

FACTS OF OMP (EFA) (COMM) 11/2016

- Petitioner 2 entered into a supply –distribution Contract of books to Respondent 2 at various places in Ethiopia. Petitioner 2 shipped the complete order in 86 shipments and the books were distributed in Ethiopia by the Petitioner 2's agent for which invoices were raised and Respondent 2 did not pay the entire amount. On 24 April 2014, Respondent 2 cancelled the contract by letter and on 4 December 2014, Petitioner 2 initiated the arbitration proceedings to recover the balance amount against the respondent. A Sole Arbitrator (**Arbitrator 2**) was appointed under UNCITRAL Arbitration Rules. Respondent 2 chose not to participate in the arbitration proceedings. The arbitration proceedings thus continued ex-parte. On 25 October 2015, Arbitrator 2 passed an ex-parte Award (**Award 2**). Petitioner 2 sought to enforce Award 2 which was not challenged by Respondent 2. Respondent 2 sought for a copy of Award 2 from Petitioner 2. The said copy was furnished by Petitioner 2 and accepted by Respondent 2.

NO REQUIREMENT TO SEEK PRIOR CONSENT FROM CG UNDER SECTION 86 (3) OF THE CODE

- After the present petitions for enforcement were filed before the Court, the Court directed the CG, whether prior consent of CG was necessary under 86 (3) of the Code. The CG in its response placed on record, an email from the Under Secretary, East & Southern Africa Division, Ministry of External Affairs which stated that prior consent of the CG is not necessary for enforcement of an arbitral award under Section 86(3) of the Code.

ANALYSING THE ISSUES RAISED AND DEALT BY THE COURT

The Court has analysed two vital questions raised before it:

1. If prior consent of CG is necessary under section 86(3) of the Code to enforce an arbitral award against a Foreign State

The Court held that prior consent of CG is not necessary under Section 86(3) of the Code to enforce an arbitral award against a Foreign State. In support of the finding, the Court has reasoned it out with important precedents.

Placing reliance on the landmark judgment *Bharat Aluminium Company*², the Court sought to explain the enforceability of an arbitral award passed in an international commercial arbitration held within India. International and domestic awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996. Therefore, Section 2 (7) of the Arbitration Act, 1996 distinguishes domestic award covered in Part – I from the foreign award covered under Part II of the aforesaid Act, but does not distinguish the “domestic award” from an “international award” rendered in India.

The Court placed reliance on *Paramjeet Singh Patheja*³ where the SC drew a distinction between the terms, ‘award’ and ‘decree’. To further strengthen the distinction between the terms, the Court placed reliance on *Nawab Usman Ali Khan*⁴ where it was held that prior consent of the CG under Section 86 (1) of the Code is not required for enforcing award under section 17 of the Arbitration Act, 1940. The Court cited *R. McDill & Co. Pvt. Ltd*⁵ where a very interesting analysis of ‘award’ and ‘decree’ demonstrated 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...”⁶

Touching upon the main objective of the Arbitration Act, it is meant to provide speedy justice to aggrieved parties. . To support the same, it placed reliance on *Satyawati*⁷, where it showed a sorry state of the proceedings that go

² *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd.* (2012) 9 SCC 552,

³ *Paramjeet Singh Patheja v. ICDS Ltd.*, (2006) 13 SCC 322

⁴ “42. The words “as if” demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central.”

⁵ *Nawab Usman Ali Khan v. Sagarmal*, (1965) 3 SCR 201

⁶ “8. Now, a proceeding under Section 14 read with Section 17 of the Indian Arbitration Act, 1940 for the passing of a judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint, and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under Section 14(2) cannot be regarded as “sued in any court otherwise competent to try the suit”, within the meaning of Section 86(1) read with Section 87-B of the Code of Civil Procedure.... It follows that the court was competent to entertain the proceedings under Section 14 of the Indian Arbitration Act, 1940 and to pass a decree against the appellant in those proceedings, though no consent to the institution of those proceedings had been given by the Central Government.”

