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Sovereign immunity in India- Absolute or Qualified?

Sonal Sharma · Wednesday, June 4th, 2014

Uniform jurisprudence on Sovereign immunity still seems a long distance away in international sphere for the reason that the national laws and approaches adopted by the States govern this issue. There have been attempts in the past to somehow streamline the approach by adopting legislations and, in a broader sense, by bringing a multilateral treaty. India still does not have a separate legislation on foreign state sovereign immunity as U.K and the US have. However, it did sign the United Nations Convention on the Jurisdictional Immunities of the States and their Property. Even though the convention is not in force yet, it shows India's inclination to formally adopt a qualified immunity approach. The case laws developed over the years show that the courts have adopted the same approach of no absolute immunity from jurisdiction.

Background

In India, Section 86 of the Civil Procedure Code governs the issue of foreign state immunity and the general rule under Section 86 states that no foreign State may be sued in any court without prior consent from the central government. The government has the discretion to grant the consent, however, the approval will depend on the specific facts of the case and would only be applied in following circumstances where the foreign State

a) has instituted a suit in the Court against the person desiring to sue it, or

b) by itself or another, trades within the local limits of the jurisdiction of the Court, or

c) is in possession of immovable property situated within those limits and is to sued with reference to such property pr for money charged thereon, or

d) has expressly or impliedly or impliedly waived the privilege accorded to it by this section.

In absence of a separate legislation, the problem that courts often face is even though it is a procedural provision and has nothing to do with substantive rights of the States to sue or be sued (however, there is plausible argument that it is not just procedural but equally substantive), it is the only way those rights can be exercised. This provision does not reflect conformity with the current trends in international law, which has already progressed from the position since this provision was first created.

However, the courts have been trying to interpret this section as of limited applicability and assert that the problem can be overcome in certain proceedings and circumstances.

One of the earliest cases which dealt with the issue of consent and sovereign immunity is *Harbhajan Singh Dhalla v Union of India*[1]. The petitioner in this case carried out building maintenance, reconditioning and renovations at the Algerian Embassy and the residence of the then Algerian Ambassador in New Delhi. He tried to collect his dues but failed and then requested the Ministry of External Affairs to grant the permission to sue the Algerian Embassy. The Ministry refused to grant the permission on "political grounds" and also contended that under section 86 petitioner failed to make prima facie case. The court discussed reasoning of Calcutta High Court in *Mirza Ali* [2] that the foreign State should only be entitled to such immunities as granted to the domestic State. The Supreme Court observed that, "the disputes have to be resolved in accordance with the laws of this country, both under the principles of Lex Loci contractus as well as lex situs". The court also observed that even though Union of India has the jurisdiction and obligation in the appropriate case to give sanction but it cannot determine the claims in an arbitrary manner or administratively adjudicate those disputes. The court further mentioned that it is not for the Central Government to attempt to adjudicate upon merits of the case. It is the function of the courts of competent jurisdiction, which Central Government cannot usurp under Section 86, and the power given to the Central Government must be exercised with proper reasoning and on permissible grounds.

Waiver from jurisdiction in arbitral enforcement proceedings:

Nawab Usmanali Khan v Sagarmal[3]: The appellant who was a Ruler of a former Indian State filed an appeal against the execution proceedings of an arbitration award contending that the in the absence of the consent of the Central Government, proceeding under section 14 and 17 of Arbitration Act, 1940 for the passing of a judgment and decree on an award be adjudged null and void. The Supreme Court held that the proceedings for passing a judgment and decree on an arbitration award "doesn't commence with plaint or a petition in the nature of a plaint", it cannot be regarded as "suits" to attract application of section 86 of CPC.

The term "suit" was again defined by Supreme Court in *Patel Roadways Limited v. Birla Yamaha Limited*[4], as "a generic term taking within its sweep all proceedings initiated by a party for realisation of a right vested in him under the law. The meaning of the term suit also depends on the context of its user which in turn, amongst other things, depends on the Act or the Rule in which it is used". This definition was upheld by the Constitution Bench of Supreme Court in *Economic Transport Organisation, Delhi v Charan Spinning Mills Private Limited and Anr*[5].

