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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 18th June, 2021**

\+ OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019

KLA CONST TECHNOLOGIES PVT. LTD..... Petitioner

Through: Dr. Amit George, Mr. K.K. Shukla, Mr. Kartickay Mathur, Mr.Amol Acharya, Mr. Piyo Jaimon and Mr. Rayadurgam Bharat, Advocates

versus

THE EMBASSY OF ISLAMIC REPUBLIC OF AFGHANISTAN ..... Respondent

Through: NEMO

\+ O.M.P. (EFA) (COMM) 11/2016 & E.A. 666/2019

MATRIX GLOBAL PVT. LTD. ..... Petitioner

Through: Mr. Devashish Bharuka, Ms. Jaya Bharuka, Mr. Ravi Bharuka, Ms. Sarvshree, Mr. Justine George, Ms. Srishti Agarwal, Mr. Ankit Agarwal and Ms. Taniya Bansal, Advocates

versus

MINISTRY OF EDUCATION, FEDERAL

DEMOCRATIC REPUBLIC OF ETHIOPIA..... Respondent

Through: NEMO

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The petitioners are seeking enforcement of arbitral awards against Foreign States.

2. The petitioner in OMP (ENF) (COMM) 82/2019 is seeking enforcement of an arbitral award dated 26th November, 2018 against the Embassy of Islamic Republic of Afghanistan whereas the petitioner in OMP (EFA) (COMM) 11/2016 is seeking enforcement of an /arbitral award dated 25th October, 2015 against Ministry of Education, Federal Democratic Republic of Ethiopia. The two important questions of law have arisen for consideration before this Court in these petitions:

I. ***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 ?***

II. ***Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction ?***

Brief facts of OMP (ENF) (COMM) 82/2019

3. On 11th February, 2008, the respondent awarded a contract to the petitioner for rehabilitation of Afghanistan Embassy at New

Delhi for consideration of Rs.3,02,17,066.83.

4. Disputes arose between the parties during the course of execution of work whereupon the petitioner invoked the arbitration clause contained in the contract between parties on 10th February, 2012.

5. The petitioner filed a petition under Section 11 of the Arbitration and Conciliation Act before the Supreme Court in which the Supreme Court appointed a sole Arbitrator on 05th January, 2015 to adjudicate the disputes between the parties.

6. The respondent participated in the arbitration proceedings till 24th July, 2017. However, there was no appearance on 13th November, 2017 whereupon the learned arbitrator proceeded *ex-parte* against the respondent. The learned Arbitrator passed an *ex-parte* award on 26th November, 2018 in which the learned Arbitrator partially allowed the claims of the petitioner.

7. The respondent has not challenged the arbitral award which has attained finality. The respondent has not made any payment to the petitioner in terms of the arbitral award.

8. The petitioner is seeking enforcement of the arbitral award dated 26th November, 2018. Notice of this petition was issued to the respondent on 13th May, 2019 in pursuance to which the respondent entered appearance through counsel on 02nd September, 2019 and sought time to take instructions but stopped appearing thereafter.

9. Vide order dated 19th November, 2019, this Court directed the Union of India to confirm whether the prior consent of the Central Government is necessary under Section 86(3) of the Code of Civil

Procedure to enforce this arbitral award.

Brief facts of OMP (EFA) (COMM) 11/2016

10. On 25th June, 2012, the petitioner entered into a contract with the respondent for supply and distribution of books to the Respondent at various places in Ethiopia. The total value of the contract was fixed at USD 25,52,754.60.

11. The petitioner claims to have shipped the goods to the respondent from 31st December, 2012 and completed the last shipment on 24th December, 2013. The petitioner shipped the complete order in 86 shipments and the books were distributed in Ethiopia by the petitioner's agent at the designated sites as facilitated by the Government of Ethiopia. The petitioner raised 86 invoices totaling USD 25,56,442.37 against which the respondent paid USD 20,22,981. The respondent cancelled the contract by letter dated 24th April, 2014.

12. The petitioner initiated the arbitration proceedings to recover the balance amount against the respondent and a sole arbitrator was appointed under UNCITRAL Arbitration Rules on 04th December, 2014.

13. The respondent chose not to participate in the arbitration proceedings and was proceeded *ex-parte* on 25th May, 2015. The learned Arbitrator passed an *ex-parte* award on 25th October, 2015.

14. The respondent has not challenged the arbitral award dated 25th October, 2015 thus, it has attained finality.

15. The petitioner is seeking enforcement of the arbitral award dated 25th October, 2015. Notice of this petition was issued to the

respondent on 24th October, 2016 but the respondent did not appear despite service.

16. On 10th May, 2019, the petitioner received an email from the respondent asking for copy of the arbitral award whereupon the petitioner visited the Embassy of Ethiopia at New Delhi on 15th May, 2019. The petitioner furnished the copy of the arbitral award to the respondent on 18th May, 2019 which was acknowledged by the respondent on 30th May, 2019.

17. Vide order dated 19th November, 2019, this Court directed the Union of India to examine whether the prior consent of the Central Government is necessary under Section 86(3) of the Code of Civil Procedure to enforce the arbitral award.

18. On 15th March, 2021 the Central Government placed on record e-mail dated 22nd May, 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 enforcement of an arbitral award under Section 86(3) of the Code of Civil Procedure. Relevant portion of the e-mail of the Ministry of External Affairs is reproduced hereunder:

> *"This has reference to your mail requesting consent to Matrix Global Pvt Ltd. Under Section 86 (3), Code of Civil Procedure, 1908 for execution of the arbitral award/decree against the Ethiopian Government.*
> *In this regard, I have been directed to convey the views of the Legal and Treaties Division of this Ministry that "the execution proceedings in respect of an arbitral award cannot be regarded as a suit for the purpose of Section 86 of the CPC. Thus, we understand that, for*

execution of an arbitral award, MEA's concurrence under Section 86 (3) CPC may not be required."

