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CUTTING CORNERS: REVIEWING THE DELHI HIGH COURT'S APPROACH TO SOVEREIGN IMMUNITY

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How must a court execute an *ex-parte* award rendered against a foreign State? Can the court freeze the bank accounts of its wholly-owned company to satisfy such an award? Moreover, how should any court deal with the dynamic personality of foreign States who are at once sovereigns immune from judicial proceedings in courts in other States and find themselves increasingly engaged in commercial relationships with private entities? These are among the queries that the Delhi High Court (DHC) has had to answer in deciding the enforceability and execution of an award passed against the respondent-
State of Ethiopia in *Matrix Global Pvt. Ltd. v Ministry of Education, F.D.R. Ethiopia*.[1]

This article is about the enforcement proceedings in this case. First, I describe the DHC's decision on sovereign immunity and critically analyse the 'means' it adopts in executing the arbitral award against Ethiopia. Next, some criticisms of this approach where constructive are offered along with concerns on how the DHC mistakes certain facets of sovereign immunity in reaching its conclusions. Last, I turn to how the DHC's approach highlights the need to enact a comprehensive domestic legislation on sovereign immunity, aligned with India's commitments under International Law, to give foreign States the same protection and certainty that India and its wholly-owned companies enjoy abroad.

The Message

The case concerned a contract for supply of books by the petitioner to the Ministry of Education in Ethiopia. This fixed-price contract was performed in full by the petitioner but not honoured so by the Ministry. To fetch the balance amount, the petitioner began arbitration proceedings against the respondent State in 2014. Since the respondent State chose not to appear before the arbitrator,

[1] *Matrix Global Pvt. Ltd. v Ministry of Education, Federal Democratic Republic of Ethiopia* OMP (EFA) (COMM) 11/2016.

the proceedings took place *ex-parte* and an award was entered against it in 2015. To enforce this *ex-parte* award, the petitioner filed an enforcement petition before the DHC under Section 36 of

the Arbitration and Conciliation Act, 1996. Concurrently, a petition for enforcing an award against the embassy of a foreign State had been filed before the DHC.[2] Hence, it was by way of a common judgment[3], delivered *ex-parte*, that the DHC settled the queries.

First, the DHC decided whether the enforcement of an arbitral award against a State was precluded by Section 86 (3) of the Civil Procedure Code, 1908, which required that a decree holder must seek prior consent of the Central Government before filing for the decree's execution against a foreign State's property located in India. Accepting the arguments made by the petitioners and the Central Government, DHC held that the provision had little applicability in the present case as Section 36 created a legal fiction, rendering an 'award' into a 'decree' for the limited purpose of enforcement.

Second, the DHC held that the plea of sovereign immunity will not be available to a foreign State in instances where the underlying transaction was commercial in nature. For 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 seek any immunity, which is otherwise available to it only when it is acting in its sovereign capacity*.[4]

The distinction made by DHC is that when a State acts in the capacity of a sovereign, it is immune; however, this immunity is not available to the State when it is engaged in commercial actions. This understanding of immunity was consistent with the 'restrictive' theory of sovereign immunity in International Law, the DHC inferred. Also consistent with this restrictive theory, the DHC held, was the idea that an arbitration agreement in a contract between a sovereign and a private entity is an 'implied waiver' of the immunity that that a foreign State enjoys, not only from the jurisdiction of courts of the forum State – here, the DHC – but also from enforcement of the award against that State's property.[5]

The Means

Having held so, the DHC directed the State of Ethiopia to deposit the award amount and provide details of all assets, including bank accounts, commercial ventures and transactions.[6] Consistent

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[2] *KLA Const. Technologies v The Embassy of Islamic Republic of Afghanistan* OMP (ENF) (COMM) 82/2019.

[3] *Matrix Global Pvt. Ltd. v Ministry of Education, Federal Democratic Republic of Ethiopia*.2021 SCC OnLine Del 3424 ('KLA Const Technologies').

[4] ibid [48].

[5] KLA Const Technologies [47]-[50].

6 ibid [52]-[55].

with its past demeanour, Ethiopia did not respond to the DHC's request. Instead, the petitioners brought on record the list of assets, including the bank accounts, maintained by Ethiopia in India.[6] This included the bank accounts of its flag carrier, the Ethiopian Airlines, which were subsequently frozen by the DHC.[7] Panicked, the Ethiopian Airlines filed an application for vacation of the order which was partly allowed by the DHC subject to the Airlines maintaining a minimum balance of ₹7.5 Crores in one of the bank accounts.[8]

This order proved to be a turning point in the procedural history of the case. Ethiopia had until then appeared neither before the arbitrator nor the DHC for more than six years, even after it had been declared the judgment debtor. It was only when the bank accounts of the Ethiopian Airlines were attached that a delegation of Ethiopian reps, including the State Minister of Education, flew to India to settle the matter with the decree holder.[9] With the parties able to come to a settlement, the DHC closed the enforcement proceedings and vacated the interim orders, including the orders attaching the bank accounts of the Ethiopian Airlines.[10]

