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Delhi High Court Rules Third Party Funders Vital to Justice but Not Liable for an Adverse Costs Award

Shaneen Parikh, Amoga Krishnan (Cyril Amarchand Mangaldas) · Tuesday, June 6th, 2023

The Delhi High Court has resoundingly acknowledged the viability of third-party funding (“**TPF**”) in providing access to justice for claimants in arbitrations. In a welcome judgment, the Court ruled that a funder was not liable for an arbitral award and therefore need not furnish security in the enforcement thereof. The Court said the funder could not be “*mulcted with liability*”, which it neither undertook nor was aware of.

The judgment, issued on May 29, 2023, in *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. & Others*, provides welcome certainty and relief to funders and funded parties in India. Aside from unequivocally recognising the validity of TPF in arbitrations, the Court also called for the government to formulate rules governing transparency and disclosure of TPF.

The judgment follows a line of decisions by Indian courts (including the erstwhile Privy Council) in cases such as *Ram Coomar Coondoo v. Chunder Cato Mookerjee* and *Bar Council of India v. A.K. Balaji*, which recognised the permissibility of litigation financing in India, and that the torts of champerty and maintenance are not (and never were), applicable in India.¹⁾

Background

The dispute relates to a failed business plan to integrate SBS Transpole Logistics Private Limited (“**Transpole**”) and SBS Holdings Inc. The Claimants—Transpole and its promoters—initiated SIAC arbitration against SBS Holdings (and another company, Global Enterprise Logistics Pte Ltd.) as Respondents, seeking damages of INR 2.5 billion. They alleged that the Respondents had breached their obligations to consummate the integration. The Claimants availed of non-recourse funding from Tomorrow Sales Agency (“**TSA**”), a non-banking financial company, under a Bespoke Funding Agreement.

By its award dated December 22, 2022, the SIAC tribunal rejected the claims and awarded SBS Holdings its legal costs of INR 96.2 million along with interest, holding the Claimants liable for them on a joint and several basis.

Proceedings for interim measures: Order of the single judge

Armed with a favourable costs award, SBS Holdings petitioned the Delhi High Court for interim relief, seeking details of assets and an injunction against not only the Claimants but also TSA as the funder.

The single judge granted the reliefs requested against the Claimants and also TSA (as Respondents in the petition), by an [order](#) dated March 7, 2023, finding that TSA had a “vested interest” in the outcome of the arbitration, having funded the Claimants “for a benefit of a return therefrom”. Relying on the decisions of the England and Wales Court of Appeal (“EWCA”) in *Arkin v. Borchard Line Ltd. & Others.* and *Excalibur Ventures LLC v. Texas Keystone Inc. and Others.*, the Court ruled that TSA could not escape its liability merely because the arbitration’s result was contrary to its expectations. The judge also held that an award could be enforced against a third party, i.e., TSA in the present case, pursuant to the Indian Supreme Court’s decision in *Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited & Another.*

Order in Appeal by the Division Bench

On appeal by TSA, a Division Bench of the Delhi High Court reversed the single judge’s decision.

The Court distinguished Indian law from the English law position in *Arkin* and *Excalibur*. In *Arkin*, the EWCA ruled that a funder would be liable for costs to the other party (albeit to the extent of the funded amount—commonly known as the ‘Arkin cap’), while in *Excalibur*, the EWCA ruled that a funder was liable not just for his own conduct but also of “those in his camp”, including the funded party. The Division Bench noted that both decisions were rendered in the context of civil litigation, where the (English) Civil Procedure Rules, 1997, allowed a court to direct a third party to pay costs; however, no analogous provision existed under Indian law, the Court said.

Interestingly, the States of Maharashtra, Madhya Pradesh, and Gujarat have amended the (Indian) Code of Civil Procedure, 1908 (as applicable to these States), empowering a court to implead a third-party financier to a suit in certain circumstances. In particular, the financier may be required to give security for the payment of all costs incurred and likely to be incurred by any defendant.²⁾

“3. Power to implead and demand security from third person financing litigation.—(1) Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer and share or interest in the property in the suit to a person who is not ready a party to the suit, the Court may order such person to be made plaintiff to the suit if he consents and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.

(2) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from

claiming any right to or interest in the property in suit.”

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of Rule 2 shall apply mutatis mutandis to such application.’ No corresponding provision is, however, included in India’s Arbitration and Conciliation Act, 1996.

The Court did not, however engage with the principle underpinning the decisions in *Arkin* and *Excalibur*, i.e., the need for a just solution to balance a respondent’s right to costs with a funder’s right to be protected against disproportionate consequences (by paying costs on behalf of the funded party).

In some cases, a funder may even agree to stump up adverse costs awarded against the funded party, but that should be specifically included in the litigation financing agreement. Given that TSA was neither a party to the arbitration agreement or the arbitration, no award could (or was), issued against it. Moreover, though the SIAC Arbitration Rules contained provisions for joinder, SBS Holdings made no application to join TSA. The Court ruled that, accordingly, there was no question of TSA being held liable for any interim relief or security in the enforcement of the foreign award. At best, SBS Holdings (being the party seeking to enforce the award), could file a substantive action against the funder (TSA), which would then be tried through a regular evidentiary hearing.