Submissions of the petitioners

19. There is no requirement under law for obtaining the consent of the Central Government under Section 86(3) of the Code of Civil Procedure for implementation of an arbitral award against a Foreign State.

20. An arbitral award passed in an international commercial arbitration held in India, as is the present case, would be construed as a '*Domestic Award*' under the Arbitration and Conciliation Act and would be enforceable under Section 36 of the Arbitration and Conciliation Act. Reliance is placed on ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd.***, (2012) 9 SCC 552.

21. The requirement of prior-consent for execution of an otherwise final and binding arbitral award against the Judgment Debtor, evidently cannot be sought to be imported into a reformed and modernized legislation such as the Arbitration and Conciliation Act. The normative core of the enactment of the Arbitration and Conciliation Act is the exclusion of the strict rigors of the Code of Civil Procedure, except for certain limited instances. Reliance is placed on ***Nawab Usman Ali Khan v. Sagarmal***, (1965) 3 SCR 201; ***R. McDill & Co. Pvt. Ltd. v. Gouri Shankar Sarda***, (1991) 2 SCC 548 and ***M/s. Uttam Singh Duggal & Co. Pvt. Ltd. v. United States of America, Agency of International Development***, ILR (1982) 2 Del. 273.

22. The legal fiction created under Section 36 of the Arbitration and Conciliation Act is for the limited purpose of enforcement of an arbitral award as a *Decree* of the Court by providing it an associated legitimacy and validity. The fiction is not intended to make it a *decree* under the Code of Civil Procedure. This legal fiction cannot be extended beyond its legitimate field. Reliance is placed on ***Paramjeet Singh Patheja v. ICDS Ltd***., (2006) 13 SCC 322.

23. The applicability of the provisions of Section 86(3) of the Code of Civil Procedure in relation to an arbitral award would violate the three main principles of the Arbitration and Conciliation Act enunciated in ***Union of India v. U.P. State Bridge Corporation Ltd.***, **(**2015) 2 SCC 52 namely speedy, inexpensive and fair trial by an impartial tribunal; party autonomy; and minimum Court intervention. Reliance is placed on ***Satyawati v. Rajinder Singh***, (2013) 9 SCC 491, in which the Supreme Court had observed that "*difficulties of a litigant in India begin when he has obtained a decree"*.

24. A Foreign State does not have *Sovereign Immunity* against an arbitral award arising out of a commercial transaction. Further entering into an arbitration agreement constitutes '*waiver of Sovereign Immunity'.*

25. The agreement by the respondent to arbitrate the disputes would operate as a waiver of the said requirement. When a Foreign State enters into an arbitration agreement with an Indian entity, there is an implicit waiver of the *Sovereign Immunity*, otherwise available to such Foreign State, against the enforcement of an arbitral award.

In fact, the very underlying rationale of international commercial arbitration is that of facilitating international trade and investment by providing a stable, predictable, and effective legal framework within which commercial activities may be conducted to promote the smooth flow of international transactions, and by removing the uncertainties associated with time-consuming and expensive litigation. Otherwise, the very edifice of the international arbitration ecosystem would collapse.

26. The respondents who voluntarily entered into a commercial contract containing an arbitration agreement with the petitioners herein, are not entitled to claim *Sovereign Immunity* to defeat the legitimate claims of the petitioners. Reliance is placed on ***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.

27. India is 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 defense 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 an international commercial arbitration. Thus, the intention is clear not to extent to not extend *Sovereign Immunity* in cases of international commercial arbitration. Though the said Convention is yet to come into effect, India's assent thereto is significant and is an indicator of the espousal of a doctrine of restricted *Sovereign Immunity*. Reliance is placed on ***Syrian Arab Republic v. A.K. Jajodia***, ILR (2004) 2 Delhi 704.

28. Union of India has filed their response in OMP (EFA) (COMM) 11/2016 in which it is stated that prior consent under Section 86 (3) is not required for execution of an arbitral award.

29. The doctrine of *contemporanea expositio* requires that Courts, while construing a statute or a provision of law, will give much weight to the interpretation put upon it, by those whose duty it has been to construe, execute and apply it. In ***Indian Metals & Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneshwar,*** 1991 Supp (1) SCC 125, the Supreme Court held:

> "*15. It is contended on behalf of the department that this earlier view of the department may be wrong and that it is open to the department to contend now that the poles really do not fall under Item 26-AA. In any event, it was submitted since the poles were exempted from duty under one notification or other, it was not very material prior to March 1, 1975 to specifically clarify whether the poles would fall under Item 26-AA or not. This argument proceeds on a misapprehension. The revenue is not being precluded from putting forward the present contention on grounds of estoppel. The practice of the department in assessing the poles to duty (except in cases where they were exempt as the condition in the exemption notifications were fulfilled) and the issue of notifications*

from time to time (the first of which was almost contemporaneous with the insertion of Item 26-AA) are being relied upon on the doctrine of contemporaneo expositio to remove any possible ambiguity in the understanding of the language of the relevant statutory instrument: see K.P. Varghese v. TTO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : (1982) 1 SCR 629] , State of Tamil Nadu v. Mahi Traders [(1989) 1 SCC 724 : 1989 SCC (Tax) 190 : (1989) 1 SCR 445] , CCE v. Andhra Sugar Ltd. [1989 Supp (1) SCC 144 : 1989 SCC (Tax) 162] and Collector of Central Excise v. Parle Exports P. Ltd. [(1989) 1 SCC 345 : 1989 SCC (Tax) 84] Applying the principle of these decisions, that a contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument, we think the assessee's contention that its products fall within the purview of Item 26-AA should be upheld."

