012.59 by way of Arbitration Costs and JPY 1,067,670,175 by way of Legal Costs.

(4) We order the Respondent to pay the Claimant interest at 3.5% per annum compounded with quarterly rests on the amount outstanding under this Award from 21 days after the date of this Award until payment.

(5) We dismiss all other claims and counterclaims.

The seat of this arbitration is London, England. This Award is made on 22nd June 2016."

Present petition

21. Notice was issued in the present petition on 13th July 2016. Tata was present in Court on that day through its lawyers who accepted notice and sought one week's time for instructions about the deposit of the awarded amount in Court. On the next date i.e. 26th July 2016, counsel for Tata stated that without prejudice Tata was prepared to deposit the awarded amount before the Registrar of this Court in the name of the Registrar General of this Court. The fixed deposit would be valid for a period of six months and would be renewed if the situation so arose. The Court then made an order to that effect. Four weeks' time was granted for filing objection, if any, to the enforcement of the Award.

22. On 30th July 2016, by way of mentioning, Tata informed the Court that it was ready to deposit the awarded amount by way of fixed deposit receipts ('FDRs') in the name of the Registrar General of the Court as under:

Sr. No.	Bank	Amount of deposit (Rs.)	Deposit Receipt Numbers.
1.	State Bank of India	2150,00,00,000.00	3958173725
2.	ICICI Bank	2000,00,00,000.00	039313003887
3.	HDFC Bank	2100,00,00,000.00	50300155315692
4.	Axis Bank	1300,00,00,000.00	15012291013
5.	Kotak Mahindra Bank	650,00,00,000.00	1411776805
6.	Indus Bank	250,00,00,000.00	300716407545
	Total	8450,00,00,000.00	

23. On 2nd September 2016, the Respondent filed a reply the details of which need not be discussed in view of the subsequent developments as may be noticed hereinafter. Rejoinder was filed to the said reply by the Petitioner on 28th September, 2016.

RBI's intervention application

24. On 30th November 2016, RBI filed IA No. 14897 of 2016 seeking intervention. By an order dated 5th October 2016, the Court permitted a sur-rejoinder to be filed by the Respondent. RBI's application was listed before this Court on 1st December 2016. Tata filed a reply to RBI's intervention application on 15th December 2016. Written note of arguments were also filed by Tata in relation to the intervention application of RBI on 15th December 2016.

The joint application of Docomo and Tata

25. On 25th February 2017, a joint application being I.A. No. 2585 of 2017 was filed by Docomo and Tata under Order XXIII Rule 3 read with Section

151 of the CPC seeking to place on record the consent terms agreed between the parties and seeking disposal of the main petition i.e. OMP (EFA) (Comm.) 7 of 2016 in terms of the said settlement. This application was signed by the authorised representatives (ARs') of both the parties and also supported by their respective affidavits. A copy of the consent terms arrived at between the parties and signed by both of them on 20th/23rd February 2017 was enclosed with the application as Annexure-A.

The consent terms

26. The consent terms arrived at between the parties read as under:

> "In the interest of putting an end to a dispute that had arisen between the Parties and in the public interest of preserving a fair investment environment in India, the Parties to the above Petition ("Parties") submit that this Honourable Court be pleased to pass an order in terms of these Consent Terms so as to put an end to the issues and differences between the Parties relating to the arbitration award dated June 22, 2016 passed by the Arbitral Tribunal in London, United Kingdom in LCIA Case No. 152896 ("Award"):
>
> 1. The Respondent has always been, and remains committed to performing its contractual obligations under the Shareholders' Agreement dated March 25, 2009 ("SHA").
>
> 2. In these circumstances although the Respondent believes it had grounds to resist enforcement of the Award as stated in its affidavit dated September 01 2016 "flied before this Hon'ble Court, as a gesture of good faith and in accordance with the Respondent's record of adherence to contractual commitments that the Respondent has always enjoyed both in India and abroad, the Respondent withdraws its objections to the enforcement of the Award in India.

