



Third-Party Funders Are Not Liable to Pay Adverse Cost Awards

According to a recent ruling by the Delhi High Court Division Bench, it was held that those who are not parties to the arbitration procedures or the arbitral awards should not be held responsible for paying adverse awards.

The verdict in Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. & Others, delivered on May 29, 2023, provides relief and welcome assurance to Indian funders and funded parties. In addition to categorically admitting the legitimacy of third-party funding ('**TPF**') in arbitrations, the Court asked the government to create regulations governing the disclosure and transparency of TPF.

Factual Background

In the current case, Tomorrow Sales Agency Private Limited ("**TSA**"), a non-banking financial institution, was approached by the promoters of SBS Transpole Logistics Pvt. Ltd. ("**Transpole**") to provide funding to them through a Bespoke Funding Agreement ("**BFA**") so they could pursue their Singapore International Arbitration Centre ("**SIAC**") lawsuit against SBS Holdings Inc. ("**SBS**"). However, neither the arbitration nor the arbitration agreement involved TSA in any way. An arbitral award was issued because the dispute being settled in SBS's favour. To secure the award, SBS claimed that TSA was required to pay it.

Judgment of the Single Judge

The case revolves around the question of whether the Funder can escape liability for the costs awarded in the arbitral proceedings, given its substantial involvement and financial interest. SBS, alleged that the Promoters, who were also directors of firms that were struck-off or liquidated, together with Transpole, were unable to pay the ordered costs. SBS further argued that the Funder had significantly influenced the arbitration procedures and stood to gain from a favourable outcome. According to SBS, the Funder has joined the case as a "real party." The Claimants allegedly lacked the resources to pay the Arbitral Award, they added that the Funder, had significant control over the arbitral procedures in addition to funding them.

The Single Judge found that, given its funding and possible benefits, SBS had prima facie shown that the Funder had a stake in the arbitration's outcome. The Judge emphasised that a party supporting litigation for financial gain could not absolve itself of responsibility if the outcome did not meet its expectations.

The BFA was terminated because of the claimants' failure to prevail, but this had no effect on SBS's rights because it was still in effect when the Arbitral Award, which included recoverable costs, was delivered. Therefore, the Single Judge made the contested order requiring the Claimants and TSA to disclose their fixed assets, bank accounts, and credit balances and preventing them from pledging unencumbered immovable property for the awarded sum in favour of SBS.

Considering pertinent precedents such as *Arkin v. Borchard Lines Ltd. and Excalibur Ventures LLC*[1] v. *Texas Keystone Inc.*[2], wherein the need to strike a balance between ensuring access to justice through funding arrangements and holding the Funder accountable when a meritless claim failed was acknowledged.

The Funder appealed the decision under Section 37 of the Arbitration Act, contesting the order and requesting a review of the verdict.

Decision of the Court

The decision of the Division Bench had set aside the Single Judge's ruling in an appeal brought by the Funder in accordance with Section 37 of the Arbitration and Conciliation Act, 1996. The grounds on which the ruling has been set aside are as follows:

- The Division Bench stated that non-signatories may make use of an arbitration agreement if they are true beneficiaries through assignment. It was made clear, nonetheless, that while a non-signatory could be added to the arbitration process, only parties to the process could have a judgment enforced against them. Due to the TSA's non-participation in the arbitration processes in this instance, no enforcement action could be brought against it.
- The Division Bench stated that TSA did not meet the requirements for joinder in accordance with Rules 7.1 and 7.8 of the SIAC Rules and so could not be added as an extra party. These requirements included gaining the approval of all parties or being presumptively bound by the arbitration agreement. Enforcement action was not viable against the Funder because it was neither a party nor did it meet the joinder conditions.
- The Division Bench cited a SIAC Practise Note that permitted taking third-party funding arrangements into account when allocating costs. It made it clear, nonetheless, that fees could not be imposed on the third-party funder directly. This component made it less likely that the Funder would be held accountable for the costs that were awarded.
- The Division Bench determined that the rulings in *Arkin v. Borchard Lines Ltd.*[3] and *Excalibur Ventures LLC v. Texas Keystone Inc.*[4]. were irrelevant to the current dispute. It claimed that these rulings were supported by English statutes that gave courts the authority to decide who was responsible for paying fees. Except in some instances involving security for costs, such discretion was not allowed by Indian law.

[1] [2005] EWCA Civ 655

[2] [2016] EWCA Civ 1144

[3] [2005] EWCA Civ 655

[4] [2016] EWCA Civ 1144