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## STATE PRACTICES RELATING TO DIPLOMATIC IMMUNITY

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### Abstract

This paper deals with foreign interests and their organizations and implements that can be prosecuted only with prior written approval of the government of India in compliance with Indian Code of Civil Procedure. Such permission might not have been appropriate, however, if the matter is subject to a special legislation. In the paper, a ruling from the Bombay State High Court v Czechoslovak Airlines 1977 describes more regarding the reaching implications of an Indian court granting diplomatic immunity in international exchange proceedings. The Court decided that the privilege cannot be argued despite the fact that the petitioner airline was a diplomatic agency because the interests and operations of that airliner were of a strictly commercial interest after acknowledging the global movement towards reduced immunity. This paper ends by saying that India is part of the treaty to the United Nations Convention on rights and privileges, 1946 and also has adopted the rights and privileges provided there by the United Nations Act 1947 (UN Privilege Act). In compliance with section 3 of this Act, the Government can apply to other foreign organizations even for the diplomatic immunities and privileges given under the Act.

**Keywords:** Diplomats, Privileges, Diplomatic immunity, International laws, Civil procedures, Domestic law, Contractual obligations,

## Introduction

India has adopted a restricted concept of sovereign immunity. Pursuant to the Code of Civil Procedure of India, foreign states and their organs and instrumentalities can be sued with the prior written consent of the Indian government. However, such consent may not be required where the matter is governed by a special law (for, e.g., the Carriage by Air Act 1972, Consumer Protection Act 1986) or where the legal proceedings are not in the nature of a suit, such as an industrial dispute under the Industrial Disputes Act 1947 [1]. In its 2011 judgment in *Ethiopian Airlines v Ganesh Narain Saboo (Ethiopian Airlines)*, the Supreme Court of India reiterated the consistent view in India that the doctrine of sovereign immunity in India was not absolute, and that foreign states do not have immunity from judicial proceedings in cases involving their commercial and trading activities and contractual obligations undertaken by them in India [2].

## Legal justification for the diplomatic immunity concept

The legislative recognition of the doctrine of diplomatic immunity in India can be found in the following provisions and statutes:

- section 86 of the Code of Civil Procedure 1908 (CPC), which provides that no suit may be instituted against foreign states in India, except with the prior written consent of the government; and
- the Diplomatic Relations (Vienna Convention) Act 1972, which incorporates certain specified immunities available to diplomatic missions and their members in India pursuant to the Vienna Convention on Diplomatic Relations, 1961 [3]. A few articles of the Convention, including articles 29, 30, 31, 32, 37, 38 and 39, have been given the force of law in India by extending the scope of sovereign immunity to diplomatic agents, their family, members of staff and servants.

It is noteworthy that in *Mirza Ali Akbar Kasani vs United Arab Republic & Anr*<sup>1</sup>, a five-judge bench of the Supreme Court held that section 86(1) CPC modifies the international doctrine of sovereign immunity to a certain extent, and when with the permission of the Legislature, a claim shall be launched against a foreign state and the presumption of diplomatic immunity under international human rights law shall not be eligible for an individual state to depend on.

On 12 January 2007, India became a signatory to the UN Convention on Jurisdictional Immunities of States and Their Property, 2004.<sup>2</sup> However, it is important to emphasize that India has not proceeded to ratify this Convention and that the Convention itself is not in force yet [4].

<sup>1</sup>1966 AIR 230, 1966 SCR (1) 319

<sup>2</sup><https://www.lexology.com/library/detail.aspx?g=5521ec58-6c1c-4577-a285-abad6baae0b4>

**Domestic laws on the extent of prosecutorial discretion:** The domestic law governing jurisdictional immunity of foreign states is prescribed in section 86(1) of the CPC. Section 86(1) provides that ‘any jurisdiction that has any authority over the trials cannot be tried by any foreign State unless authorized in written by the Central Government Secretary to that country’; implying thereby that there is immunity in the favour of foreign states from the jurisdiction of Indian courts, which survives unless the government consents to a suit against a foreign state. However, the proviso to section 86(1) exempts suits by tenants of immovable properties held by foreign states from the requirement of obtaining the government’s prior consent [5].

- Further, section 86(2) provides that the government shall not consent to a suit against a foreign state unless certain conditions exist. As per section 86(2), the government may only consent to A foreign policy suit in which the foreign policy:
  - has brought proceedings against a person who wishes to sue the foreign state before a court;
  - by itself or another, and within strict limitations of the local competence of the Court of Justice;
  - is held in real estate found beyond those limits and must be compensated for money owed for that asset;
  - The luxury granted to it has been explicitly or impliedly agreed to waiver.