(Emphasis Supplied)

30. Further, following two principles of interpretation in *Bennion on Statutory Interpretation*, Lexis Nexis, 2005, 5th Ed., Pg. 702, have been relied upon:

> "*Section 231. The basic rule regarding post-enacting history.*
> *In the period immediately following its enactment, the history of how and in act meant is understood by the profession forms part of the contemporanea expositio, and maybe held to throw light on the legislative intention. The later history may, under the doctrine that an ongoing Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.*
> *Section 232. Use of official statements on meaning of Act.*

Official statements by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the legal meaning of its provisions."

(Emphasis Supplied)

31. The *United Nations Convention on Jurisdictional Immunities of States and their Property, 2004*, as reflective of the modern international trends on this issue, contains provisions whereby the shield of sovereign immunity has been whittled down in the case of purely commercial transactions, as also an arbitration agreement has been construed as an indicator of the waiver of sovereign immunity against post-judgment measures of constraint. It is relevant to note that India became a signatory to the said Convention on 12th January, 2007, though it has not proceeded to ratify this Convention; and the Convention itself is not in force yet. The relevant Articles of the Convention are:

"ARTICLE 10
COMMERCIAL TRANSACTIONS
1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.
2. Paragraph 1 does not apply:
(a) in the case of a commercial transaction between States; or
(b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
(a) suing or being sued; and
(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,
is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

xxx xxx xxx

ARTICLE 17
EFFECT OF AN ARBITRATION AGREEMENT

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
(a) the validity, interpretation or application of the arbitration agreement;
(b) the arbitration procedure; or
(c) the confirmation or the setting aside of the award,
unless the arbitration agreement otherwise provides.

xxx xxx xxx

ARTICLE 19
STATE IMMUNITY FROM POST-JUDGMENT MEASURES OF CONSTRAINT

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) the State has expressly consented to the taking of such measures as indicated:
(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

(Emphasis Supplied)

32. ***Relevant Provisions***

Arbitration and Conciliation Act, 1996

Section 35 - Finality of arbitral awards.
Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

Section 36 - Enforcement.
(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

Code of Civil Procedure

Section 86 - Suits against foreign Rulers, Ambassadors and Envoys.

> *(1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:*
>
> *Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a foreign State from whom he holds or claims to hold the property.*
>
> *xxx xxx xxx*
>
> *(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.*
>
> *(Emphasis Supplied)*

Relevant judgments

33. In ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd.*** (2012) 9 SCC 552, the Supreme Court *inter-alia* explained the enforceability of an arbitral award passed in an international commercial arbitration held within India. The relevant portion of the judgment is reproduced hereunder:

> *"88. ...In our opinion, the aforesaid provision does not, in any manner, relax the territorial principal adopted by Arbitration Act, 1996. It certainly does not introduce the concept of a delocalized arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way "foreign" but also to "international commercial arbitrations" covered within Section 2(1)(f) held in India. The term "domestic award" can be used in two senses: one to distinguish it from "international award", and the other to distinguish it from a "foreign award". It must also be remembered that "foreign award" may well be a domestic award in the country in which it is*

rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the distinction is necessarily to be made between the terms "domestic awards" and "foreign awards". The scheme of the Arbitration Act, 1996 provides that Part I shall apply to both "international arbitrations" which take place in India as well as "domestic arbitrations" which would normally take place in India. This is clear from a number of provisions contained in the Arbitration Act, 1996 viz. the Preamble of the said Act, proviso and the explanation to Section 1(2), Sections 2(1)(f), 11(9), 11(12), 28(1)(a) and 28(1)(b). All the aforesaid provisions, which incorporate the term "international", deal with pre-award situation. The term "international award" does not occur in Part I at all. Therefore, it would appear that the term "domestic award" means an award made in India whether in a purely domestic context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Arbitration Act, 1996 from the "foreign award" covered under Part II of the aforesaid Act; and not to distinguish the "domestic award" from an "international award" rendered in India. In other words, the provision highlights, if anything, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions."

34. In ***Paramjeet Singh Patheja v. ICDS Ltd***. (2006) 13 SCC 322, the Supreme Court considered the scope and ambit of the legal

fiction under Section 36 of the Arbitration Act which equated an arbitral award to a '*decree'* within the meaning of the CPC for the purpose of enforcement. The specific issue before the Supreme Court was as to whether an arbitral award is a '*decree'* within the meaning of Section 9 of the Presidency Towns Insolvency Act, 1909 so as to enable an insolvency notice to be taken out thereunder. It was submitted before the Court that if an Award rendered under the Arbitration Act is not challenged within the requisite period by means of a petition under Section 34 of the Arbitration Act, then the same can be enforced as a decree under Section 36 of the Arbitration Act. On this basis, it was argued that there is no distinction between an '*award*' and a '*decree'*, and hence, an arbitral award would amount to a decree within the meaning of Section 9 of the Presidency Towns Insolvency Act, 1909. The Supreme Court rejected this submission and observed that in certain contexts, the legal fiction of an arbitral award being the equivalent of a decree would not be applicable. The relevant portion of the judgment is reproduced hereunder:

> "*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.*
> *43. For the foregoing discussion we hold:*
> *xxx xxx xxx*
> *(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and Conciliation Act,*

1996 cannot be construed to be a "decree" for the purpose of Section 9(2) of the Insolvency Act."