However, the term was only defined in regard with proceedings before National Consumer Commission and Forums. The Supreme Court in *Ethiopian Airlines v. Ganesh Narin Saboo*[6] relied on the same definition for proceedings before the consumer forum. But in its discussion it observed that it has already been held in

Sagarmal that the phrase in Section 86 "sued in any court" must be strictly construed and confined to the *suits proper* and thus Section 86 doesn't bar jurisdiction in under the Arbitration Act. It is clear that they still didn't bring the enforcement proceedings within the broad definition of "suits" for the purposes of applicability of Section 86.

Arbitration Clause is not a Waiver of State's Immunity from Jurisdiction:

This issue was taken up by Delhi High Court in *M/s Uttam Singh Duggal and Co. Pvt. Ltd. v United States of America Agency for International Development*[7)], in which the appellants entered into contract with the defendants to construct staff houses and apartment, and the contract contained a clause for arbitration with the contracting officer of the USAID mission in India as the sole arbitrator. When dispute arose between the parties and defendants refused to refer the dispute to arbitration, the appellants approached the court under Section 20 of the Arbitration Act for appointment of an arbitrator. The responded pleaded sovereign immunity. The court observed that even though the Central government gave its consent to sue respondents, it is not useful as application under Section 20 is not a suit.

Even though in this particular case, the Central Government did give the consent for suing the defendants regarding performance of their contract, the court still discussed the issues involved. One of the main contentions appellants raised was that the parties had entered into a contract containing an arbitration clause and that by the parties agreeing on the reference of any dispute to arbitration meant submitting to the jurisdiction of the court. The court relying on the reasoning in old English cases of *Duff Development Co. Ltd v. Kelantan Government and another* (1924) All E.R. 1 (7) and *Compania Mercantil Argentina v. United States Shipping Board*, (1924) 93 Law Journal Reports Wing's Bench Division, decided that there can be no waiver of privileged immunity just on the basis of arbitration clause in the contract, because the only method to waive an immunity is when an independent foreign sovereign submits to the jurisdiction and such submission takes place only when jurisdiction is invoked.

The fact that this judgment was delivered in 1982, when the UK State Immunity Act was already in place, raises a question why the court didn't take the provisions of the Act into consideration and still followed the ruling in the case. As it is safe to assume that UK State Immunity Act 1978 overrules these decisions by allowing waiver by a prior written agreement; it will be interesting to see how Indian Supreme Court would rule on this issue now.

Signing a Convention and passing of special statue to give effect to the convention amounts to express waiver of immunity.

Ethiopian Airlines v. Ganesh Narin Saboo

Brief facts:

The case relates to delay in the delivery of a consignment of reactive dyes in Dar-es-Salaam, Tanzania in 1992, which led to deterioration in the quality of the goods. Ganesh Narain Saboo, who booked the consignment with Ethiopian Airlines, filed a complaint with the State Consumer Disputes Redressal Commission in Maharashtra

under the Consumer Protection Act for alleged deficiency of service by Ethiopian Airlines. The state commission held that the complaint is not maintainable because prior permission of the central government under section 86 for proceeding against the instrumentality of a foreign state had not been obtained. On appeal, the national commission held that section 86 is not applicable to the proceeding under Consumer Protection Act and remanded the case to be decided afresh in accordance with law. The appeal was heard by a division bench of the Supreme Court and subsequently referred to a larger bench.

One of the Issues involved was, whether in view of the provisions of the Carriage by Air Act, 1972, the Ethiopian Airlines is deemed to have submitted to the jurisdiction of the Indian Courts for the purposes of Code of Civil Procedure.

Contentions:-:

The Carriage by Air Act, 1972 was enacted to give effect to the Convention for Unification of Rules relating to International Carriage by Air signed at the Warsaw, as amended by Montreal Convention and Section 7 of the act provides that every high contracting party to the Convention, shall for the purposes of any suit brought in a court in India in…to enforce a claim in respect of the carriage undertaken by *him be deemed to have submitted to the jurisdiction to that court*.