3. The Respondent agrees to the disposition of the amount awarded in paragraph 202 of the Award (being the sums of (i) US $ 1,172,137,717, (ii) US $ 65,276,963, (iii) GBP 119,012.59 and JPY 1,067,670,175, and (iv) interest at 3.5% per annum compounded with quarterly rests on the amounts specified in the foregoing items (i),(ii) and (iii) from 21 days of the date of the Award until payment of the said amounts) ("Funds") in the manner set out in paragraph 4 below, and as per the directions of this Hon'ble Court, for payment to the Petitioner in satisfaction of the Award in United States Dollars to a bank account designated by the Petitioner ("Designated Bank Account"), subject to ruling on the objections raised by the Reserve Bank of India ("RBI") in its Application for Intervention in these proceedings after hearing RBI. The obligations of the Respondent hereunder shall further be subject to (i) receipt of approval of the Competition Commission of India and (ii) receipt of the Withholding Tax Certificate (as defined hereinafter). The Petitioner will apply to the Indian Income Tax authorities to obtain the withholding tax certificate ("Withholding Tax Certificate") in relation to payments under the Award based on which Respondent will remit the Funds, after deduction of taxes, if any, to Designated Bank Account. The Petitioner agrees that the amount of Rs. 8450,00,00,000 (Rupees Eight Thousand Four Hundred and Fifty Crore Only) along with accrued interest which amounts to a total of Rs. 8,730,59,83,623 (Rupees Eight Thousand Seven Hundred Thirty Crore Fifty Nine Lakh Eighty Three Thousand Six Hundred and Twenty Three Only) as on 30 January 2017 (along with any further interest which may accrue thereon) ("Deposit") deposited in this Hon'ble Court shall be released in accordance with the procedure prescribed in detail in paragraph 4 below. It is clarified that in case there is any difference between the Deposit and the Funds as per the Award, then any shortfall would be made up by the Respondent to the extent of the shortfall, and in case there is any excess amount then the same will get remitted back to Respondent, by way of withdrawal or deposit from/into the Interim Account by the Respondent, and

the deduction of tax, if any, shall be computed and withheld on such adjusted amount.

4. Subject to the ruling and directions of this Honourable Court, as provided in paragraph 3 above, the payment of the Funds, after deduction of taxes, if any, to the Designated Bank Account and other related actions shall be made in the following manner:

4.1 The Deposit is to be retained by the Registrar of this Hon'ble Court till requisite clearance from Competition Commission and the Withholding Tax Certificate as mentioned in these consent terms have been obtained. Once the requisite clearances/ certificate have been obtained the Deposit will be transferred to an account in the name of the Respondent ("Interim Account").

4.2 Petitioner will then nominate an Authorised Dealer ("AD") for remittance of Funds after deduction of taxes, if any, to the Designated Bank Account.

4.3 The Petitioner undertakes that it shall, simultaneously with the receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account, complete the process of debiting its dematerialised accounts of all shares of Tata Teleservices Limited ("Shares") held by the Petitioner and have the Shares credited to the dematerialised accounts of the Respondent and/or its nominees and the Respondent shall co-operate with the Petitioner for having the Shares credited to the dematerialised accounts of the Respondent and/or its nominees and in completing and executing Form FCTRS for this purpose.

4.4 Both Parties will take all actions and provide all documents and information as requested by the AD to permit remittance of the Funds, after deduction of taxes, if any, to the Designated Bank Account and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees.'

5. In light of the withdrawal of the objections of the Respondent, this Honourable Court may be pleased to declare that the Award is enforceable in India and shall operate as a deemed decree and this Honourable Court shall proceed to execute the same, subject to the ruling on the objections of RBI as raised in RBI's Application for Intervention in these proceedings (and for that purpose the Parties agree not to object to the intervention of RBI).

6. The Petitioner agrees and undertakes that the enforcement of the Award in India, and this deemed decree, against the Indian assets of Tata will be limited to the monies deposited (along with interest accrued thereon) in this Hon'ble Court by the Respondent only so long as Respondent complies with its obligation to make up for any difference between the Deposit and the Funds in terms of paragraph 3 of these consent terms.

7. The Petitioner undertakes to this Honourable Court that it shall suspend proceedings initiated against the Respondent which are currently pending in United Kingdom [Claim No. CL-2016-000428 in the High Court of Justice, Queen's Bench Division of the Commercial Court] and in the United States of America [Civil Action No. 1:16-cv-7809, in the United States District Court, Southern District of New York] for a period 6 months from the date hereof ("Suspension Period"). Upon receipt of the Funds, after deduction of taxes, if any, by the Petitioner in the Designated Bank Account any time within the Suspension Period as per paragraph 4 above, the Petitioner shall unconditionally withdraw all proceedings initiated against the Respondent in relation to the SHA and/or the Award, including aforementioned proceedings in the United Kingdom and aforementioned proceedings in the United States of America within one week thereof. In the event of the Petitioner not receiving payment of the Funds, after deduction of taxes, if any, in the Designated Bank Account of the Petitioner within the Suspension Period, the Petitioner shall be free to pursue the UK and US enforcement actions.

