

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

% **Date of decision: 26th April, 2017**

+ **CS(COMM) No.246/2017 & IA No.4079/2017 (u/O XXXIX R-1&2 CPC).**

SIVA INDUSTRIES AND HOLDINGS LTD. Plaintiff

Through: Mr. Anirudh Wadhwa, Mr. Akash Chandra Jauhari and Mr. Vipul Kumar, Advs.

Versus

TATA TELESERVICES LTD. & ORS. Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit pleading,
 - (i) that the plaintiff, by virtue of a Share Subscription Agreement dated 24th February, 2006, subscribed to 520 million shares of defendant no.1 Tata Teleservices Ltd. (TTL) at a Subscription Price of Rs.17/- per share;
 - (ii) pursuant to a rights issue announced by the defendant no.1 TTL in July / August, 2007, the plaintiff subscribed to additional 20.8 million equity shares, increasing its shareholding to 540.8 million shares;
 - (iii) that pursuant to a re-structuring exercise done by the defendant no.1 TTL, plaintiff's shareholding stands at 270.4 million shares of Rs.34/- each, representing 8.19% of the total paid-up equity capital of defendant no.1 TTL;
 - (iv) the defendant no.1 TTL and the defendant no.2 Tata Sons Ltd. (TSL) issued and allotted 84,38,79,801 equity shares of defendant no.1

TTL representing about 20% of the post-issue paid up equity capital to the defendant no.3 NTT Docomo Inc. (Docomo);

(v) defendant no.3 Docomo also entered into Secondary Share Purchase Agreements with other existing shareholders of the defendant no.1 TTL including the plaintiff, defendant no.2 TSL and group companies of defendant no.2 TSL;

(vi) consequent thereto, shareholding of the defendant no.3 Docomo constituted 26% of the post-issue paid up equity capital of defendant No.1 TTL;

(vii) on 25th March, 2009, defendant no.1 TTL and defendant no.2 TSL executed a Shareholders Agreement with defendant no.3 Docomo as regards *inter se* rights, obligations and duties with respect to defendant no.3 Docomo's shareholding in defendant no.1 TTL;

(viii) on the same day, the plaintiff also executed an *inter se* Agreement with the defendant no.1 TTL and defendant no.2 TSL, agreeing to indemnify certain losses that the defendant no.1 TTL and defendant no.2 TSL may suffer on account of certain claims that could be made by the defendant no.3 Docomo under the Shareholders Agreement dated 25th March, 2009;

(ix) that the Shareholders Agreement dated 25th March, 2009 between defendant no.1 TTL and defendant no.2 TSL on the one hand and defendant no.3 Docomo on the other hand provides for an exit (put) option at an assured / pre-determined price, *inter alia* providing that in the event of failure of defendant no.1 TTL to achieve certain

performance indicators, the defendant no.3 Docomo would have a right to divest its shareholding at a pre-determined price;

(x) that the *inter se* Agreement Dated 25th March, 2009 between the plaintiff on the one hand and the defendant no.1 TTL and defendant no.2 TSL on the other hand, without any consideration and /or on a mistaken and erroneous basis provides for indemnification by the plaintiff to the defendant no.1 TTL and defendant no.2 TSL of the losses suffered by them as a result of any indemnification claim made by the defendant no.3 Docomo;

(xi) that on account of gross mismanagement of defendant no.1 TTL by the defendant no.2 TSL and defendant no.3 Docomo, the defendant no.1 TTL failed to achieve the key performance indicators and which caused grave prejudice to the legal rights of the plaintiff as a minority shareholder;

(xii) on 25th April, 2014, on account of failure of the defendant no.1 TTL to meet the performance indicators as set out in the Shareholders Agreement dated 25th March, 2009, the defendant no.3 Docomo informed the defendant no.1 TTL and defendant no.2 TSL about its election to exercise its sale option and requested the defendant no.1 TTL and defendant no.2 TSL to acquire its shareholding in the defendant no.1 TTL for a consideration of 50% of the acquisition price, amounting to Rs.72.5 billion or the fair market value whichever is higher;

(xiii) that under the Foreign Exchange Management Act, 1999, the Foreign Exchange Management (Permissible Capital Account

Transactions) Regulations, 2000 and Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 and various Circulars / Notifications / Amendments issued thereunder or related thereto, the transfer of security by a non-resident cannot be at a price which is more than the fair market value of such security, without prior special permission from the defendant no.4 Reserve Bank of India (RBI);

