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## **TATA V. DOCOMO:**

### **HOW THE ISSUE BECAME TATA & DOCOMO V. RBI?**

The judgement of the Delhi High Court in this case was one which put an end to the long standing spat between Tata Sons and its partner NTT Docomo over the right of NTT to sell its stake in the Indian wireless venture Tata Docomo for at least 50% of the original investment.

The dispute between the Indian and Japanese giants was one which had the potential to impact foreign investments in India. It was even feared at one stage that the issue may even disrupt the economic ties between India and Japan.

When RBI came up with its objections, even after Tata decided to withdraw its objections to it the enforceability of the arbitral award, it became another bolt on India's history of dealing with foreign investors. It was also criticized that the apex bank's attempt to intervene into a straight forward commercial arrangement would deter foreigners from investing in India. The Tata-

Docomo debacle casted doubts on India's resolve to make herself investor friendly.

#### **Facts of the case**

The original disputed agreement between the parties provided for an exit option to NTT Docomo, a Japanese company for its investment in India. The agreement between them has provided NTT the right to sell its stake of 26.5% brought for \$2.6 billion in 2009 at two rates whichever is higher. That is either at fair value or at half of the acquisition price, amounting to Rs. 7,250 crore. This meant that a higher price than what is allowed under the new rules. The new rules state that foreign companies can only exit investments at a valuation based on the return on equity. Therefore, when NTT wanted its investment back at the second option, problems arose.

In 2014, the RBI issued new FDI rules that do not allow what NTT wanted. Thus Tata could not pay

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and the negotiations between them could not bear fruits. Therefore, NTT initiated arbitration proceedings to recover it.

In June 2016, the London court of international arbitration adjudicated that the Tata Sons would pay \$ 1.7 billion to NTT for breaching its contractual obligations. According to the consent terms agreed by Tata and NTT Decomo, the latter would begin transferring shares to an account designated by Tata after deducting taxes.

Though, Tata had initially objected the enforcement of the award in India, later it withdrew the objections. As per the settlement agreement NTT would not enforce the award within six months in any jurisdiction.

The RBI which was not initially a party was later impleaded as party, had objected to the transfer. However, the Delhi High Court in April permitted Tata Sons and NTT Docomo to enforce the arbitral award.

### **Issues of the Case**

There were three main questions before the Delhi high court, namely;

1. Whether RBI has locus standi to seek intervention in order to object the enforceability of the arbitral award when RBI was not a party to the arbitration agreement.
2. Whether the agreement and the award were valid.
3. Whether the settlement agreement was valid.

### **Contention of the parties**

The RBI which was not initially a party to the case but was later allowed to join in, contended that the mutual settlement between the companies permitting transfer of funds violated provisions of the Foreign Exchange Management Act (FEMA), 1999 and was against public policy.

The counsel on behalf of RBI contended that under Order XXIII Rule 3 CPC 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 hit by Section 23 of the Indian Contract Act.

According to him, the compromise under order XXIII Rule 3 of CPC envisaged a lawful agreement to be brought into effect. 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 9<sup>th</sup> February 2017 of this court in OMP (comm.) 154/2016 (*Shakti Nath v. Alpha Tiger Cypress Investments No. III ltd*)

Therefore, notwithstanding the fact that Tata may not have objection to the enforceability of the award the court should refuse to enforce it as 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 or a SEBI-registered Merchant Banker. It was also in violation of Section 6(3) of FEMA which

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empowered RBI to prohibit, restrict or regulate the transfer of any security by a person outside India. The Foreign Investment Protection Board had approved Docomo's acquisition of shares in TTSL subject to the condition that "issues/transfer of shares shall be as per SEBI/RBI guidelines." Therefore, the Award which dispensed with the obtaining of any consent from RBI for the transmission of the damages granted to Docomo was contrary to the fundamental policy of India and could not be enforced.

It claimed that an agreement between the two companies on exit options is contrary to FDI norms in India as the foreign investor cannot sell its stake to the bigger partner after it withdrew from the joint venture. Tata Sons told the court that while it was willing to pay; Indian laws prevented it from doing so.

On the other hand Docomo contented that only a party to an arbitral award can object to its enforceability subject to S.s.41(1) of the Arbitration Act and therefore, entertaining the objection raised by RBI would be against the fundamental policy of Indian Law. Tata contended, referring to S.3 and S.6 of FEMA that there was no blanket prohibition against repatriation of monies to an entity outside India at a price not exceeding that arrived at as per internationally accepted price methodology.

## **THE JUDGEMENT**

The court adjudged that in view of S.48 and S.2 (h) of the Arbitration and Conciliation Act, the RBI, being a non-party to the agreement cannot seek to intervene in order to object to the enforcement of the award.

The court also observed, rejecting RBI's contention, that 'the SHA could not be said to be void or opposed to any Indian law, including FEMA, much less the ICA. FEMA contains no absolute prohibition on contractual obligations. It clearly envisages grant of special permission by RBI. As rightly held by the AT, Clause 5.7.2 was legally capable of performance without the special permission of RBI, using the general permission under sub-regulation 9(2) of FEMA 20. The court added that the Award of the AT was also in accordance with the intention of the parties and was not opposed to any law in India.

Similarly, the court upheld the validity of the consent terms agreed by the parties during the execution proceedings. The court said that it was well settled law in India that the parties to a suit or an award may enter into a settlement even at the stage of execution of the decree or award. For this the court relied on the Privy Council judgement in *The Oudh Commercial Bank Ltd v. Thakurein Bind Basni Kuer*, (1939) 41 Bom I.R 708 and a few other SC judgements which reiterated the Privy Council decision.

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### **Impact of the Judgement**

There are a number of cases where foreign investors want to withdraw their funds from the country as they have won arbitral awards from arbitral tribunals seated outside India. The provisions of FEMA forced these investors to hang on and prevented them from withdrawing their money from India. FEMA does not allow a stake or share buyback at a pre-determined valuation.

However, this verdict of Delhi HC turning down the RBI intervention which opposed the agreement between Tata Sons and Japanese telecom major NTT Docomo will attract more foreign investments. It can be called as a watershed moment for foreign investment. This will boost investor confidence and assure them that their investments are safe. This makes the Indian legal system robust and efficient in ensuring that stakeholders' investments are secure.

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