(Emphasis Supplied)

35. In ***Nawab Usman Ali Khan v. Sagarmal***, (1965) 3 SCR 201, the Supreme Court categorically held that the prior-consent of the Central Government under Section 86 (1) of the CPC would not apply to an arbitral award enforcement proceeding under Section 17 of the erstwhile Arbitration Act, 1940. The factual background and ratio of the aforesaid judgment has been aptly captured and reiterated by the Supreme Court in the subsequent decision in ***R. McDill & Co. Pvt. Ltd. v. Gouri Shankar Sarda***, (1991) 2 SCC 548 wherein it was inter-alia observed as under:

"9. In Nawab Usmanali Khan v. Sagarmal [(1965) 3 SCR 201 : AIR 1965 SC 1798] on which reliance has been placed by learned counsel for the appellant it was held that a proceeding under Section 14 read with Section 17 of the Act 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 "suit in any court otherwise competent to try the suit" within the meaning of Section 86(1) read with Section 87-B, Civil Procedure Code. In the above case the appellant was the Ruler, of the former Indian State of Jaora. He had money dealing with the respondent. The respondent after obtaining a decree in terms of the award started execution proceedings against the appellant. The Central Government gave a certificate under Section 86(3) read with Section 87-B of the Code of Civil Procedure, 1908 consenting to the execution of the decree against the properties of the appellant. The

executing court passed the prohibitory order under Order XXI Rule 46 of the Code of Civil Procedure in respect of sums payable to the appellant on account of the privy purse. On an objection raised by the appellant by order dated March 15, 1958, the court recalled the decree and cancelled the certificate as prayed for, on the ground that the amount receivable by the appellant on account of his privy purse was not attachable. The respondent preferred appeal before the High Court. The High Court allowed the Appeal No. 33 of 1958. Usmanali Khan (appellant) filed an appeal before this Court. This Court held as under: (SCR pp. 205-06)

> *"Section 86(1) read with Section 87-B confers upon the Rulers of former Indian States substantive rights of immunity from suits. Section 141 makes applicable to other proceedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights. Nor does Section 41(a) of the Indian Arbitration Act, 1940 carry the matter any further. By that section, the provisions of the Code of Civil Procedure, 1908 are made applicable to all proceedings before the court under the Act. Now, by its own language Section 86(1) applies to suits only, and Section 141, Code of Civil Procedure does not attract the provisions of Section 86(1) to proceedings other than suits. Accordingly, by the conjoint application of Section 41(a) of the Indian Arbitration Act and Sections 86(1) and 141 of the Code of Civil Procedure, the provisions of Section 86(1) are not attracted to a proceeding under Section 14 of the Indian Arbitration Act, 1940. 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."

10. The following observations in Hansraj Gupta v. Official Liquidator, Dehra Dun-Mussorrie Electric Tramway Co. Ltd. [LR (1932) 60 IA 13, 19: AIR 1933 PC 63] made by Lord Russell of Killowen were quoted. (IA p. 19)

"The word 'suit' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint."

The following observations made by Shah, J. in Bhagwat Singh v. State of Rajasthan [AIR 1964 SC 444, 445-46: (1964) 1 LLJ 13] were also quoted with approval: (quoted at SCR p. 205)

"The appellant is recognised under Article 366(22) of the Constitution as a Ruler of an Indian State, but Section 86 in terms protects a Ruler from being 'sued' and not against the institution of any other proceeding which is not in the nature of a suit. 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."

The above observation made by Lord Russell of Killowen and Shah, J. go to show that for a suit the civil proceeding is instituted by the presentation of a plaint. In the aforesaid background it was held 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..."

(Emphasis Supplied)

36. In ***Uttam Singh Duggal & Co. Pvt. Ltd. v. United States of***

America, Agency of International Development, ILR (1982) 2 Del. 273, the maintainability of a petition filed under Section 20 of the Arbitration Act, 1940 was brought into question. It was contended that the Respondent being a Foreign State, was immune from the jurisdiction of the Indian Courts. This Court rejected the contention. Relevant portion of the judgment is as under:

> "*12. Mr. Mridul contended that assuming the concept of restrictive sovereignty applies that the commercial transactions are not immune, the transaction in question is not a commercial transaction because there is no buying and selling involved and, therefore, the restrictive theory of immunity cannot be applied. I do not agree in this contention. The US AID had entered into a building contact with the plaintiff M/s. Uttam Singh Duggal and Company. Mr. Mridul may be right in contending that the contract is not a transaction or a trading or commercial character but, in my view the transaction cannot be placed anything above a purely private act. No sovereign or public act is involved in the transaction. It may sometime become difficult to differentiate between a sovereign private and public act; in order to differentiate between a sovereign act and a private act one will have to look into the nature or to the purpose of the transaction. The transaction as already stated was purely a construction contract and it would, in my opinion, would best be termed a private commercial act.*
>
> *13. There also is another reason for not accepting the plea of immunity. The Central Government had by its letter dated 26th March 1981 accorded its consent under section 86 of the Code of Civil Procedure for suing US AID regarding the performance of the contract dated 15th January 1969. Mr. Mridul contended that section 86 is applicable only to a suit and since a petition under section 20 of the Arbitration Act is not a suit section 86 will not be applicable and, therefore, the consent accorded [by] the*

Central Government is of no avail to the petitioner. It appears to be a common case that section 86 only applies to a suit and that a petition under section 20 of the Arbitration Act is not a suit within the meaning of the expression "suit" as used in section 86 of the Code of Civil Procedure. In my opinion, the fact that section 86 is only applicable to a suit and the petition in hand not being a suit is not governed by section 86 will not make any difference. The fact remains that the Central Government has not chosen to uphold the plea of immunity on the facts of this case and this in a way suggests that the Central Government wants to restrict the theory of immunity only to sovereign act and not to a sovereign private act or commercial activity."