8. The Petitioner undertakes to this Honourable Court that it shall not initiate any further proceedings in relation to the SHA and/or the Award during the Suspension Period, or thereafter, if the Funds, after deduction of taxes, if any, are received during the Suspension Period.

9. The Parties agree that upon receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account by the Petitioner, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees, as per paragraphs 3 and 4 above, the Award shall stand fully and finally satisfied and discharged and that the Parties shall have no outstanding claims against each other.

10. The Parties agree that the Consent Terms as set out hereinabove are exhaustive and conclusive, as between the Parties hereto, with respect to the issues dealt hereinabove.

11. The Parties shall co-operate with each other and provide all necessary assistance in completing and filing all forms and completing all other formalities necessary for completing the payment of the Funds, after deduction of taxes, if any, and the credit of the Shares to dematerialised accounts of the Respondent and/or its nominees as set out in this order.

12. The parties shall bear their respective costs in connection with these proceedings."

Submissions on behalf of RBI

27. Mr. C. Mukund, learned counsel appearing for RBI was first asked by the Court about the *locus standi* of RBI to file such an application in this Court. He was asked about the provision under the Act which permitted such an intervention application by an entity which was not a party to the Award sought to be enforced. While Mr. Mukund was unable to dispute that there was no provision in the Act which permitted such intervention, he referred

to Order XXIII Rule 3 CPC and submitted that the Court was not bound to take on record a compromise seeking to give effect to an Award in terms of a contract that was per se hit by Section 23 of the Indian Contract Act 1872 (ICA). He referred to the Explanation to Order XXIII Rule 3 which stated that an agreement/compromise which was void or voidable under the ICA was not deemed to be lawful within the said Rule. According to him, the compromise under Order XXIII Rule 3 CPC envisaged a lawful compromise or agreement to be brought into effect. He pointed out that Rule 4 of Order XXIII CPC stated that the said provision would not apply in proceedings in the execution of a decree or an order. He referred to the decisions in ***State of Punjab v. Amar Singh & Anr. (1974) 2 SCC 70; Union Carbide Corporation v. Union of India (1991) 4 SCC 584*** and an order dated 9th February 2017 of this Court in OMP (Comm.) 154/2016 (***Shakti Nath v. Alpha Tiger Cyprus Investments No. 3 Ltd.***)

28. Mr Mukund submitted that inasmuch as the impugned Award requires remission of money to an entity outside India, RBI's role cannot be negated "for any reason whatsoever." He submitted that the impugned Award inasmuch as it concluded that the FEMA Regulations need not be looked into was illegal and contrary to the public policy of India. Therefore, notwithstanding that Tata may have no objection to the enforceability of the Award, the Court should refuse to act on the consent terms on the ground that the Award sought to be enforced was opposed to the public policy of India.

29. Mr Mukund referred to the consent terms which acknowledged the present application by RBI seeking intervention. He pointed out that under para 3 of the consent terms, it was agreed that the payment of the amounts to Docomo in satisfaction of the Award would be subject to the order of this Court on RBI's application seeking intervention. Therefore, as far as the parties themselves were concerned, they could not be heard to object to the *locus standi* of RBI or to the maintainability of the present application.

30. Mr. Mukund further submitted that even after the pronouncement of the Award, Tata had applied to RBI on 1st July 2016 for permission to enforce the Award. This was opposed by Docomo by its letter dated 11th July 2016. By its communication dated 25th July 2016, RBI had rejected the request. That rejection had attained finality since neither of the parties challenged it.

31. According to Mr. Mukund, RBI was of the consistent view that Clause 5.7.2 of the SHA was in violation of Regulation 9 of the FEMA 20 which provided that the transfer should be at a price not exceeding the price arrived at, as per any internationally accepted pricing methodology for valuation of shares on a rational basis duly supported by a Chartered Accountant ('CA') or a SEBI-registered Merchant Banker. It was also in violation of Section 6(3) of FEMA which empowered RBI to prohibit, restrict or regulate the transfer of any security by a person outside India. The Foreign Investment Promotion Board ('FIPB') by a communication dated 14th March 2009, approved Docomo's acquisition of shares in TTSL and stated that "Issues/valuation/transfer of shares shall be as per SEBI/RBI guidelines." Therefore, the Award in question which dispensed with the obtaining of any

permission from RBI for transmission of the damages granted to Docomo was contrary to the fundamental policy of India and could not be enforced.

