



Enforcement of arbitral awards against foreign states: Delhi HC declines invocation of sovereign immunity in commercial dealings

**KLA Const. Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan
Matrix Global Pvt. Ltd. v. Ministry of Education, Federal Democratic Republic of Ethiopia**

Citation	2021 SCC OnLine Del 3424
Date	18 June 2021
Court	Hon'ble High Court of Delhi
Coram	Hon'ble Mr. Justice J.R. Midha

1. **FACTUAL MATRIX:**

- 1.1 KLA Const. Technologies Pvt. Ltd. and Matrix Global Pvt. Ltd. (“**Petitioner I**” & “**Petitioner II**”) respectively sought enforcement of two arbitral awards; *first*, in OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019 concerning the arbitral award dated 26 November 2018 against the Embassy of Islamic Republic of Afghanistan (“**Respondent I**”) and *second*, in O.M.P. (EFA) (COMM) 11/2016 and E.A. 666/2019 seeking enforcement of the arbitral award dated 25 October 2015 against the Ministry of Education, Federal Republic of Ethiopia (“**Respondent II**”).

Brief Facts of OMP (ENF) (COMM) 82/2019:

- 1.2 Petitioner I was awarded a contract for the rehabilitation of the Afghanistan Embassy in New Delhi for the sum of Rs.3,02,17,066.83 by Respondent I. The disputes arose during the course of execution of the work and led the Petitioner I to invoke the arbitration clause. Subsequently, the Hon’ble Supreme Court of India appointed an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”) to adjudicate the dispute. Respondent I appeared before the Sole Arbitrator until 24 July 2017 and there was no appearance thereafter.
- 1.3 The Sole Arbitrator passed an *ex-parte* award on 26 November 2018 in favor of Petitioner I. Respondent I did not challenge the award and it attained finality, however no payment was made to Petitioner I in terms of the award.

Brief Facts of OMP (EFA) (COMM) 11/2016:

- 1.4 Petitioner II and Respondent II entered a contract of USD 25,52,754.60 for supply and distribution of books to Respondent II at various locations throughout Ethiopia. Disputes arose between the parties due to non-payment of dues and the contract was cancelled by Respondent II on 24 April 2014. Subsequently, a Sole Arbitrator was appointed under the UNCITRAL Arbitration Rules invoked by Petitioner II.
- 1.5 Respondent II chose not to participate in the arbitration and hence, the Sole Arbitrator proceeded *ex-parte* on 25 May 2015 and rendered the award *ex-parte* on 25 October, 2015. Respondent II did not challenge the award and thus, it attained finality, which led to Petitioner II filing the instant enforcement petition. Strangely, Respondent II refrained from appearing before the Court as well despite service of notice.

Response of the Union of India:

- 1.6 Notably, the Hon’ble High Court of Delhi (“**High Court**”) directed the Union of India to file an affidavit confirming whether the prior consent of the Central Government under Section 86(3) of the Code of Civil Procedure, 1908 (“**CPC**”) is necessary for enforcement of the arbitral award.
- 1.7 The Central Government on 15 March 2021, placed on record that, prior consent of the Central Government was not necessary for enforcement of an arbitral award under Section 86(3) of the CPC as it was only applicable to suits.

2. **ISSUES:**

- 2.1 Whether the prior consent of Central Government is necessary under Section 86(3) of the CPC to enforce an arbitral award against a Foreign State?
- 2.2 Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction?

3. CONTENTIONS OF PETITIONERS:

- 3.1 Petitioners submitted that an arbitral award passed in an International Commercial Arbitration (“ICA”) held in India, as in this case, should be interpreted as a “Domestic Award” under the Act and would be enforceable under Section 36. To buttress this submission, reliance was placed on the judgment in *Bharat Aluminium Company*¹. Moreover, the legal fiction under Section 36 of the Act is for the limited purpose of enforcement of an award as a decree, bestowing it with the associated legitimacy and validity, and it did not have the effect of making it a decree under the CPC.
- 3.2 Whilst placing reliance upon the decisions in *Nawab Usman Ali Khan*², *R. McDill & Co. Pvt. Ltd.*³, and *M/s. Uttam Singh Duggal & Co. Pvt. Ltd.*⁴, the Petitioners submitted that, the need of prior consent for execution of an arbitral award against the Judgment Debtor, like in CPC, cannot be incorporated into a reformed and contemporary law like the Act.
- 3.3 It was contended by the Petitioners by placing reliance on the judgment in *U.P. State Bridge Corporation Ltd.*⁵ that the application of Section 86(3) of the CPC to an arbitral award would be in violation of the three main principles of the Act, namely speedy, inexpensive, and fair trial by an impartial tribunal; party autonomy; and minimal Court intervention.
- 3.3 The Petitioners further contended that an arbitral award arising out of a business transaction does not give a foreign state sovereign immunity and the signing of an arbitration agreement tantamount to a waiver of sovereign immunity. The main premise of ICA is to facilitate global trade, by creating a reliable, predictable, and efficient legal framework within which commercial activities may be conducted to encourage the smooth flow of international dealings, as well as by removing the uncertainties associated with time-consuming and costly litigation. If not, the entire international arbitration ecology would come crashing down.
- 3.5 Placing reliance on *Ethiopian Airlines*⁶, *Rahimtoola*⁷, *Trendtex Trading Corporation*⁸ and *Birch Shipping Corp.*⁹, it was contended that Respondents willingly entering into a business contract with the Petitioners, comprising of an arbitration agreement and thus cannot be allowed to invoke sovereign immunity to oppose Petitioner’s claims at the stage of enforcement.
- 3.6 Petitioners also contended that India is a signatory to “*The United Nations Convention on Jurisdictional Immunities of States and their Property, 2004*” (“**Convention**”) and Article 10 of the Convention forbids a Foreign State from claiming Sovereign Immunity and under Article 19 of the Convention, there is an express prohibition for a Foreign State from claiming sovereign immunity in the face of post-judgment measures of constraint, such as attachment, arrest, or execution, against the State’s property in cases arising, from an ICA.