The Misdirection

The DHC's orders, whereby it attached the bank accounts of a foreign State's wholly-owned entity to satisfy the debts of the judgment debtor State, raise several issues. These orders highlight that it did not differentiate between Ethiopia and its flag carrier, even when, as the Airlines argued, the latter was legally distinct from its owner, the foreign State, and that it was commercial in nature, having control over all its assets.[11] One could argue that this position is extraordinary given the litany of judgments from the Supreme Court holding that companies which are fully owned by the Indian government are legally distinct from the government due to their incorporation under the existing companies law.[12] Accounting for these rulings and DHC's orders, the overall position in India today is that government companies incorporated by the Indian government are not to be treated as its alter-egos, but if the case concerns a company whose sole shareholder is a foreign State, then the assets of that company can be attached to satisfy the debts of the foreign State. This is an apparent inconsistency in applying the cardinal company law principle whereby a company enjoys a legal personality separate from its shareholders, and for whose debts a company is in no way liable.

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[6] Order dated 02 September 2021 OMP (EFA) (COMM) 11/2016.
[7] Order dated 15 December 2021 OMP (EFA) (COMM) 11/2016.
[8] Order dated 21 December 2021 OMP (EFA) (COMM.) 11/2016.
[9] Order dated 06 September 2022 OMP (EFA) (COMM.) 11/2016.
[10] Order dated 22 September 2022 OMP (EFA) (COMM.) 11/2016.
[11] Order dated 21 December 2021 OMP (EFA) (COMM.) 11/2016.
[12] *Heavy Engineering Mazdoor Union v State of Bihar* [1969] 1 SCC 765; *A.K. Bindal v Union of India* [2003] 5 SCC 163; *Electronics Corporation of India Ltd. v Secy, Revenue Dept., Government of A.P* [1999] 4 SCC 458.

Yet, even if the DHC's view that the Ethiopian Airlines was nothing more than the 'alter ego' of the Ethiopian government and did not enjoy a separate legal existence is accepted, the DHC does not explain how or why this legal position is tenable. The DHC does not, for instance, test its own conclusions against any objective criteria, like the purpose of the Airlines' incorporation, purpose of its bank accounts, control over its day-to-day affairs, its capital and profits, or whether or not the Ethiopian Airlines was itself party to the underlying contract, in order to determine the status and personality of the Ethiopian Airlines vis-à-vis the Ethiopian government. These criteria could have helped the DHC ascertain whether the Ethiopian Airlines performed any sovereign functions which in turn would have rendered it an alter-ego. Far from it, the procedural history of the dispute shows that the DHC simply took cognizance of the Airlines' assets at the behest of the petitioners:

> *Although the judgment debtor has not appeared in the execution proceedings at any stage, the decree holder placed on record an affidavit including therein the assets of Ethiopian Airlines which it claims is a fully owned subsidiary of the Government of Ethiopia.*[13]

Hence, in attaching the bank accounts maintained by the Ethiopian Airlines, the DHC did not on its own analyse the relationship between the Ethiopian Airlines and the Ethiopian State. Its lack of analysis and wonton attachment orders vitiated well-established legal principles, which were otherwise available to government-owned companies in India. These facets become more perplexing when one recalls that India's erstwhile flag carrier, Air India, was recently successful in its leave to appeal application before the Quebec Court of Appeal by arguing that its assets should not be attached for satisfying the debts owed its owner, the Union of India.[14]

The Misunderstanding

Inconsistency in applying legal principles and lack of analysis are not the only difficulties with the DHC's approach. The court treats sovereign immunity as a single concept. From this supposition it concludes that an arbitration agreement between a State and a private entity is an 'implied waiver' of that State's immunity, *tout court*. This understanding, built without reference to contemporary international law or practice of foreign jurisdictions, leaves much to be desired since the 'restrictive' theory that the DHC aligns itself with is misunderstood by it.

First, when we refer to the restrictive theory of sovereign immunity, we are recalling the gradual shift in international law and domestic practice in the 20th century from an absolute immunity for all acts of a State to the restriction of this immunity to only those acts of a State which are sovereign

[13] Order dated 19 July 2021, OMP (EFA) (COMM) 11/2016 [2].
[14] *Air India Ltd. v CC/Devas (Mauritius) Ltd.* 2022 QCCA 218 (CanLII).

in nature, thereby excluding the State's commercial actions. Indeed, now, the status or personality of a State is no longer enough to determine immunity; a State's entitlement to immunity depends on the 'the activity or transactions in question'.[15]

Second, sovereign immunity consists of a State's immunity from jurisdiction i.e., from proceedings in the courts of a forum state, as well as the State's immunity from execution or 'measures of constraint' against its property located in the forum State. In other words, as the International Court of Justice (ICJ) explained in the *Jurisdictional Immunities* case between Germany and Italy:

> *Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question.*[16]

This distinction is vital and has practical implications. For one, measures against a State's properties can be the subject of international controversies, leading to diplomatic tensions. It is for this reason that the UN Member States adopted the Convention on Jurisdictional Immunities of States and their Properties (Convention) in 2004.[17] India became a signatory to the Convention in 2007 and, while it is yet to enter into force, the Convention establishes the benchmark for how UN States understood the extent of their sovereign immunity in the 21st century.