Submissions on behalf of Docomo

32. Mr. Kapil Sibal, learned Senior counsel appearing for Docomo, submitted that under Section 41(1) of the Act it is only a party to the Award which can object to its enforcement, and that too on extremely limited grounds set out in Section 48 of the Act. The relief granted by the AT in the impugned Award was not in the form of a put option but only the already envisaged damages under Clause 5.7.2 of the SHA. Mr Sibal was categorical that RBI had no *locus standi* to intervene or object to the enforcement of the Award in question. He submitted that entertaining such an objection at the instance of an entity which was not a party to the Award would itself be opposed to the fundamental policy of Indian law.

Submissions on behalf of Tata

33. Mr. Darius Khambata, learned Senior counsel appearing for Tata, at the outset clarified that the stand taken by Tata in its letter dated 1st July 2016 seeking permission of RBI stood withdrawn since Tata's objection to the enforcement of the Award itself stood withdrawn. He submitted that RBI's submission that it had consistently opposed Clause 5.7.2 of the SHA was factually incorrect. Referring to Sections 3 and 6 of the FEMA he submitted that there was no blanket prohibition against the repatriation of monies to an entity outside India at a price not exceeding that arrived at as per internationally accepted price methodology. That provision itself envisaged such transfer being allowed by a special permission of RBI. Likewise, none of the FEMA Regulations spoke of a total prohibition. Even if such

restriction existed at the time of the enforcement of an Award, it could be overcome by the special permission of RBI.

34. Analysing Clause 5.7.2 of the SHA, Mr. Khambata pointed out that there were three distinct possible scenarios emerging as a result of the inability to work out Clause 5.7.2. That clause was, therefore, not inherently void. Even a post-facto RBI permission could be obtained as was pointed out in ***Life Insurance Corporation of India v. Escorts Ltd. (1986) 1 SCC 264***. He referred to the internal notings on file of RBI, the letter dated 22nd December 2014 from RBI to the Ministry of Finance (MoF) and the response thereto all of which revealed a position contrary to what was being projected before the Court.

Locus standi of RBI

35. The Court first takes up the question of the *locus standi* of RBI to seek intervention in the present proceedings. There is no provision in the Act which envisages an entity, not a party to an Award, seeking to intervene in proceedings for the enforcement of such Award. Who can oppose the enforcement has been clearly indicated in Section 48 itself. The beginning of Section 48(1) reads: "1. Enforcement of a foreign award may be refused, at the request of **the party** against whom it is invoked, only if **that party** furnishes to the court proof that..." Section 2(h) of the Act defined 'party' to mean a party to an arbitration agreement. Clearly, therefore, in terms of Section 48(1) of the Act, RBI not being a 'party' cannot seek to intervene in order to object to the enforcement of the Award in question.

36. It is not RBI's case that it can maintain the present application under any provision of the CPC. Order XXIII Rule 3 CPC reads as under:

> "3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -
>
> Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> Explanation: An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

37. While the proviso to Rule 3 envisages one party alleging and the other party denying that an adjustment or satisfaction has been arrived at, and in which event the Court decides such question, it does not contemplate any third party i.e., an entity which is not a party to the suit, coming forward to object to an application under Order XXIII Rule 3 of the CPC. The Explanation emphasises that the compromise must be lawful. It elaborates this by stating that a compromise that is void or voidable under the ICA shall not be deemed to be lawful. This, too, does not recognise a third party coming forward to oppose a compromise on that ground.

38. Interestingly, Rule 4 states that nothing in the order would apply to proceedings in execution of decree or order. That does not mean that there can never be a compromise in an execution proceeding. In the interests of justice, in exercise of the power under Section 151 CPC, a civil Court which is an executing Court can certainly take on record a settlement arrived at between the parties as far as the execution is concerned even *de hors* Order XXIII Rule 3 CPC. When parties have agreed to bring an end to the disputes between them which form the subject matter of the decree which is sought to be enforced, the Court cannot and should not come in the way of taking on record such compromise. It is true, however, that where the Court feels that the agreement is void or voidable under the ICA, it need not act on it and pass an order in terms thereof.

39. All of the above still does not recognise the *locus standi* of an entity which is not a party to the suit, or as in this case, an Award, to oppose the compromise.