(xiv) in fact as on 25th March, 2009, when the Shareholders Agreement was executed, the “optionality” clauses set out therein were in contravention of applicable law and hence *void ab initio* and any indemnity obligation of the plaintiff pursuant to the *inter se* Agreement dated 25th March, 2009 would be contrary *inter alia* to Foreign Exchange Management (Guarantees) Regulations, 2000 and as such *void ab initio*;

(xv) that the defendant no.2 TSL on 6th May, 2014 for the first time informed the plaintiff that defendant no.3 Docomo had announced its intention to exercise the sale/exit option under the Shareholders Agreement dated 25th March, 2009;

(xvi) on 11th February, 2015, the defendant no.2 TSL informed the plaintiff that the defendant no.2 TSL had applied to defendant no.4 RBI for purchase of 1,248,978,378 shares held by the defendant no.3 Docomo in the defendant no.1 TTL at a value of Rs.58.045 per share and that the defendant no.3 Docomo had filed a request for Arbitration alleging breach of Shareholders Agreement dated 25th March, 2009;

(xvii) on 22nd June, 2016, the Arbitral Tribunal passed an Award in favour of defendant no.3 Docomo and against the defendant no.1 TTL and defendant no.2 TSL;

(xviii) on 8th July, 2016 the defendant no.2 TSL claimed amounts allegedly payable by the plaintiff in terms of *inter se* Agreement Dated 25th March, 2009;

(xix) the defendant no.3 Docomo has filed OMP (EFA) (COMM) No.7/2016 in this Court seeking execution of the Arbitral Award against the defendant no.2 TSL; and,

(xx) that the defendant no.2 TSL in the aforesaid proceedings has contended that since the defendant no.4 RBI has refused permission to make payment to the defendant no.3 Docomo for transfer of shares, the Arbitral Award cannot be enforced.

2. The plaintiff, on the aforesaid pleas, has sought the reliefs in this suit of (i) declaration that the *inter se* Agreement dated 25th March, 2009 particularly Clause 4 thereof whereunder the plaintiff has agreed to indemnify the defendant no.1 TTL and defendant no.2 TSL is unenforceable, illegal, null and void and not binding on the plaintiff; (ii) declaration that Clauses 5.7 and 5.8 of the Shareholders Agreement dated 25th March, 2009 between the defendant no.1 TTL and defendant no.2 TSL on the one hand and defendant no.3 Docomo on the other hand are unenforceable, illegal, null and void and not binding on the plaintiff; and, (iii) permanent injunction restraining the defendant no.1 TTL, defendant no.2 TSL and defendant no.3 Docomo from in any manner making, pursuing and / or enforcing any claim against the plaintiff in respect of and / or arising out of *inter se* Agreement

dated 25th March, 2009 and the Shareholders Agreement dated 25th March, 2009.

3. The suit came up before this Court first for admission on 19th April, 2017, when the following queries (coupled with my reasons / observations) were made from the counsel for the plaintiff:-

“4. I have enquired from the counsel for the plaintiff the need for the plaintiff to file the present suit and have put it to the counsel for the plaintiff, whether not the plaintiff can take all the pleas as taken in this plaint in its defence to the proceedings if any initiated against it in enforcement of the agreements aforesaid whereunder the plaintiff is obligated to so re-purchase the shares sold by it to Docomo.

5. I am of the view that a person against whom a demand with a threat of legal proceedings is made cannot be permitted to rush to the Court to seek declaration that the demand is bad and that the remedy of such person is to contest the legal proceedings and to take all the pleas on which the relief of declaration is claimed in the defence to the suit.

6. For institution of a suit, a cause of action is a must and a legal demand enforceable with a legal proceeding, even if coupled with threat of the legal proceedings, cannot in my view constitute a cause of action. If all persons to whom notices preceding legal proceedings are issued are permitted to so rush to the Court, the same will result in multiplicity of proceedings.

7. The words ‘Cause of Action’ are not empty words and imply that the plaintiff should have a grievance for redressal of which it is necessary for the plaintiff to approach the Court. A threat of legal proceedings cannot be such a grievance. It is for this reason only that Section 41 of the Specific Relief Act, 1963 also prohibits injunctions from being granted to restrain any person from prosecuting a judicial proceeding unless such restraint is necessary to

prevent multiplicity of proceedings.

