

# Dispute Resolution Hotline

February 07, 2013

## FILE SOVEREIGN IMMUNITY: IS NOT SO IMMUNE ANYMORE

The division bench of the Bombay High Court ("**Bench**") in a recent judgment delivered by Justice D Y Chandrachud and Justice A A Sayyed has eased the path for Sharpoorji Pallonji and Company ("**the Company**") for recovery of a sum of INR 59.22 lakhs ("**Debt**") with interest from Qatar Airways ("**Qatar**") and denied the benefit of sovereign immunity to Qatar.

### BRIEF FACTS OF THE CASE

Qatar had engaged the services of the Company for interior decoration of its workplace. The payment due for such services was in arrears and therefore the Company instituted a summary suit against Qatar before the Single Judge, Bombay High Court ("**Court**") under Order XXXVII of the Civil Procedure Code, 1908 ("**CPC**"), for the recovery of the Debt. Qatar raised a preliminary objection as to whether such suit would be maintainable against it since it is a 'Foreign State' and that requisite permission for instituting a suit against a 'Foreign State' had not been obtained from the Central Government under Section 86 of the CPC.

The Court dismissed the objection raised by Qatar stating that it was not necessary to obtain consent as contemplated by Qatar to proceed with the suit. Moreover, the Union Ministry of External Affairs had already stated that consent to institute the suit was not necessary in this case and therefore the suit was held to be maintainable.

Qatar was aggrieved by the aforesaid decision and instituted an appeal before the Bench. The appeal was however dismissed and the reasons delivered by the Court have been discussed below.

### SOVEREIGN IMMUNITY IN INTERNATIONAL LAW

Sovereign immunity is a well-recognized principle of public international law. It flows from the maxim "par in parem non habet imperium" which basically states that one sovereign state may not exercise jurisdiction over another sovereign state. The principle covers the entire judicial process, from the initiation or institution of proceedings up to the stage of orders/ decisions by a court as well as their execution.

### PROVISION FOR SOVEREIGN IMMUNITY UNDER INDIAN LAW

Section 86<sup>1</sup> of the CPC elucidates upon the law relating to sovereign immunity/consent to be obtained in suits instituted against 'Foreign State'. An entity will qualify as a 'Foreign State' depending upon the nature of its constitution and the extent of 'control' the government exercises on that entity.

### JUDICIAL PRECEDENTS; WHAT WAS HELD?

#### Consent required

- In Kenya Airways v. Jinibai B Kheshwala<sup>2</sup>, a division bench of Delhi High Court held that since the ownership and control of Kenya Airways (company) vested in a foreign State, would fall within the purview of protection under Section 86 of CPC though the airline had waived the protection under Section 86 of CPC by participating in the proceedings without demur for a long period of time.
- In Veb Deutfracht Seereederei Rostock v. New Central Jute Mills Co. Ltd. & Anr.<sup>3</sup>, the Supreme Court noted in its decision that the Appellant was deemed to be a department of the Government of Germany since under the Constitution of the German Democratic Republic, industrial enterprises, banks, insurance companies and means of transport, amongst other industries, were nationally owned properties, private ownership being inadmissible in view of the provisions of Article 12 of the Constitution of G.D.R. Consequently it was held that consent under Section 86 of the CPC would be required while addressing a caution to the union government that it is neither the purpose nor the scope of Section 86 of the CPC to protect foreign traders who have committed breach in terms of any contract.

#### Consent not required

- In Planmount Ltd. v. Republic of Zaire<sup>4</sup>, the suit was for recovery of money for repairs made to the property belonging to the Republic of Zaire. The contention was that as Republic of Zaire was a sovereign state, it could not be sued. The court however said that there has been a change in state practice as regards sovereign immunity to the extent that liabilities arising out of commercial activities of the sovereign state would not be protected by the principle of sovereign immunity as such activities are not governmental acts.
- In Trendtex Trading Corp'n Ltd. v. Central Bank of Nigeria<sup>5</sup>, it was held that the court held that the Central Bank of Nigeria was not entitled to plead sovereign immunity because, according to principle of restrictive immunity under

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international law, a state-owned entity is not entitled to immunity for acts of a commercial nature. 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."