40. The Court is unable to accept the submission made on behalf of RBI that since the Award discusses the provisions of the FEMA and the Regulations thereunder *in extenso* and comes to a definite conclusion as to their applicability, hearing RBI by the execution Court is imperative. There may be arbitral Awards (as there may be for that matter judgments of the Court) in private disputes to which RBI is not a party where its powers and functions under the statute that governs it or the rules and regulations thereunder may be discussed. That would not mean that either during the course of the arbitral proceedings or in the consequential execution RBI

would have to be joined as a party or intervener and heard. There is no provision under the Act or the CPC that requires this.

41. The fact that the legislature did not intend this is evident when a comparison is made with the provisions for mergers and amalgamations under the Companies Act, 1956 (as it stood prior to its amendment in 2015). Section 394 thereof envisaged notice being issued to the Central Government by the Company Court in order to give it an opportunity to be heard in those proceedings. There is no such statutory requirement that where the enforcement of an arbitral Award might result in remitting money to an non-Indian entity outside India, or to an account of a party outside India, RBI has to necessarily be heard on the validity of the Award. The mere fact that a statutory body's power and jurisdiction might be discussed in an adjudication order or an Award will not confer *locus standi* on such body or entity to intervene in those proceedings.

42. At the same time, RBI will, just as any other entity, be bound by an Award interpreting the scope of its powers or any of its regulations subject to it being upheld by a Court when challenged by a party to the Award. If, for example, there is a judgment by a civil Court, within India or outside India, taking a particular interpretation of the powers of RBI under the FEMA and that judgment is either not challenged or is upheld on challenge by the superior judicial body, then as far as the two parties to the judgment are concerned, RBI will be bound by the decision of the Court. There may be instances where the executing Court might direct that the payment of monies under an Award to a non-Indian entity outside India would be

subject to the permission of the RBI since the regulations under the FEMA require it. That determination, too, subject to being altered in appeal, will be binding on the parties as well as RBI. However, even in that situation, RBI cannot intervene in those proceedings and demand to be heard. As of date, this may be viewed as a gap in the Act, particularly, in the context of Indian courts being frequently approached for the enforcement of international Awards. But in the absence of a provision that expressly provides for it, the question of permitting RBI to intervene in such proceedings to oppose enforcement does not arise.

43. The very stand that RBI is now taking in this Court that without its special permission there cannot be a transfer of monies by Tata to Docomo, was taken by Tata before the AT and was expressly negatived by the AT by a unanimous Award. The AT decided that since the sum awarded to Docomo was in the nature of damages and not the Sale Price of the shares, the question of having to seek the special permission of RBI did not arise. If, as in this case, neither of the parties maintains any objection to the enforcement of the Award, and the Court finds no impediment to its enforcement, then the Award which takes a view on the requirement of RBI's permission will be enforceable as such. RBI will be bound by such determination and cannot refuse permission.

44. To repeat, the AT has come to a definite conclusion that what has been awarded to Docomo is damages. It has given effect to the alternative mechanism envisaged by the parties under Clause 5.7.2 of the SHA. It is not even RBI's stand that any general or special permission of RBI would be

required if what is being paid by Tata to Docomo is in the nature of damages. In this context the Court would refer to RBI's own stand at various stages of the proceedings. In the internal notings on file of RBI (which was provided to Tata by RBI under the Right to Information Act, 2005), while processing the application of Tata for permission it was noted as under:

> "I would take a different view. The assured return applies where the overseas investor gets his entire principal PLUS a certain return. Here both the parties agreed to protect the downside loss at 50% of the invested value. This is according to me a fair agreement/contract and we should facilitate honouring this commitment. We may approve.
>
> DG(HRK)
>
> Although strictly as far as wordings of the regulation this may not be allowed. From the point of view of equity & the intention behind the regulation (that there would be no assured return) the foreign investor has a merit in this claim. The larger of issue of fair commitment to reasonable contracts in relation to FDI inflows also have to be kept in view. Our strategic relationship with Japan has also become very significant in relation to FDI inflows.
>
> In the circumstances, we may propose to accept the plea of the foreign investors & in future, in all such cases similar principle could be applied.
>
> ED (G))
> PGM FED
> GM (HSM)
>
> As per DGs order we have written to GOI. Company has been pressing for a decision. Discussed with DG over telephone. He is agreeable to approving this case and informing Govt. that in view of urgency we approved and propose to adopt this principle in future also. In any case, the policy permitting

downward protection is under formulation (expected to be completed in 2 weeks).

DG-DL (Discussed)
Governor for Info."