(Emphasis Supplied)

37. In ***Union of India v. U.P. State Bridge Corporation Ltd.***, 2015 (2) SCC 52, the Arbitral Tribunal did not proceed for almost four years despite orders of the High Court directing the Tribunal to hold regular sittings and complete the proceedings within three months. The Supreme Court while substituting the Arbitral Tribunal noted three main principles of Arbitration & Conciliation Act namely, (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. Relevant portion of the judgment is reproduced:

"*14. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of UNCITRAL Model Law, came to be enacted in the same year as the Indian law which is known as the English Arbitration Act, 1996 and it became effective from 31-1-1997. It is treated as the most extensive statutory reform of the English arbitration law. Commenting upon the*

structure of this Act, Mustill and Boyd in their Commercial Arbitration, 2001 companion volume to the 2nd Edn., have commented that this Act is founded on four pillars. These pillars are described as:

(a) The first pillar: Three general principles.

(b) The second pillar: The general duty of the Tribunal.

(c) The third pillar: The general duty of the parties.

(d) The fourth pillar: Mandatory and semi-mandatory provisions.

Insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co. [2005 QB 207: (2004) 3 WLR 533: (2004) 4 All ER 746: 2004 EWCA Civ 314] In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: (QB p. 228, para 31)

> *"31. ... Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness."*

Section 1 of the Act sets forth the three main principles of arbitration law viz. (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.

15. In the book O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms. Indu Malhotra), it is rightly observed that the Indian Arbitration Act is also based on the aforesaid four foundational pillars.

16. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure…"

(Emphasis Supplied)

38. In ***Satyawati v. Rajinder Singh,*** (2013) 9 SCC 491, the Supreme Court was concerned with a long-drawn out execution proceeding which had been pending adjudication for a long period of time with the decree-holder being unable to enjoy the fruits of the decree. The Supreme Court commented adversely on the ills that plagued the executory mechanism in India, and called for a '*conceptual change'* and the adoption of practices and interpretations that would provide succor to the successful litigant. The relevant portion of the judgment is reproduced hereunder:

"*14. This Court, again in Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. [(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that: (SCC p. 326)*

"4. ….. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time.

15. Once again in Shub Karan Bubna v. Sita Saran Bubna [(2009) 9 SCC 689: (2009) 3 SCC (Civ) 820] at para 27 this Court observed as under: (SCC p. 699)

"27. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the

relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."

(Emphasis Supplied)

39. In ***Ethiopian Airlines v. Ganesh Narain Saboo,*** (2011) 8 SCC 539, the Ethiopian Airlines pleaded that being an instrumentality of a sovereign State, it could not be proceeded against under the Consumer Protection Act, 1986 without the permission of the Government of India under Section 86(1) of the CPC. The Respondent had booked a consignment of receptive dyes with the Ethiopian Airlines to be delivered at Dar Es. Salaam, Tanzania. According to the Respondent, there was a gross delay in arrival of the consignment at the destination which was attributable to the Ethiopian Airlines. The Respondent accordingly filed a complaint before the concerned State Consumer Dispute Redressal Commission. The Ethiopian Airlines filed a written statement in which a preliminary objection regarding the maintainability of the complaint was raised on the ground of lack of permission having been granted by the Government of India under Section 86 (1) of the

CPC. The State Consumer Dispute Redressal Commission upheld this preliminary objection, and held that the complaint filed by the Respondent was not maintainable in the absence of the requisite permission not having been granted by the Government of India under Section 86(1) of the CPC. Aggrieved by the aforesaid determination, the Respondent preferred an appeal before the National Consumer Disputes Redressal Commission (hereinafter referred to as the "National Commission"). The National Commission categorically observed in the impugned judgment that Section 86 of the CPC was not applicable since the case in dispute is covered under the provisions of the Consumer Protection Act, and overruled the impugned Judgment. The Ethiopian Airlines approached the Supreme Court against the said decision of the National Commission. The Supreme Court clarified that a proceeding under the Consumer Protection Act is a '*Suit'* as defined under the Code of Civil Procedure. It further held that provisions of the Code of Civil Procedure will only apply to a certain extent under the Consumer Protection Act and Section 86 of the Code of Civil Procedure is not applicable to proceedings before a Consumer Fora. More importantly, while upholding the impugned Judgment of the National Commission, the Supreme Court arrived at various pertinent findings in relation to the nature of sovereign immunity enjoyed by entities owned by Foreign States. The relevant findings of the Supreme Court are reproduced hereinbelow:

> *"72. Section 86 of the Code of Civil Procedure is inapplicable to the present case because the older and*

more general statute has been excluded by more recent special statute, namely, Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Ethiopian Airlines is not entitled to sovereign immunity in the suit at issue in the present case. Therefore, any other consent of the Central Government is not required to subject the appellant, Ethiopian Airlines, to a suit in an Indian Court.

73. It is settled principle of statutory interpretation that specific statutes that come later in time trump prior general statutes. Both the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972, which came long after the Code of Civil Procedure, 1908, are more focused and specific statutes and therefore should be held to supersede Section 86 of the Code. This Court in Savita Garg[(2004) 8 SCC 56] has clearly laid down that the principle that in fora created by the Consumer Act, the provisions of the Code of Civil Procedure are applicable only to a limited extent, therefore, the provisions of the Code of Civil Procedure have not been made applicable to the proceedings of the National Consumer Forum.