The Convention embodies the distinction between immunity from jurisdiction and immunity from enforcement in its structure, dealing with each subject in distinct 'Parts' and as separate regimes.[18] Under its regime on immunity from jurisdiction, the Convention clarifies that if a State has entered into an arbitration agreement with a party, then it 'cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent' to determine issues related to the arbitration, including the confirmation of the award.[19] So, as far as the DHC held that an arbitration agreement between a State and the private entity waives its immunity, it was correct and the award was indeed enforceable. But enforceability does not automatically ensure execution. As the waiver was limited to immunity from jurisdiction, the DHC erred in treating the arbitration agreement as an 'implied waiver' of immunity from execution as well. This much was observed by the ICJ too, when it noted:

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[15] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 80.
[16] Jurisdictional Immunities of the State (*Germany v Italy*: Greece intervening) [2012] ICJ Rep 99 [113].
[17] United Nations Convention on Jurisdictional Immunities of States and Their Property, A/RES/59/38 ('UNCJISP').
[18] Michael Wood, 'Immunity from Jurisdiction and Immunity from Measures of Constraint' in Roger O'Keefe and Christian Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013) 14.
[19] UNCJISP Article 17.

> *Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.*[20]

While the petitioner did place reliance on the Convention in their submissions[21], the DHC did not refer to it in deciding the matter. What is more curious is that the Central Government appeared before the DHC with legal advice from the External Affairs Ministry's Legal and Treaties Division but made no submissions on the Convention despite its apparent connection with the issues at hand.[22] Odder still is the fact that the Central Government has relied on the Convention to reject a private claims in the past.[23] So, had the Central Government or the DHC referred to the Convention, it would have found that in reference to immunity from execution, Article 20 clarifies that a State's consent to the exercise of jurisdiction 'shall not imply the consent to the taking of measures of consent'.[24][25] Without this, it is clear that not only did the DHC attach the assets of an entity which had nothing to do with the underlying transaction that gave rise to the arbitral award, the legal concepts through which the DHC found itself in a position to do so were also misunderstood by the court.

Conclusion

Seized of the enforcement petitions, the DHC had before it an opportunity to lay down a sound foundation for the future of sovereign immunity law in India. Instead, the DHC's approach relied on an inconsistent application of established legal principles and assumptions which were made in absence of any enabling domestic legislation. One can argue that in doing this the DHC's ruling defeats India's obligation to accord the customary standard of sovereign immunity as embodied in the 2004 Convention.

Perhaps the final question to ask is whether the Ethiopian delegation reached a settlement because of and not despite the DHC's attachment and freezing orders against the bank accounts of the Ethiopian Airlines? In my opinion, without these orders, the settlement would not have been arrived at. And in so far as this view is correct, the DHC was wrong, as I have argued, to hold the Ethiopian government to ransom.

Coda

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[20] Jurisdictional Immunities of the State (*Germany v Italy*: Greece intervening) [2012] ICJ Rep 99 [113].
[21] KLA Const Technologies (n 3) [27].
[22] ibid [18].
[23] *Shyam Lal v Union of India* 2010 SCC OnLine Del 3248.
[24] UNCJISP (n 20) art 20.
[25] Vienna Convention on Law of Treaties 1986, art 18.

Why Air India can seek the detachment of its assets in Canada – or, for that matter, how the Indian government plans to oppose the order of a French court attaching its Parisian flat on the grounds that it was a property in use for sovereign purposes, and not commercial ones[26] – is that, over time, courts in foreign jurisdictions, assisted by sovereign immunity laws, have developed criteria – many of them mimicked in this article – to differentiate States from their wholly-owned entities, parastatals and instrumentalities.

These criteria help their domestic courts determine how, when and in what manner assets owned by these entities can be attached to satisfy the debts owed by the owner State. While India and its wholly- owned entities take confidence and benefit from sovereign immunity laws in foreign jurisdictions to challenge attachment orders against their assets, foreign States and their state-owned entities, much like Ethiopia and its flag carrier, are without the similar protections in India. This situation exists some twenty years after the Law Commission of India recommended in its 176th Report that a separate statute on the subject of sovereign immunity must be enacted.[27]

[26] Dipanjan Roy Chaudhury, 'Before Talking to Paris, India Awaits French Court's Devas Order' *The Economic Times* (17 January 2022) <https://economictimes.indiatimes.com/news/india/before-talking-to-paris-india-awaits-french- courts-devas-order/articleshow/88941796.cms> accessed 11 October 2022.

[27] Law Commission of India, 176th Report on 'The Arbitration and Conciliation (Amendment) Bill, 2001' (2001) 187 < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081036.pdf> accessed 11 October 2022.