Invoking Of Sovereign Immunity By Foreign State In Execution Of An Arbitration Award – A Reviewal

written by Rajdev Singh | July 10, 2021

In a landmark judgement, the Hon'ble High Court of Delhi has held that a foreign state cannot invoke a plea of sovereign immunity against the enforcement of arbitral awards originating from commercial transactions. The Single-Judge Bench of Hon'ble Mr Justice J. R. Midha had clubbed both the petitions[1] since they involved similar factual matrixes and adjudication of common questions of law. The Petitioners had sought for the enforcement of arbitral awards against foreign states, i.e., Islamic Republic of Afghanistan and Ministry of Education, Federal Democratic Republic of Ethiopia, respectively.

The Hon'ble Court, in its wisdom, framed two important questions of law for adjudication of the petitions:

1. Whether the prior consent of Central Government is necessary under Section 86(3) of the Code of Civil Procedure to enforce an arbitral award against a Foreign State?
2. Whether a Foreign State can claim Sovereign Immunity against the enforcement of an arbitral award arising out of a commercial transaction?

This article discusses the rationale given by the Court while dealing with the aforesaid issues in light of various decisions of the Apex Court and several High Courts.

Necessity Of Prior Consent Of The Central Government For Enforcement Of An Arbitral Award

The petitioners had argued that there was no requirement to obtain the prior consent of the Central Government under Section 86(3)[2] of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") for the execution of an arbitral award against a foreign state. Further, it was argued that the requirement of prior consent for a final and binding arbitral award cannot be brought into Arbitration and Conciliation Act and doing so would defeat the very purpose of the legislation as the fundamental reason for enacting the Arbitration and Conciliation Act was to make the procedural aspect of litigation less cumbersome for the litigants with certain exceptions. Moreover, the creation of legal fiction under Section 36 of the Arbitration and Conciliation Act[3] was carried out for the enforcement of an arbitral award as a 'Decree' by giving it legitimacy and validity. However, the legal fiction was not intended to classify it as a 'decree' under the CPC.

The petitioners urged that if the provision of Section 86(3) is applied strictly, it may lead to violation of the three fundamental principles of the Arbitration and Conciliation Act: speedy trial by an unbiased tribunal; complete autonomy of the parties and minimum court intervention as was held by the Hon'ble Apex Court in Satyawati vs. Rajinder Singh[4]. The petitioner placed reliance on a catena of judgments[5] of the Hon'ble Supreme Court including the landmark decision of Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Ltd.[6] wherein the Hon'ble Apex Court distinguished between a domestic arbitration award and foreign arbitration award in the context of both types of arbitrations taking place in India.

Applicability Of Plea Of Sovereign Immunity Against Execution Of Arbitral Award

The petitioners also urged that a foreign state could not invoke the defence of "Sovereign Immunity" against the enforcement of an arbitral award emanating from a commercial transaction. It is apparent from the conduct of entering into an arbitration agreement amounts to "Waiver of Sovereign Immunity" by the parties. It was argued that the very foundation of international commercial arbitration involves the promotion of smooth commercial transactions bypassing any uncertainties associated with expensive and time-consuming litigation.

The petitioners placed heavy reliance on numerous judgments[7] to showcase that the act of voluntary entry into a commercial contract containing an arbitration agreement translates to the waiver of "Sovereign Immunity" and the same could not be used to defeat legitimate claims of the other party. Furthermore, the petitioner also referred to India as being a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 (hereinafter referred to as the "Convention"). Article 10 of the Convention prohibits a Foreign State from resorting to Sovereign Immunity in the case of disputes arising out of commercial transactions. More particularly, Article 19 of the Convention expressly restricts a Foreign State from invoking the defence of sovereign immunity against post-judgment measures of constraint, such as attachment, arrest, or execution, against a property of the State in cases arising inter-alia out of international commercial arbitration.

However, the Convention is yet to come into effect but India's assent to it signifies the intention of the Government to restrict the doctrine of Sovereign Immunity. One of the most pertinent developments took place when the Union of India, in their response, placed on record an e-mail dated May 22nd 2019 from the Under Secretary (E&SA), East & Southern Africa Division, Ministry of External Affairs according to which prior consent of the Central Government is not necessary for the enforcement of an arbitral award under Section 86(3) of the Code of Civil Procedure.

Therefore, it can be safely concluded that when a Foreign State enters into an arbitration agreement with an Indian entity, there is an implicit waiver of Sovereign Immunity, otherwise available to such Foreign State, against the enforcement of an arbitral award.

Conclusion

The Hon'ble Court has thus held that prior consent of the Central Government under Section 86(3) of the Code of Civil Procedure is not required for enforcement of the two arbitral awards in question against the respondents. Moreover, a Foreign State cannot seek Sovereign Immunity for delaying the

execution of an arbitral award rendered against it. The Court observed that once a Foreign State opts to wear the hat of a commercial entity, it would be bound by the rules of the commercial legal ecosystem and cannot be permitted to seek any immunity, which is otherwise available to it only when it is acting in its sovereign capacity. International commercial arbitration – being a preferred choice of dispute resolution due to its flexible yet stable nature in global cross-border transactions – cannot be put to the risk of collapsing altogether by rendering special treatment to the Foreign States.

- [1] *KLA Const. Technologies Pvt. Ltd. vs. The Embassy of Islamic Republic of Afghanistan* OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019 and *Matrix Global Pvt. Ltd. vs. Ministry of Education, Federal Democratic Republic of Ethiopia* O.M.P. (EFA) (COMM) 11/2016 & E.A. 666/2019
- [2] *The provision reads as under:* Section 86: Suits against foreign Rulers, Ambassadors and Envoys
  (3) 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 any foreign State
- [3] Section 36. Enforcement: Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.
- [4] (2013) 9 SCC 491
- [5] *Please see: Nawab Usman Ali Khan vs. Sagarmal*, (1965) 3 SCR 201; *R. McDill & Co. Pvt. Ltd. vs. Gouri Shankar Sarda*, (1991) 2 SCC 548 and *M/s. Uttam Singh Duggal & Co. Pvt. Ltd. vs. the United States of America, Agency of International Development*, ILR (1982) 2 Del. 273.
- [6] (2012) 9 SCC 552
- [7] *Ethiopian Airlines v. Ganesh Narain Saboo*, (2011) 8 SCC 539; *Rahimtoola v. Nizam of Hyderabad,* (1957) 3 WLR 884; *Trendtex Trading Corporation v. Central Bank of Nigeria,* (1977)2 WLR 356 and *Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania*, 507 F. Supp. 311, 1981 A.M.C. 2666.

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