74. This court in Vishwabharathi House Building Coop. Society and Others [(2003) 2 SCC 412] dealt with the object of the Consumer Protection Act, 1986: to provide expeditious adjudication of consumers' complaints by adopting summary procedure. The Consumer Protection Act, 1986 is a comprehensive and self-contained piece of legislation, and its object is to decide consumers' complaints expeditiously, via summary procedure. The Consumer Protection Act, 1986 also permits authorised agents to appear on behalf of the complainants in order to ensure that they are not burdened with the heavy professional fees of lawyers.

75. Similarly, the Carriage by Air Act, 1972 explicitly provides that its rules apply to carriage performed by the State or by legally constituted public bodies under Chapter 1 Section 2 sub-section (1). Thus, it is clear that according to the Indian Law, Ethiopian Airlines can be subjected to suit under the Carriage Act, 1972. It may be pertinent to

mention that the Carriage by Air Act, 1972 (69 of 1972) is an Act to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of September, 1955 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to exceptions, adaptations and modification) to non-international carriage by air and for matters connected therewith.

76. In effect, by signing on to the Warsaw Convention, Ethiopia had expressly waived its Airlines' right to immunity in cases such as that sub judice. Therefore, the Central Governments of both India and Ethiopia have waived that right by passing the Carriage by Air Act, 1972 and by signing onto the Warsaw Convention.

77. In accordance with the interpretation set forth above, the Bombay High Court has noted that Section 86 is of only limited applicability and can be overcome in cases of even implied waiver. For example, in The German Democratic Republic v. The Dynamic Industrial Undertaking Ltd., [AIR 1972 Bombay 27], the Bombay High Court found that Section 86 does not supplant the relevant doctrine under International Law. Rather, Section 86 "creates another exception" to immunity (emphasis added), in addition to those exceptions recognized under International Law.

78. Likewise, in Kenya Airways v. Jinibai B. Kheshwala, [AIR 1998 Bombay 287], the Bombay High Court found that, while Kenya Airways was state entity prima facie entitled to immunity under Section 86, it had nevertheless waived that immunity by, in its written statements, failing to raise a plea of sovereign immunity under Section 86 of the CPC. Therefore, in that case, the Bombay High Court found that Kenya Airways was not entitled to sovereign immunity and could be subjected to suit in an Indian court.

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. For instance, in England, in Rahimtoola v. H.E.H. The Nizam of Hyderabad [1958 AC 379 : (1957) 3 WLR 884 : (1957) 3 All E.R. 441 (HL)], Lord Denning found that: (AC p. 418)

> *"…there was no reason why a country should grant to the departments or agencies of foreign governments an immunity which the country does not grant its own, provided always that the matter in dispute arises within the jurisdiction of the country's courts and is properly cognizable by them."*

80.Lord Denning also held that: (Rahimtoola case [1958 AC 379 : (1957) 3 WLR 884 : (1957) 3 All E.R. 441 (HL)], AC p. 422)

> *"if the dispute concerns... the commercial transactions of a foreign government... and it arises properly within the territorial jurisdiction of a country's courts, there is no ground for granting immunity,"*

finding implicitly that it would not

> *"…offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country." Rahimtoola case [1958 AC 379 : (1957) 3 WLR 884 : (1957) 3 All E.R. 441 (HL)], AC p. 422)*

81. Likewise, in Trendtex Trading Corporation Ltd. v.Central Bank of Nigeria [1977 QB 529 : (1977) 2 WLR 356 : (1977) 1 All E.R. 881 (CA)], the Court held that the Central Bank of Nigeria was not entitled to plead sovereign immunity because, according to International Law Principle of restrictive immunity, a state-owned entity is not entitled to immunity for acts of a commercial nature, jure gestionis. The Court noted that

> *"…if a government department goes into the market places of the world and buys boots or cement - as a*

commercial transaction - that government department should be subject to all the rules of the market place."

82.The Court also noted an "important practical consideration" stating that foreign sovereign immunity,

> *"...in protecting sovereign bodies from the indignities and disadvantages of that process, operates to deprive other persons of the benefits and advantages of [the judicial] process in relation to rights which they possess and which would otherwise be susceptible to enforcement."*

As the court stated, the principle of restrictive immunity is "manifestly better in accord with practical good sense and with justice."

83. On a careful analysis of the American, English and Indian cases, it is abundantly clear that the appellant Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India.

84. It may be pertinent to mention that the Parliament has recognized this fact while passing the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Section 86 was itself, a modification and restriction of the principle of foreign sovereign immunity and thus, by limiting Section 86's applicability, the Parliament through these Acts, further narrowed a party's ability to successfully plead foreign sovereign immunity.

85. In the modern era, where there is close interconnection between different countries as far as trade, commerce and business are concerned, the principle of sovereign immunity can no longer be absolute in the way that it much earlier was. Countries who participate in trade, commerce and business with different countries ought to be subjected to normal rules of the market. If State-owned entities would be able to operate with impunity, the rule of law would be degraded and international trade, commerce and business will come to a grinding halt.

86. Therefore, we have no hesitation in coming to the conclusion that the appellant cannot claim sovereign immunity. The preliminary objection raised by the appellant before the court is devoid of any merit and must be rejected."