⁷ *R. McDill & Co. Pvt. Ltd. v. Gouri Shankar Sarda*, (1991) 2 SCC 548

⁸ Para 10 of *Ibid.*

⁹ *Satyawati v. Rajinder Singh*, (2013) 9 SCC 491

on for extended periods. It called for speedy redressal so that the decree-holder can enjoy his fruits of success from the execution decree. It placed emphasis on “*fair, speedy and inexpensive trial by an Arbitral Tribunal*” as laid down in *UP State Bridge Corporation Ltd.*⁸

The Court, throwing light on the term “*decree*” under Section 36 (1) of the Arbitration Act, held that award can be treated as a decree only upto the extent where it does not defeat the essence of the Arbitration Act – speedy, binding and legally enforceable.

2. **A Foreign State can claim sovereign immunity against enforcement of arbitral award arising out of a commercial transaction?**

The Court held that Foreign State cannot claim a Sovereign Immunity against enforcement of an arbitral award arising out of a commercial transaction. In passing this finding, the Court placed reliance on precedents.

The Court critically dissected the term immunity as is divided into two types: “*absolute immunity*” and “*restrictive immunity*”. Stating *Trendtex Trading Corporation*⁹, it was held that “*absolute immunity*” is exercised when traditional functions such as to maintain law and order and other affairs of the State have to be exercised while “*restrictive immunity*” is exercised when there exists commercial transactions and activities. Since, the transaction is commercial in nature, it does not enjoy the immunity.

The Court relied upon *Uttam Singh Duggal & Co. Pvt. Ltd.*¹⁰, where a differentiation was drawn between a private and a sovereign act. Commercial transactions constitute a part of private transactions, hence, do not enjoy the immunity. As held in *Ethiopian Airlines*¹¹ Section 86 of the Code in a mindful manner as it creates another exception to a list of immunities as recognised in International Law. It further reiterated that commercial transactions do not enjoy the immunity under International Laws.

To sum up, the Court stated that, Section 86 of the Code has a constricted usage. When an agreement is entered into between a party and a Foreign State, there is an implied waiver of “*sovereign immunity*”. Such agreements are bound by the laws of commercial system.

CONCLUSION

- Through the present judgment, the Court, has emphasised on the meaning on the of the words, ‘award’ and ‘decree’ and the interplay between the said terms. By analysing the present set of facts and juxtaposing them with past precedents, the Court has ruled that the present situation was one where the Arbitral Award had to be treated as a decree. The Court has thus, strived to strike a balance between the Code and the Arbitration Act. The Court also explained with the help of past precedents, that whenever an agreement is in the nature of a commercial transaction, sovereign immunity cannot be exercised even if either parties were a sovereign. This judgment will most certainly help parties in understanding the situations where a sovereign can exercise its immunity and that the same will not be available when the sovereign acts in its commercial capacity. The judgment to a large extent also underscores the limited intervention of courts at the enforcement stage of an arbitral award.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

Abhileen Chaturvedi, Associate Partner – Email – abhileenchaturvedi@elp-in.com; Ria Dalwani, Senior Associate – Email – riadalwani@elp-in.com; Sharmin Kapadia, Paralegal – Email – sharminkapadia@elp-in.com

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⁸ *Union of India v. U.P. State Bridge Corporation Ltd.*, (2015) 2 SCC 52

⁹ *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 2 WLR 356

¹⁰ *Uttam Singh Duggal & Co. Pvt. Ltd. v. United States of America, Agency of International Development*, ILR (1982) 2 Del 273

¹¹ *Ethiopian Airlines v. Ganesh Narain Saboo*, (2011) 8 SCC 539

“77. In accordance with the interpretation set forth above, the Bombay High Court has noted that Section 86 CPC is of only limited applicability and can be overcome in cases of even implied waiver. For example, in *German Democratic Republic v. Dynamic Industrial Undertaking Ltd.* [AIR 1972 Bom 27], the Bombay High Court found 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.”

“79. *Ethiopian Airlines* is not entitled to sovereign immunity with respect to a commercial transaction is also consonant with the holdings of other countries’ courts and with the growing International Law principle of restrictive immunity...”