45. The above stand was reiterated by RBI in its letter dated 22nd December 2014 to the MoF where it said:

> "Taking into consideration the above provisions, we observe that the proposed structure is not in line with the extant provisions, as the fair value of the shares is Rs 23.34 per share. However, the larger issue here is of a fair commitment in the contracts in relation to an investment and a downside protection of an investment, rather than an assured return. Besides our strategic relationship with Japan in recent times in relation to FDI flows is also a matter to be kept in view. In view of this, we are inclined to accept the proposal and in future, in all such case, similar principle shall be applied."

46. RBI did not contend that the SHA was void or illegal. Instead, it drew attention to the fact that the fair value of the shares was less than the Sale Price and that the transfer of the Sale Shares by Docomo to Tata at the Sale Price was not within the ambit of the general permission.

47. The MoF responded by its letter dated 6th February 2015 to RBI as under:

> "The proposal needs to be examined by RBI as per its extant regulations. An individual proposal cannot be considered in exception of such regulations. In case, RBI is of the opinion that the existing regulations need modification, a detailed proposal on the subject along with justification and rationale may be forwarded in the Government for taking a view in the matter."

48. RBI's refusal of permission prior to the Award was perhaps on account of the above stand of the MoF. RBI wrote to Tata on 20th February 2015 rejecting its application for special permission, stating:

> "You are advised that in terms of Regulation 9 of Foreign Exchange Management Transfer or Issue of Security by a Person resident outside India) Regulations, 2000, as amended from time to time, a person resident outside India may transfer the shares or debentures held in an Indian company at a price not exceeding that arrived at as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker. The guiding principle being that the nonresident investor is not guaranteed any assured exit price at the time of making such investment/agreements and shall exit at the price prevailing at the time of exit. Accordingly your request to purchase shares of Tata Teleservices Limited from NTT Docomo Inc. at any pre-determined price cannot be acceded to. You may ensure that the transaction complies with the provisions cited above."

49. Significantly, therefore, even at this stage, RBI did not refuse the special permission on the ground that the SHA was illegal or void. It is not understood why RBI had to seek advice from the MoF in this regard. Its refusal to grant permission after the Award stems from its understanding that notwithstanding that the Award grants damages to Docomo, the remittance is by way of payment of Sale Price by Tata to Docomo for the shares. This was because the Award required Docomo to return the share scrips to Tata upon receiving the amount.

50. The Award is very clear on this issue. What was awarded to Docomo were damages and not the price of the shares. The order that the share scrips must be returned to Tata was only incidental and, in fact, Docomo itself was not interested in retaining the share scrips. It could be seen as an

acknowledgment of Docomo volunteering to return the share scrips as they were of no particular use to it. It is not open to RBI to re-characterise the nature of the payment in terms of the Award to which there is no longer any opposition from Tata, the only party which could possibly oppose its enforcement. RBI has not placed before the Court any requirement for any permission of RBI having to be obtained for Docomo to receive the money as damages in terms of the Award.

51. As regards the refusal of permission by RBI for the second time, after the Award, the seeking of such permission by Tata was based on its earlier opposition to the Award which was similar to the one raised now by RBI. With Tata having accepted the Award as such, it has withdrawn its objections thereto and consequently its stand in the application made to RBI on 1st July 2013 seeking permission. As long as the Award stands, there is no need for any special permission of RBI for remission by Tata of the amount awarded thereunder to Docomo as damages. The refusal by RBI of such permission which is not required in the first place, or the fact that such refusal has not been challenged, would therefore not affect the enforceability of the Award.

52. The upshot of the above analysis is that there is no provision in law which permits RBI to intervene in a petition seeking enforcement of an arbitral Award to which RBI is not a party. Its prayer for permission to intervene is rejected.

Validity of the SHA and the Award

53. Therefore, there is as such no opposition whatsoever to the enforceability of the Award. The Court nevertheless proposes to examine if the SHA and the Award that recognise and enforce its clauses are valid.

54. The SHA was entered into between Docomo, Tata and TTSL on 25th March 2009. The regulatory regime in force at the time was provided under the FEMA. In terms of Section 3 FEMA, dealings in foreign exchange were prohibited unless permitted by a general permission or special permission of RBI. Regulation 3 of FEMA 20 read with Sections 6(2) and 6(3) FEMA prohibited a non-resident from transferring shares of an Indian company to a resident unless permitted by a general permission or special permission of RBI. The general permission had to be obtained under Regulations 9(2) & 10B(2) of FEMA 20 subject to the conditions set out in Circular No. 16 dated 4th October 2004. In the event that such transfer of shares was not in conformity with the above Circular (including the pricing guidelines), the special permission of RBI would be required to complete such a transfer.