¹ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd.*, (2012) 9 SCC 552.

² *Nawab Usman Ali Khan v. Sagarmal*, (1965) 3 SCR 201.

³ *R. McDill & Co. Pvt. Ltd. v. Gouri Shankar Sarda*, (1991) 2 SCC 548.

⁴ *M/s. Uttam Singh Duggal & Co. Pvt. Ltd. v. United States of America, Agency of International Development*, ILR (1982) 2 Del. 273.

⁵ *Union of India v. U.P. State Bridge Corporation Ltd.*, (2015) 2 SCC 52.

⁶ *Ethiopian Airlines v. Ganesh Narain Saboo*, (2011) 8 SCC 539.

⁷ *Rahimtoola v. Nizam of Hyderabad*, (1957) 3 WLR 884.

⁸ *Trendtex Trading Corporation v. Central Bank of Nigeria*, (1977)2 WLR 356.

⁹ *Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania* 507 F. Supp. 311, 1981 A.M.C. 2666.

3.7 Lastly, it was submitted that in view of the Union of India’s response that prior approval under Section 86(3) is not necessary for the enforcement of an arbitral award, no such concurrence of Central government is required. It was also asserted by the Petitioners relying on *Indian Metals & Ferro Alloys Ltd., Cuttack*¹⁰ that when construing a statute or a provision of law, the theory of *contemporanea expositio* demands that courts give great weight to the meaning given to it by them, whose task it is to construe, execute, and apply it.

4. JUDGMENT:

- 4.1 At the outset, the High Court whilst placing reliance on the case of *Nawab Usmanl*¹¹, *R. McDill & Co. Pvt. Ltd.*¹², and *M/s. Uttam Singh Duggal*¹³ deduced that Central Government’s approval is not required to enforce an arbitral decision against a foreign state under Section 86(3) of the Code. Agreeing with the Union of India’s stance, the same was categorically upheld by the High Court.
- 4.2 The High Court reasoned that an arbitral award arising out of a commercial transaction cannot be enforced if a foreign state claims sovereign immunity. It was observed that since a sovereign state can prescribe the right and liabilities of foreign states to sue and be sued in Municipal Courts, when such consent is indeed granted under Section 86 of the Code, it would not then be open to a foreign state to rely on the doctrine of immunity under international law in divergence of positive municipal law.
- 4.3 The High Court placed reliance on the case of *Paramjeet Singh*¹⁴ & *U.P. State Bridge Corporation*¹⁵ to observe that Section 36 of the Act treats an arbitral award as a “decree of a Court” for the limited purpose of enforcing an award under the Code, and it cannot be read in a way that undermines the 1996 Act’s underlying rationale viz. the prompt, binding, and legally enforceable resolution of disputes between the parties.
- 4.4 The High Court opined that the protection provided by Section 86 of the CPC is restricted in scope, and it would not apply to situations of implied waiver. Whilst placing reliance on *Ethiopian Airlines*¹⁶ the High Court observed that a commercial contract between a party and a foreign state is an implied waiver by the foreign state that it will not be able to raise a defence to an enforcement action based on the concept of sovereign immunity. This is also in conformity with the principle of restrictive immunity in vogue under international law.
- 4.5 The High Court concluded that when a foreign state chooses to function as a commercial entity, it is subject to the norms of the commercial legal environment and is not authorised to claim immunity that it would otherwise have when operating in its sovereign role. The High Court determined that since arbitration is a consensual and binding mechanism for resolving disputes, a foreign state cannot claim that its consent must be sought again at the stage of enforcing an arbitral award against it, while ignoring the fact that the arbitral award is the culmination of the arbitration process to which the Foreign State has admittedly consented.

¹⁰ *Indian Metals & Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneswar*, 1991 Supp (1) SCC 125.

¹¹ *Supra* note 2.

¹² *Supra* note 3.

¹³ *Supra* note 4.

¹⁴ *Paramjeet Singh Patheja v. ICDS Ltd.*, (2006) 13 SCC 322.

¹⁵ *Supra* note 5.

¹⁶ *Supra* note 6.

5. CONCLUSION:

- 5.1 The High Court ruled that both the petitions for enforcement of arbitral awards are maintainable and directed the Respondents to deposit the award amounts with the Registrar General of the High Court within four weeks. If the Respondents do not deposit the funds within four weeks, the Petitioners will have the right to pursue attachment of the Respondent's assets.

6. PSL OPINION:

- 6.1 The judgment carries the flavour of the day adding yet another hallmark in Indian judiciary's pro-arbitration and pro-enforcement approach in the recent past. It is a landmark development in assimilating Indian jurisprudence in consonance with globally prevalent norms pertaining to foreign states attempting to claim sovereign immunity wearing a commercial hat. The observations of the High Court concerning the defence of state immunity showcase the wide ambit of powers held by the courts in India in safeguarding sovereign interests and commercial interests with equal force and also in terms of aligning with the international jurisprudence on the subject.