8. *In fact, the relief claimed by the plaintiff of permanent injunction is in the teeth of the bar contained in the said Section 41 of the Specific Relief Act.*

9. *Whenever the Legislature felt a need to constitute a legal notice as a cause of action, it has provided so. Mention in this regard may be made of Section 60 of the Copyright Act, 1957 and Section 142 Trade Marks Act, 1999 pari materia which enables a suit to be filed against threats of infringement. However as per proviso thereto, the said provision also does not apply once the legal proceedings as consequence of threat are instituted.*

10. *The counsel for the plaintiff has candidly stated that if the plaintiff awaits the legal proceedings, Tata Sons would invoke arbitration under the arbitration clause contained in the agreement aforesaid.*

11. *The aforesaid rather shows the suit to be also in abuse of the process of this Court. It is clear that the suit is intended as a spoke in the arbitration proceedings anticipated by the plaintiff. Though the existence of an arbitration clause is not a bar to the very maintainability of the suit, till the defendants invoke Section 8 / Section 45 of the Arbitration and Conciliation Act, 1996 but the Court will certainly not allow its jurisdiction to be invoked to defeat / delay the right of another to invoke arbitration.*

12. *The counsel for the plaintiff, on enquiry as to why the plaintiff has not invoked the arbitration clause, states that Docomo, Reserve Bank of India (RBI) impleaded as defendant No.4 and Union of India (UOI) impleaded as defendant No.5 are not parties to the arbitration agreement and their presence is necessary for adjudication of the pleas as raised by the plaintiff in this suit.*

13. *In this regard it is stated that though Tata Sons since the filing of this suit has applied for recording of the compromise of its disputes with Docomo pending before this Court but RBI / UOI raised objection thereto.*

14. *I am doubtful whether for such reasons RBI / UOI can be said to be necessary or proper parties to the disputes which may arise in arbitration. Taking a plea, of an agreement being against the public policy within the meaning of Section 23 of the Indian Contract Act, 1872, does not require impleadment of UOI as a party to the proceedings where such a plea is taken. It is for the Court / Arbitral Tribunal to decide on the basis of the material before it the agreement which is sought to be enforced in the proceedings is against the public policy and hit by Section 23 of the Contract Act or not.*

15. *The need for the presence of Docomo in the arbitration is pleaded on the ground that the plaintiff is being called upon to re-purchase directly from Docomo. However, the counsel agrees that the agreement aforesaid itself provides for the plaintiff to re-purchase directly from Docomo. It will always be open to the plaintiff, if it is so the contention, to contend that Tata Sons cannot enforce the said obligation and in the event of Docomo enforcing the said obligation, again all defences would remain open to the plaintiff.*

16. *The arbitration clause aforesaid is for arbitration proceedings to take place at Mumbai.*

17. *I have enquired from the counsel for the plaintiff the basis on which the territorial jurisdiction of this Court is invoked.*

18. *The counsel for the plaintiff states that since the registered office of Tata Teleservices which is a party to the agreement is situated at Delhi and since meetings have taken place at Delhi, this Court would have territorial jurisdiction.*

19. *The registered office of Tata Sons is admittedly at Mumbai and the agreement aforesaid was executed at Mumbai. The notices issued by Tata Sons to plaintiff have also been issued from Mumbai. The enforcement of the agreement / obligation has been claimed not by Tata Teleservices but by Tata Sons. The presence of Tata*

Teleservices as a party to the agreement was merely as a confirming party with no rights and obligations and the existence of its registered office at Delhi cannot furnish jurisdiction to the Courts at Delhi. The agreement aforesaid provides for enforcement of the decision of the arbitration also in the Courts at Mumbai, displaying an intention of the parties of having agreed to the exclusive jurisdiction of the Courts at Mumbai only.

20. *The counsel for the plaintiff seeks time to make further submissions, if any.*

21. *List on 26th April, 2017.”*

4. The counsel for the plaintiff has today referred to:

(i) ***Radnik Exports Vs. Standard Chartered Bank*** 2014 SCC OnLine 3404 (appeal whereagainst is informed to have been dismissed as withdrawn) in para 27 whereof I have held:

- (a) that under Section 34 of the Specific Relief Act, 1963, negative declaration can also be claimed; it is thus possible thereunder to sue for declaration that the plaintiff is free of debt; and,
- (b) that Section 34 is not the sole repository for the relief of declaration and it is open to every person against whom a bank or financial institution may have a claim for recovery of a debt to sue in a Civil Court on the same grounds on which he may have a defence before the Debt Recovery Tribunal (DRT) to such claim of a bank / financial institution, for declaration that he is not a debtor of the bank / financial institution and is not liable to pay any amount to the bank / financial institution.