(Emphasis Supplied)

40. In ***Syrian Arab Republic v. A.K. Jajodia,*** ILR (2004) 2 Delhi 704, a suit for possession and recovery of damages for use and occupation of the premises in question was filed which was decreed in favor of the plaintiff/landlord and against the Appellant/Syrian Arab Republic. Amongst the issues framed in the suit, issue No. 4 pertained to "*whether the plaintiff has obtained valid permission under Section 86 of code of Civil Procedure to file the present suit?*". The Court decided Issue no. 4 in favor of the Respondent after finding that the Ministry of External Affairs *vide* letter dated 01st January, 1991 had accorded its consent to sue the Appellant for recovery of possession of suit. This Court while rejecting the appeal of the Appellant, held that in relation to a '*Suit*' to be brought against a Foreign State or in respect of any Ruler of Foreign State, a sovereign state can prescribe the right and liabilities of Foreign States to sue and be sued in its Municipal Courts while detracting from the general doctrine of immunity recognized by International Law. It was also observed therein that no immunity is available to the Chief of the Mission or any other person working in the Mission in matters which are purely in the domain of commercial relationships such as a landlord-tenant relationship. The relevant findings of the Court are reproduced hereinunder:

"*14. The argument regarding the Diplomatic immunity will not come to the aid of the appellant in the present case as was canvassed by Mr. Wadhwani. By no stretch of imagination, it can be said that a representative of Sovereign State who has taken on rent an accommodation from a private individual or a citizen of this country cannot take back his premises so let out either in case of termination of tenancy or in case of bona fide need of such private individual/person. No immunity, much less Diplomatic immunity, is available to the Chief of the Mission or any other person working in the Mission in the matter which are purely in domain of landlord-tenant relationship. In the instant case especially after their categorical representation to the Ministry that they will vacate the premises. Inviolability of the premises, of which reference has been made by Mr. Wadhwani, is in relation to the act of the receiving State. Under the Diplomatic Relations (Vienna Convention) Act, 1972 there is a sanctity of the premises of that State. Inviolability is in relation to search and seizure and arrest and not in relation to such act by a foreign mission or its head in relation to matters pertaining to this kind of dispute where sanction has also been granted to sue by the Central Government. In Mirza Ali Akbar Kashani v. United Arab Republic, (Supra), the Supreme Court laid down as under:*

> *"The effort of the provision of Section 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed that every sovereign State is competent to make its own laws in relation to the right and liabilities of foreign State to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the right and liabilities of foreign States to sue and be sued in its municipal courts. That being so, it would be legitimate to hold that the effect S. 86(1) is*

> *to be modify to a certain extent the doctrine of immunity recognised by international law. The section provides that foreign states can be sued within the municipal courts of India with the consent of Central Government and when such consent is granted as required by S. 86(1), it would not be open to a foreign State to rely on doctrine of immunity under international law, because the municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, S. 86(1) is not merely procedural; it is in the sense a counterpart of Section 84. Whereas S. 84 confers a right on a foreign State to sue, S. 86(1) in substance imposes a liability on foreign State to be sued."*
>
> *15. Therefore, the argument raised by learned Counsel for the appellant that Article 31 and/or other Articles of the Schedule of the Diplomatic Relations (Vienna Convention) Act, 1972 have application in the facts of this case, has no force taking all these aspects into consideration…"*
>
> (Emphasis Supplied)

41. In ***Rahimtoola v. Nizam of Hyderabad,*** (1957) 3 WLR 884, the House of Lords was confronted with an issue with regard to a claim made against the then High Commissioner for Pakistan, in his personal capacity, for certain money that he had received. However, the High Commissioner established that he had received the money in England in his official capacity as the High Commissioner and not in his personal capacity. Though, the law of immunity was applied, Lord Denning, in his judgment, held as under:

> "*……it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute, not on whether "conflicting*

rights have to be decided," but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does not offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of a court, there is no ground for granting immunity."

(Emphasis Supplied)

42. In ***Trendtex Trading Corporation v. Central Bank of Nigeria,*** (1977) 2 WLR 356, the Court of Appeal (UK) was dealing with a case where the Central Bank of Nigeria had issued an irrevocable letter of credit to the appellant for shipping cement to Nigeria. The Central Bank declined to make payments later due to congestion in the port of discharge. The Court held that the Bank cannot seek immunity only because it was a department of the State of Nigeria. Lord Denning, after taking note of the doctrine of sovereign immunity vis-à-vis commercial transactions by a Government (or its organs), held as under:

"*.....(i) The doctrine of absolute immunity. A century ago no sovereign state engaged in commercial activities. It kept to the traditional functions of a sovereign – to maintain law and order – to conduct foreign affairs – and to see to the defence of the country. It was in those days that England – with most other countries – adopted the*

rule of absolute immunity. It was adopted because it was considered to be the rule of international law that time…

…..(ii) The doctrine of restrictive immunity. In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state – or creates its own legal entities – which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. This doctrine gives immunity to acts of a governmental nature, described in latin as jure imperii, but no immunity to acts of a commercial nature, jure gestionis…..

….. So I turned to see whether the transaction here was such as to attract sovereign immunity, or not. It was suggested that the original contracts for cement were made by the Ministry of defence of Nigeria: and that the cement was for the building of barracks for the army. On this account it was said that the contracts of purchase where acts of a governmental nature, jure imperii, and not of a commercial nature, jure gestionis. They were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods…..

….. I prefer to raise my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."