55. Clause 2.2.2 of the SHA prohibited the parties from acting in violation of any applicable law. It read as under:

> "2.2.2 The Parties have agreed that the provisions of this Agreement shall be subject to the provisions of the License Agreements, and in the event of any inconsistency between the provisions of this Agreement and the License Agreements, the provisions of the License Agreements shall prevail. Further, no Party shall take any action or have any right that would violate applicable Law or cause a loss of any License Agreement. Each provision of this Agreement shall be interpreted so as not to cause such violation of Law or loss of any License Agreement, and in the event of such violation or potential loss the Parties shall use good faith efforts to agree on an alternative

structure that will afford the Parties the substantial benefits intended by such provision."

56. Sub-regulation 5(1) of FEMA 20 allowed a non-resident to purchase shares or convertible debentures of an Indian company under the Foreign Direct Investment (FDI) Scheme which was set out in Schedule 1 thereto. As of the date of the SHA, the FDI Scheme did not mention "options". Paragraph 2(1) of Schedule 1 required Indian companies issuing securities to comply with the provisions of the Industrial Policy and Procedures as notified by the Secretariat for Industrial Assistance ('SIA') in the Ministry of Commerce and Industry, Govt. of India. Pursuant thereto, Docomo subscribed to and purchased equity shares of TTSL by investing US$ 2.5 billion. There has been no suggestion that at the time of such investment any binding legal provision was violated.

57. The main bone of contention was Clause 5.7.2 which provided *inter alia* that if Tata was "unable to find a willing buyer or buyers to purchase the Sale Shares at the Sale Price or if the sale of the Sale Shares is not closed during the Sale Period" Tata "shall acquire, or shall procure the acquisition of, the Sale Shares at any price not later than the end of the Sale Period." The further condition was that Tata "shall have the obligation to indemnify and reimburse" Docomo "for the difference between the Sale Price and the price at which the Sale Shares are actually sold, which payment shall be made at the time of closing of the Sale/Sales."

58. The case of both Tata and Docomo is that Clause 5.7.2 of the SHA protected Docomo from not losing more than 50% of its investment. Even

RBI appears to have accepted that this was in the nature of a downside protection and was not in the nature of an assured return on its investment. On its part, the AT has accepted the explanation offered that the right granted to Docomo under Clause 5.7.2 was not an issue of any "security" that would fall within the ambit of Regulations 4 and 5 of FEMA 20. The AT held that Clause 5.7.2 of the SHA was a contractual promise by Tata to find a buyer for Docomo's shares which could always have been performed using general permissions of RBI under FEMA 20. It was held that the promise was valid and enforceable because sub-regulation 9(2)(i) of FEMA 20 permitted a transfer of shares from one non-resident to another non-resident at any price. The AT held that Tata could have lawfully performed its obligation to find a buyer at any price, including at a price above the shares' market value, through finding a non-resident buyer. Its failure to do so was, according to the AT, a breach entitling Docomo to damages.

59. The SHA, therefore, could not be said to be void or opposed to any Indian law including the FEMA, much less the ICA. FEMA contains no absolute prohibition on contractual obligations. It envisages grant of special permission by RBI. As rightly held by the AT, Clause 5.7.2 of the SHA always was legally capable of performance without the special permission of RBI, using the general permission under sub-regulation 9(2) of FEMA 20.

60. As far as the Award itself is concerned, the interpretation placed by the AT on the clauses of the SHA was consistent with the intention of the contracting parties and not opposed to any provision of Indian law. There is nothing in the SHA as interpreted by the Award that renders it void or

voidable under the ICA or opposed to either the public policy of India or the fundamental policy of Indian law. The AT's interpretation of the various provisions of the FEMA and the regulations thereunder have also not been shown to be improbable or perverse. What was invested by Docomo was US $ 2.5 billion and what it will receive in terms of the Award is only 50% of that amount. The Court finds that no ground under Section 48 of the Act is attracted to deny the enforcement of the Award.

Is the compromise valid?

61. The Court next proposes to examine if the compromise/consent terms arrived at between the parties are lawful or whether they are void or voidable under the ICA. The Consent Terms were entered into between Docomo and Tata on 20th/23rd February 2017. They begin by noting that it is with a view to putting an end to their disputes and "in the public interest of preserving a fair investment environment in India" that the parties have decided to enter into the said consent terms. Further, it is noted that "as a gesture of good faith and in accordance with the Respondent's record of adherence to contractual commitments that the Respondent has always enjoyed both in India and abroad, the Respondent withdraws its objections to the enforcement of the Award in India."