Where the funded party discloses the terms of the funding agreement (and such an agreement has an adverse costs clause), the award holder could—in reliance of the disclosure—call upon the funded party to stump up the amounts payable under the award. As there is no contractual arrangement between the award holder and the funded party in this regard, should the funded party refuse to make reasonable efforts towards such liability, it may be foisted with further costs for any actions taken on enforcement.

What is, however, clear is that in its judgment, the Court has refused to recognise a direct action against a funder by the counter-party.

Finally, the Court also distinguished the applicability of *Gemini Bay*, where the Supreme Court ruled that non-signatories may be bound by an arbitral award. The Court said *Gemini Bay* applied only where the non-signatory was treated as a party to the proceeding and orders were passed against it under the award. That was not the case here, as TSA was neither a party to the arbitration agreement, the arbitration, nor the award.

Conclusion

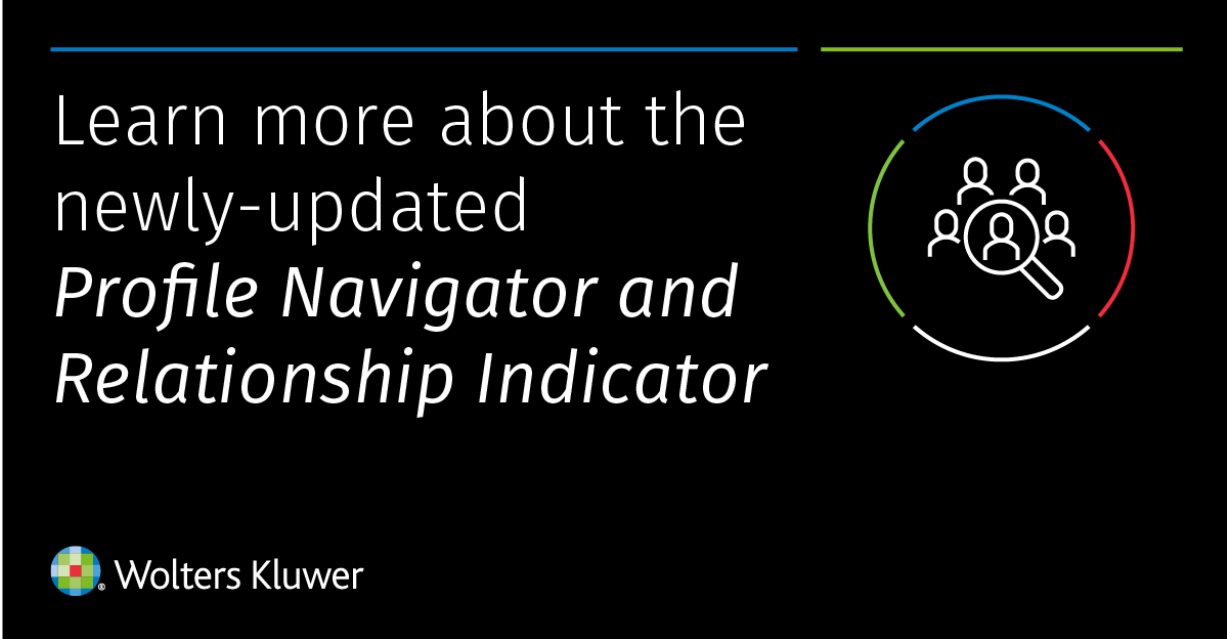
The Court’s decision is a welcome contribution to limited recent jurisprudence on TPF in India. Though the Delhi High Court’s orders are binding in its jurisdiction over the Union Territory of Delhi, the judgment will have persuasive value in all courts nationwide.

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References

Also see: *Ram Sarup v. Court of Wards*, (1939-40) 67 IA 50, and ‘Third-party Funding in India: ?1 Principles and Challenges’, *Global Arbitration Review*, November 16, 2021:
<https://globalarbitrationreview.com/third-party-funding-in-india-principles-and-practical-challenges>

Order XXV, Rule 3, Code of Civil Procedure, 1907, inserted by the amendment dated October 1, 1983, in the states of Bombay (now Maharashtra and Gujarat) and Madhya Pradesh, which states as follows:

- “3. Power to implead and demand security from third person financing litigation.—(1) Where any plaintiff has for the purpose of being financed in the suit transferred or agreed to transfer and share or interest in the property in the suit to a person who is not ready a party to the suit, the Court may order such person to be made plaintiff to the suit if he consents and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in the property in suit is concerned, or declaring that he shall be debarred from claiming any right to or interest in the property in suit.*
- (2) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to or interest in the property in suit.”*
- (3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of Rule 2 shall apply mutatis mutandis to such application.’*

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