- In *Ethiopian Airlines v. Ganesh Narain Saboo*<sup>6</sup>. It was held that Section 86 of the CPC is not applicable in the context of special legislation enacted by the Parliament subsequently, namely, the Carriage by Air Act, 1982 and the Consumer Protection Act, 1986. However, the Supreme Court further held that Ethiopian Airlines is not entitled to sovereign immunity with respect to a commercial transaction is well in consonance with the growing body of international law principles. The court also held that a company of a foreign State has a juristic personality distinct from its shareholders and even if the entire share capital of a foreign company is held by a State or by an entity of the State that does not render the company a foreign State within the meaning of Section 86(1) of the CPC.

## CONTENTIONS

Qatar contended that it is a company owned and controlled by the State of Qatar and its ruling family and therefore it is a 'Foreign State' within the meaning of Section 86 of CPC. It was the contention of Qatar that the suit instituted in the original jurisdiction of the Court was not maintainable in the absence of permission by the Central Government,

The Company objected to the maintainability issue raised by Qatar stating that they had sought the consent of the Union Government in the Ministry of Law and Justice in a response to which the Union Ministry of External Affairs communicated that upon consultation with the Legal and Treaties Division they had concluded that Qatar does not fall within the purview of Section 86 of the CPC and therefore the grant of permission for institution of the recovery suit was not required.

## DECISION

The Court dismissed Qatar's appeal while stating the following reasons for its decision in its oral judgment:

- The principle of sovereign immunity does not apply to Qatar as it is not a 'Foreign State' within the meaning of Section 86(1) of the CPC. It held that Qatar being a company has a distinct legal personality of its own which finds recognition in the contractual relationships into which it enters.
- That the suit for recovery of the Debt was founded on a purely contractual and commercial dealing between Qatar and the Company and such contractual relationships stemming from business activities of Qatar in India would be subject to the jurisdiction of the competent courts of India.

## ANALYSIS

The basic premise on which the Bench dismissed the appeal is very clear that Qatar is a company incorporated under the laws of Qatar and is a juristic entity which cannot be equated with a 'Foreign State'. This judgment has reiterated the often cited principle that a company has a distinct personality independent of its shareholders. Moreover, the Court has clarified that no one can evade responsibilities arising out of transactions of private and commercial nature by seeking protection under the principles of sovereign immunity for sovereign states.

The decision of the Bench is a clear turnaround from the views expressed by a concurrent division bench of the Delhi High Court in the case of *Mansoor Mumtaz and Ors. v. Saudi Arabian Airlines Corporation*<sup>7</sup> wherein the Delhi High Court had gone into the aspect of control of Saudi Arabian Airlines (which vested with the Kingdom of Saudi Arabia). The division bench of the Delhi High Court held that since the control over the Defendant Airlines Corporation is with the State, merely because it is carrying on an independent work will not take it away from the purview of sub-section 1 to Section 86 and therefore consent of Central Government will be required to determine that it was a Foreign State. In the present case, the Bombay High Court has not gone into the fact whether or not the Control of Qatar Airways rests with a Foreign State but has based its decision on the premise that a company is a distinct legal entity separate from its shareholders and in a way refused to lift the corporate veil of Qatar Airways.

Ironically the case of *Mansoor Mumtaz* was not discussed in the present judgment rendered by the Bombay High Court.

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You can direct your queries or comments to the authors

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<sup>1</sup> "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 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.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the foreign State may be sued, but it shall to be given, unless it appears to the Central Government that the foreign State:

(a) has instituted a suit in the Court against the person desiring to sue it, or

(b) itself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to it by this section.

(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.

(4) The proceeding provisions of this section shall apply in relation to:

(a) any Ruler of a foreign State;

(aa) any ambassador or Envoy of a foreign State ;

(b) any High Commissioner of a Commonwealth country; and

(c) any such member of the staff of the foreign State or the staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf.

as they apply in relation to a foreign State.

<sup>2</sup> AIR 1998 Bom 287 (DB)

<sup>3</sup> (1994) 1 SCC 282

<sup>4</sup> (1981) 1 All ER 1110

<sup>5</sup> (1997) 1 All ER 881

<sup>6</sup> AIR 2011 SC 3495

<sup>7</sup> RFA (OS) No. 20/2002 Order passed in 2008

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