(ii) ***Rolls-Royce Plc Vs. Unite the Union***

MANU/UKWA/0375/2009 holding:-

- (A) that the power of the Court to grant declaratory relief is discretionary;
- (B) there must, in general, real and present dispute between the parties before the Court as to the existence or extent of a legal right between them;
- (C) however, the claimant does not need to have a present cause of action against the defendant; and,
- (D) that the fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for declaration, provided that it is directly affected by the issue.

(iii) ***Gouriet Vs. H.M. Attorney-General*** 1978 A.C. 435 holding that:-

- (I) for the Court to have jurisdiction to declare any legal right, it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in future, conditionally on the happening of an event;
- (II) a party applying for declaratory relief need not have a subsisting cause of action or a right to some other relief as well;

- (III) relief in the form of a declaration of a right is generally superfluous for a plaintiff who has a subsisting cause of action; and,
- (IV) it is, when an infringement of the plaintiff's rights in future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declaration of rights can be most usefully invoked.

5. I have considered the aforesaid and am still unable to find the plaint to be disclosing a cause of action for the reliefs claimed.

6. As far as the reliance placed on my judgment in *Radnik Exports* supra is concerned, I was therein concerned with a suit for declaration that the "Structured Currency Option" Agreements entered into by the plaintiff with the defendant Bank were agreements by way of wagers hit by the bar of Section 30 of the Indian Contract Act, 1872 and consequently void and unenforceable and for permanent injunction restraining the defendant Bank from in any manner acting upon or seeking to enforce any transaction under the said agreements. What the counsel for the plaintiff has relied upon is not what was held in that case; rather the suit was found to be not maintainable and was dismissed reasoning (i) that if it were to be held that the suit was maintainable and the defendant Bank initiated proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act), the possibility of the Civil Court and the DRT rendering conflicting findings could not be ruled out and in which case the finding of the Civil

Court will prevail over the finding of the DRT; (ii) however, such an interpretation would set at naught the very reason for the enactment of the DRT Act and establishment of the DRT and would lead to a waste of effort on the part of DRT in adjudication, if the same were not binding; (iii) the same could not be permitted; (iv) that the jurisdiction of the Civil Court to entertain a suit for declaration is thus necessarily barred and it matters not whether on the date of institution of the suit the bank had initiated any proceedings before the DRT or not and whether the said proceedings were pending or not; and, (v) as long as the declaration claimed in the suit is the same as the defence which could be raised by the plaintiff to a claim by the defendant Bank before the DRT, the jurisdiction of the Civil Court would be barred and the consequential relief of permanent injunction against recovery would also be barred.

7. It would thus be seen that ***Radnik Exports*** is against the plaintiff herein rather than being in favour of the plaintiff who has relied upon the same.

8. What has been held by me in ***Radnik Exports*** in the context of the DRT Act and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), would apply equally to the present case. The *inter se* Agreement between the plaintiff on the one hand and the defendant no.1 TTL and defendant no.2 TSL on the other hand and which TTL and TSL have made the claim against the plaintiff which is pleaded as the cause of action for this suit, provides for arbitration. If the claim made by the defendant No.1 TTL and defendant no.2 TSL against the plaintiff is not settled, the defendant No.1 TTL and the

defendant no.2 TSL would have to invoke the arbitration clause contained therein. It is not in dispute that what the plaintiff has pleaded in the plaint in the present suit would be the defence of the plaintiff in the said arbitration proceedings. If the suit for declaration were to be entertained and simultaneously the arbitration is also invoked, the same will again result in the possibility of conflicting findings by this Court and by the Arbitral Tribunal.

9. Just like the DRT Act and the SARFAESI Act bar the jurisdiction of the Civil Court, similarly Section 5 of the Arbitration and Conciliation Act, 1996, wording whereof commences with a *non obstante* clause, bars judicial intervention except as provided in Part-I of the said Act. Part-I of the said Act certainly does not provide for a person against whom a claim which if not settled has been agreed to be subject matter of arbitration, rushing to the Civil Court for a declaration that he is not liable for the claim. The dicta in *Radnik Exports*, thus squarely applies.

10. Else, I confirm my observations contained in the order dated 19th April, 2017 relevant part whereof has already been reproduced hereinabove.

11. The suit is found to be not maintainable and is dismissed. Resultantly, the pending application being IA No.4079/2017 under Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 (CPC) is also infructuous.

12. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

APRIL 26, 2017

‘pp’..

(corrected & released on 14th October, 2017)