The court held that Section 86 is inapplicable for the following reasons:

1) That the savings clause in the code of civil procedure makes way for special acts as it clearly states that "nothing in the [Code of Civil Procedure] shall be deemed to limit or otherwise affect any special law or any form of special procedure prescribed by or under any other law…"

2) That a special statue, which provides for a forum in which suits arising under that law can be brought impliedly repeals in respect of suits covered by it the general provisions of Code of Civil Procedure. So, "the legislative intent is deem[ed] to exclude older and more general statue by recent and special statutes".

3) As per principle of statutory interpretation, "a special statue that comes later in time trumps prior general statues. If the legislature decides to confer the later enactment with a non-obstante clause, it means legislature wanted that enactment to prevail".

4) By signing onto the Warsaw Convention, Ethiopia had expressly waives its Airline's right to immunity in cases brought under the national act i.e. Carriage by Air Act, 1972. Therefore, the Central Governments of both India and Ethiopia have waived the right of sovereign immunity to jurisdiction.

Commercial Activities and Sovereign Immunity:

In *Ganesh Narin*, the Supreme Court briefly discussed the issue of non-entitlement to sovereign immunity with respect to commercial transactions. It agreed with the growing international principle of restrictive immunity and relied on Lord Denning's observation in *Rahimtoola v H.E.H. The Nizam of Hyderaband and Ors.* (1957) 2 ALL

E.R that departments and agencies of a foreign country should not be granted an immunity which a country does not grant to its own. It also noted the court's ruling in *Trendtex Trading Corp Ltd. v Central Bank of Nigeria* (1977) 1 ALL E.R. 881, that if a government department goes into market place and engages in a commercial transaction, it should be subject to all the rules of the market place.

They further tried to clarify that Section 86 CPC itself is a "reflection of modification and restriction of the principle of foreign sovereign immunity" and by enacting special statues, Parliament has further narrowed a State's ability to plead sovereign immunity and hence in today's world "the principle of sovereign immunity can no longer be absolute in the way it much earlier was".

2004 UN Convention on State Immunity

India signed the convention on Jan 12, 2007 but the convention is not in force yet. Even though, just signing the convention cannot be taken as an official position of India on this issue but taking into account the above case laws, it sure looks like a step in the right direction.

Conclusion:

In absence of a specific legislation that expressly allows waiver of sovereign immunity by prior agreement, it is going to be a task for the Indian judiciary to interpret the applicability of this Section under different circumstances while trying to enforce it in conformity with the legislative intent as well as prevalent international view.

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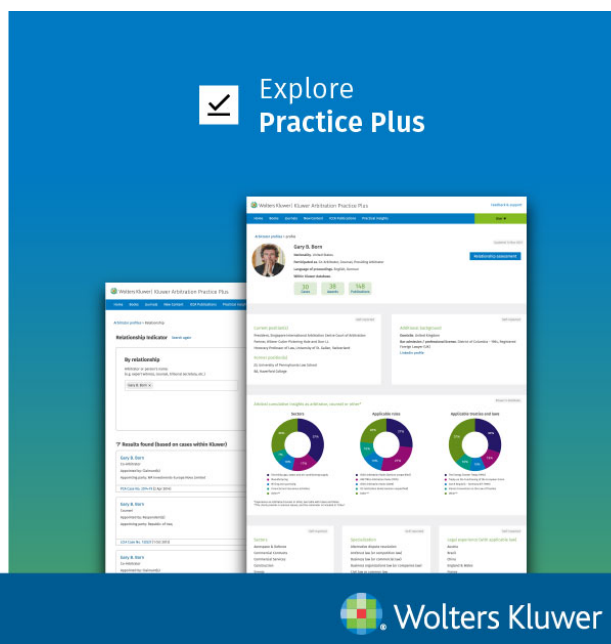

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References

↑**1** AIR 1987 SC 9
↑**2** AIR 1962 Cal 387.
↑**3** AIR 1965 SC 1798
↑**4** (2000) 4 SCC 91
↑**5** (2010) 4 SCC 114
↑**6** AIR 2011 SC 3495
↑**7** 22 (1982) DLT 25

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