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No Immunity for You: Delhi Court Allows Enforcement of Award Against Afghanistan and Ethiopia

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There has been much debate about immunity this last year. While, most were discussing concepts of "herd immunity" against the novel coronavirus, the Delhi High Court (**Court**) ventured into and addressed aspects of "sovereign immunity". In a batch of petitions (*KLA Const Technologies v. The Embassy of the Afghanistan* and *Matrix Global v. Ministry of Education, Ethiopia*) a Single-Judge of the Court ruled that foreign States cannot claim "sovereign immunity" (or related procedural safeguards under the Civil Procedure Code, 1908 (**CPC**)) to resist enforcement of awards before Indian courts.

Background

In both the cases before the Court, the petitioners (both Indian companies) had entered into contracts with the government/ government entities of Afghanistan and Ethiopia, respectively, for rehabilitation of the embassy premises and for supply and distribution of certain books. Disputes that had arisen between the parties were referred to arbitration seated in India, resulting in arbitral awards in favour of the petitioners.

Both petitioners then approached the Court under Section 36 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking enforcement of the awards against assets of Afghanistan and Ethiopia in India. In what may now appear to be an over-confident move, neither Afghanistan nor Ethiopia appeared in the Court, leaving the Judge to consider the issue without input from the respective respondents.

Sovereign Immunity and the Civil Procedure Code

Before turning to the reasoning employed by the Court, it is important to understand how "sovereign immunity" is understood in India. Section 84 of the CPC grants foreign States the right to sue in Indian courts "*provided that the object of the suit is to enforce private rights*". As a corollary, Section 86 of the CPC also provides for foreign States to be sued in India, provided the Central Government of India consents thereto. Section 86(3) in particular provides that: "*Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of a foreign State*".

The requirement to seek prior consent of the Central Government has however been limited in its scope, with Indian courts holding that they would only be strictly applicable to proceedings which may be categorised as "suits" under the CPC and would not be applicable, for instance, to initiate insolvency suits (*see AIR 1940 Cal 244*), probate proceedings (see AIR 1956 Bom 45) or to labour disputes (*see AIR 1963 Raj 22*).

It also bears mentioning that the Indian courts initially viewed the procedural safeguards in Section 86, CPC to be *exhaustive* of claims to sovereign immunity, *de hors* applicable international law on the issue. For instance, *Mirza Ali Akbar Kashani* (1965) the Supreme Court held that:

> "*just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for rights and liabilities of foreign States to sue and be sued in its municipal courts*" (Para 29).

In other words, in *Mirza* the Supreme Court held that a plea of sovereign immunity raised in Indian courts are to be resolved entirely as a matter of Indian law. It was, therefore, the Central Government's prerogative to decide if a foreign State should be sued in India. However, its more recent judgement, *Ethiopian Airlines v. Ganesh Narain Saboo* (2011), illustrated a different approach to the issue by observing that:

> "*Section 86 does not supplant the relevant doctrine under the international law. Rather, Section 86 "creates another exception" to immunity (emphasis added), in addition to those exceptions recognised under the international law*". (Para 77)

Resultantly, the defence of sovereign immunity in India represents both a procedural right (*i.e.* requiring prior consent of the Central Government) and a substantive right (governed largely by common law and international law recognizing diplomatic privileges afforded to States).

Are Award-Related Enforcement Proceedings "Suits"?

So far as the procedural rights of a foreign State in relation to civil claims are concerned, the Supreme Court in *Nawab Usman Ali Khan's case* (1965) held that:

> "*A proceeding which does not commence with a plaint or petition in the nature of plaint, or where the claim is not in respect of dispute ordinarily triable in a civil court, would prima facie not be regarded as falling within Section 86, Code of Civil Procedure*".

The judgement in *Nawab Usman's case*, albeit in the context of a former ruler of a princely state of India who was no longer *sovereign*, clarified that no prior consent under Section 86, CPC was necessary to *initiate arbitration* against a foreign State or for *arbitral awards to be rendered as decrees*. However, having been rendered as decrees under Section 14/ 17 of the 1940 Act, their

enforcement would nonetheless have been subject to Section 86(3) (*reproduced above*).

In this respect, it may be noted (as previously discussed on this blog) that Section 36 of the Arbitration Act made a significant departure from the 1940 Act by providing that arbitral awards may be enforced "*as if it were a decree of the court*". In this context the Supreme Court clarified in *Paramjeet Singh Patheja* (2006):

> "*The words 'as if' demonstrate that award and decree or order are two different things.* […] *The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central*". (Para 42)

Decision of the Court

The Court has rightly drawn from the judgement in *Paramajeet Singh Patheja* to hold that there exists a conceptual difference between a *decree simpliciter* and an arbitral award, which only for the purpose of being enforced made be treated at par with a decree of a court. With this, the Court has unequivocally held that no prior consent of the Central Government under Section 86, CPC was necessary for the petitioners to pursue enforcement of their respective arbitral awards against Afghanistan and Ethiopia. Not only does this permit enforcement against foreign States without the intervention of the Central Government, in practical terms this greatly augments the speed of enforcement of such awards.

As regard the substantive aspect of sovereign immunity, the Court drew from previous judgements of Indian courts where foreign States were deemed to have *waived* their sovereign immunity by failing to raise the plea of sovereign immunity promptly or by entering into international conventions which provided for civil liability. Notably, the Court has also drawn from decisions of courts in the United Kingdom and the United States of America which represent the growing international consensus that State actors are to be treated at par with private parties when in their commercial avatar. In fact, the Court has ventured further by holding that:

> "*An arbitration agreement in a commercial contract between a party and a Foreign State is an implied waiver by the Foreign State so as to preclude it from raising a defense against an enforcement action premised upon the principle of Sovereign Immunity*". (Para 47)

On the basis of this reasoning, the Court has directed Afghanistan and Ethiopia to provide an affidavit setting out their assets in India against which the awards can be enforced.

Conclusion

Commenting on the difficulties of enforcing arbitral awards in India, the Supreme Court has previously observed that "*difficulties of a litigant in India begin when he has obtained a decree*".

In this context, the instant decision of the Court will contribute towards undoing some of these difficulties against sovereign counterparties.

The decision of the Court in *KLA Const.* is noteworthy for its strong reaffirmation that the arbitral process is not comparable to the prosecution of suits in civil courts. The Court has also clarified that the court system only acts in the penumbra of the arbitral process to assist it and to enforce the outcome of such proceedings.

In a world where the contours of "State" are no longer precise and easily discernible, with States directly or indirectly entering into vast commercial relationships, their counter-parties are likely to welcome the Court's inference that consenting to arbitration shall *ipso facto* proscribe such a party from thereafter claiming sovereign immunity. It is the authors' view that the same reasoning is equally applicable to foreign-seated arbitrations, allowing the enforcement of such awards against the concerned State's Indian assets. Readers may note however, that this reasoning may not find direct applicability in the case of investment arbitration – whose subject-matter may not be exclusively commercial in nature.

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