(Emphasis Supplied)

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

arbitral award was passed in favour of the Birch Shipping Corp., in a dispute arising out of a contract for shipment of corns. When the arbitral award was sought to be executed, the defendant raised the issue of immunity against attachment in aid of execution in terms of the Foreign Sovereign Immunities Act, 1976. While repelling the said submission, the United States District Court, District of Columbia held that in the case of the commercial nature of an activity or a transaction, there could be no claim for immunity from attachment. The relevant findings of the Court are reproduced hereinunder:

> "*The only significant question, then, is whether it is proper to attach an account which is not used solely for commercial activity. Certainly the statute places no such restriction upon property which may be attached, nor is there anything in the legislative history indicating that Congress contemplated such a limitation. Central bank accounts are exempt, but that exception is not applicable to accounts used for mixed purposes. See H. Rep No. 94 - 1487 at 6630. Indeed, a reading of the Act which· exempted mixed accounts would create a loophole, for any property could be made immune by using it, at one time or another, for some minor public purpose. Defendant asserts, however, that failure to find this property immune will make it impossible for foreign countries to maintain embassies. Even if it could be shown this was actually a problem, the solution would not be the broad immunity defendant asks, but segregation of public purpose funds from commercial activity funds. Holding otherwise would defeat the express intention of Congress .to (provide, in cases of commercial litigation such as this, that a "judgment creditor" [would have] some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment." H.Rep. No. 94-487, at 6606.*

Accordingly, the property at issue here is not immune from attachment, and the motion to quash the writ is denied."

(Emphasis Supplied)

Summary of Principles of law

44. The prior consent of Central Government is not necessary under Section 86(3) of the Code of Civil Procedure to enforce an arbitral award against a Foreign State.

45. A Foreign State cannot claim a *Sovereign Immunity* against enforcement of an arbitral award arising out of a commercial transaction.

46. Section 36 of the Arbitration and Conciliation Act treats an arbitral award as a '*decree*' of a Court for the limited purpose of enforcement of an award under the Code of Civil Procedure which cannot be read in a manner which would defeat the very underlying rationale of the Arbitration and Conciliation Act namely, speedy, binding and legally enforceable resolution of disputes between the parties.

47. Section 86 of the Code of Civil Procedure is of limited applicability and the protection thereunder would not apply to cases of implied waiver. An arbitration agreement in a commercial contract between a party and a Foreign State is an implied waiver by the Foreign State so as to preclude it from raising a defense against an enforcement action premised upon the principle of *Sovereign Immunity*.

48. In a contract arising out of a commercial transaction, such as the transactions which are subject matter of the present petitions, a

Foreign State cannot seek *Sovereign Immunity* for the purpose of stalling execution of an arbitral award rendered against it. 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. It is the purpose and nature of the transaction of the Foreign State which would determine whether the transaction, and the contract governing the same, represents a purely commercial activity or whether the same is a manifestation of an exercise of sovereign authority.

49. Arbitration being a consensual and binding mechanism of dispute settlement, it cannot be contended by a Foreign State that its consent must be sought once again at the stage of enforcement of an arbitral award against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the Foreign State has admittedly consented to.

50. This proposition is in consonance with the growing International Law principle of restrictive immunity, juxtaposed with the emergence of arbitration as the favored mechanism of international dispute resolution in the past few decades. It needs no gainsaying that International Commercial Arbitration has witnessed increasing adoption across the world over the past few decades on account of it being a flexible yet stable, efficient, and legally binding mechanism of dispute resolution for entities engaging in global and cross-border transactions while eschewing the particularistic difficulties and complexities encountered in domestic legal systems.

However, if Foreign States are permitted to stymie the enforcement of arbitral awards, which are the ultimate fruits of the above consensual process, on the specious ground that they are entitled to special treatment purely on account of being Foreign States, then the very edifice of International Commercial Arbitration would collapse. Foreign States cannot be permitted to act with impunity in this regard to the grave detriment of the counter-party in the arbitration proceedings.

Findings

51. Applying the abovementioned well settled principles of law, this Court holds 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.

52. Both these petitions for enforcement of the arbitral awards are maintainable and the respondents are directed to deposit the respective award amounts with the Registrar General of this Court within four weeks. If the amounts are not deposited by the respondents within four weeks, the petitioners shall be at liberty to seek attachment of the assets of the respondents.

53. Learned counsel for the petitioner in OMP (ENF) (COMM) 82/2019 submits that approximately Rs.1,72,65,000/- has become due to the petitioner under the arbitral award dated 26th November, 2018 as on 06th May, 2021.

54. Learned counsel for the petitioner in O.M.P (EFA)(COMM) 11/2016 submits that approximately USD 6,99,738.91 has become

due to the petitioner under the arbitral award dated 25th October, 2015 and the same in Indian currency comes to approximately Rs.7,60,75,997/- as on 06th May, 2021.

55. The respondents in OMP (ENF) (COMM) 82/2019 and OMP (EFA) (COMM) 11/2016 are directed to file affidavit of their assets on the date of the cause of action, date of the award as well as today in Form 16A Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure along with the documents mentioned therein within 30 days of the receipt of the notice. The respondents are directed to specifically disclose the following assets in their affidavits:

(i) All assets owned and held by the respondents in India;

(ii) All bank accounts and bank account statements of the respondents held with any bank in India;

(iii) All the commercial ventures of the respondents in India, including state-owned airlines, companies, undertakings etc., having commercial transactions with Indian companies, commercial entities or citizens, and disclosure of all assets in India (including bank accounts) of such commercial ventures;

(iv) All commercial transactions entered into by the respondents and their state-owned entities with Indian companies, commercial entities or citizens where money is due and payable by such Indian companies, commercial entities or citizens along with details of the amounts so owed.

56. List for reporting compliance on 30th July, 2021.

57. The authorized representatives of the respondents shall remain

present before the Court on the next date.

58. Copy of this judgment be sent by email to Embassy of the Islamic Republic of Afghanistan, Delhi at delhi@afghanistan-mfa.net and Embassy of the Federal Democratic Republic of Ethiopia, Delhi at ambassador.newdelhi@mfa.gov.et and delethem@yahoo.com.

59. The petitioner in both the cases are also permitted to send the copy of this judgment to the respondents by email.

J.R. MIDHA, J.

JUNE 18, 2021
ds/ak/dk