62. A perusal of paras 3 to 6 of the consent terms shows that the parties have undertaken to abide by the directions of this Court and obtain all the requisite statutory permissions and clearances. Another important aspect is that Docomo has in para 7 of the consent terms undertaken that for a period of six months pending compliance with the consent terms, all other

enforcement actions instituted in Courts abroad shall stand suspended and after compliance shall stand withdrawn.

63. The Court is unable to find anything in the Consent Terms which can be said to be contrary to any provision of Indian law much less opposed to public policy or void or voidable under the ICA. The issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India.

64. It appears to be a well settled legal position that parties to a suit, or as in this case, an Award, may enter into a settlement even at the stage of execution of the decree or Award. In ***The Oudh Commercial Bank Ltd. v. Thakurain Bind Basni Kuer (1939) 41 Bom LR 708***, the Privy Council held that independent of Order XXIII Rule 3 CPC, the provisions of Order XXI Rule 2 and Section 47 CPC would enable the executing Court to record and enforce a compromise. This was reiterated by the Supreme Court of India in ***Moti Lal Banker v. Mahraj Kumar Mahmood Hasan Khan AIR 1968 SC 1087***. In ***N.K. Rajgarhia v. Mahavir Plantation Ltd. & Ors. (2006) 1 SCC 502***, it was observed that "the court's freedom to act to further the ends of justice would surely not stand curtailed." The Court came to the

conclusion that the compromise entered into between the parties during the execution proceedings was valid in law.

Conclusion

65. The result is that:

(i) IA No. 14897/2016 filed by RBI is dismissed.

(ii) IA No. 2585 of 2017 is allowed and the Consent Terms enclosed therewith are taken on record.

(iii) The Award dated 22nd June 2016 passed by the AT in London in LCIA Case No. 152896 under the LCIA Rules is declared as enforceable in India and shall operate as a deemed decree of this Court.

(iii) The parties are bound by the Consent Terms and will proceed to take steps in terms thereof.

(iv) The monies deposited in this Court by Tata by way of the FDRs referred to in para 22 of this order together with the interest accrued thereon ('the Deposit') shall be retained by the Registrar of this Court till requisite clearance from the Competition Commission of India and the Withholding Tax Certificate as mentioned in the Consent Terms have been obtained.

(v) Once the requisite clearances/certificate has been obtained, the Deposit will be transferred to an account in the name of Tata ('Interim Account'). For this purpose, the parties are at liberty to mention the matter before the Registrar General of this Court who will from that point onwards either

himself deal with the matter or designate a Registrar of this Court for the purpose of the completion of the further steps in terms of this judgment.

(vi) Docomo will nominate an Authorised Dealer ('AD') for remittance of Funds after deduction of taxes, if any, to the Designated Bank Account as stated in the Consent Terms.

(vii) As undertaken by it in the Consent Terms, Tata shall, simultaneously with the receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account, complete the process of debiting its dematerialised accounts of all shares of TTSL held by Docomo and have the Shares credited to the dematerialised accounts of Tata and/or its nominees and Tata shall co-operate with Docomo for having the Shares credited to the dematerialised accounts of Tata and/or its nominees and in completing and executing Form FCTRS for this purpose.

(viii) Both, Tata and Docomo will take all actions and provide all documents and information as requested by the AD to permit remittance of the Funds, after deduction of taxes, if any, to the Designated Bank Account and the credit of the Shares to dematerialised accounts of Tata and/or its nominees.

(ix) Docomo is bound by its undertaking as recorded in para 7 of the Consent Terms regarding keeping the other enforcement proceedings instituted by it against Tata elsewhere under suspension and to ultimately withdraw them subject to compliance by Tata with its obligations under the Consent Terms. Docomo is also bound by its undertaking that it shall not initiate any further proceedings in relation to the SHA and/or the Award

during the Suspension Period, or thereafter, if the Funds, after deduction of taxes, if any, are received during the Suspension Period.

(x) Upon receipt of the Funds, after deduction of taxes, if any, in the Designated Bank Account by Docomo, and the credit of the Shares to dematerialised accounts of Tata and/or its nominees, as per paragraphs 3 and 4 of the Consent Terms, the Award shall stand fully and finally satisfied and discharged and that the Parties shall have no outstanding claims against each other.

66. Liberty is granted to both Tata and Docomo to apply to the Court in the event of any difficulty in complying with any of the directions.

67. The petition is disposed of in the above terms.

S. MURALIDHAR, J

APRIL 28, 2017
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