In DSR Lines a Department of the German Democratic Republic vs New Central Jute Mills Co Ltd and Ors<sup>3</sup>(New Central Jute Mills), the Supreme Court observed that the object of making the government’s consent a mandatory requirement for instituting a suit against a foreign state was to ensure that parties with legitimate claims are not left without a remedy, as well as that sovereign states are not subject to frivolous and vexatious litigation in Indian courts [6].

Section 86(6) of the CPC, the Supreme Court has held that the power conferred on the government to refuse consent should be carefully exercised and so long as a case fulfils the conditions specified in section 86(2), the government should normally accord the consent to sue. It has been held that the power to refuse consent must be exercised in accordance with the principles of natural justice and the order refusing the consent should disclose reasons for the refusal (Harbhajan Singh Dhalla v. Union of India<sup>4</sup>). Further, in disputes involving commercial transactions and contractual breaches by foreign states, or their undertakings, the position is that there is no immunity (New Central Jute Mills, Harbhajan Singh Dhalla v Union of India, Ethiopian Airlines, Qatar Airways v Shapoorji Pallonji & Co).

<sup>3</sup>1994 AIR 516, 1994 SCC (1) 282

<sup>4</sup>1987 AIR, 9 1987 SCR (1) 114

In addition to foreign states (including their organs, departments, instrumentalities), per section 86(4) of the CPC, the immunity under section 86 is also available to rulers, ambassadors, envoys, high commissioners of foreign states, and any such member of the staff of the foreign state, or the staff or retinue of the ambassador or envoy or the high commissioner of a foreign state, as the government may specify [7,8]. Thus, the privilege of sovereign immunity in India extends to matters relating to the performance of sovereign functions of foreign states and excludes matters pertaining to commercial or contractual transactions undertaken by foreign states and their instrumentalities in India. Further, the protection of section 86, CPC is applicable only in relation to suits proper and does not extend to legal proceedings that are not in the nature of suits or which are governed by special statutes.

**State waiver of immunity or consent:** A foreign state (including its instrumentalities) can waive its sovereign immunity or consent to the exercise of jurisdiction expressly or impliedly. Instances of implied waiver would include cases where the foreign state institutes a suit of its own accord or where a foreign state participates in a suit instituted against it without raising the defense of sovereign immunity for a substantial time, as was the case in *Kenya Airways v Jinibai B Kheshwala*.<sup>5</sup> In that case, while accepting that Kenya Airways was entitled to sovereign immunity, the Bombay High Court held that its participation in the suit for about 16 years before claiming immunity amounted to a deemed waiver of the immunity [9].

Foreign states may also waive their immunity by entering into treaties that dilute the scope of sovereign immunity and make states and their instrumentalities amenable to the jurisdiction of foreign courts. This can be seen from the *Ethiopian Airlines* case wherein the Supreme Court of India found that by signing the Convention for The Unification of Certain Rules Relating to International Carriage by Air 1929 Ethiopia had expressly waived the Ethiopian Airlines' right to immunity in matters relating to carriage by air [10].

**States not enjoy immunity from suit (even without the state's consent or waiver:** As far as statutory exceptions to sovereign immunity are concerned, the proviso to section 86(1) of the CPC provides that the government's consent is not required in suits instituted by tenants of immovable property held by foreign states. Thus, foreign states do not enjoy sovereign immunity in tenancy disputes wherein the relevant state is the landlord as regards the tenant. Further, immunity is not available in cases involving commercial and contractual transactions [2, 4,11].

One of the earliest instances of an Indian court refusing sovereign immunity in cases of commercial activity by a foreign state is a 1977 decision of the Bombay High Court in *State of Maharashtra v Czechoslovak Airlines*. The court, after recognizing the global trend towards restricted immunity, held that immunity could not be claimed even though the respondent airline was a department of a sovereign state on account of the fact that the respondent

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<sup>5</sup>Appeal No. 370 of 1996 in Suit No. 1236 of 1978; Decided On, 23 April 1998

airline's objectives and activities were purely commercial in nature. Sovereign immunity has also been held not to apply to cases involving tenancy disputes in immovable properties where the foreign state is the tenant (Syrian Arab Republic v AK Jajodia<sup>6</sup>). Under the provisions of section 86(2)(c) CPC, the government is also empowered to grant consent to sue for such disputes.

The government, while making its assessment, is expected to holistically consider the facts and circumstances of the case and proceed in accordance with the principles of natural justice by affording the applicant a reasonable opportunity to be heard before refusing the consent, as provided for in section 86(6) of the CPC, and by providing its reasons for the refusal, if any. As a general rule, Indian courts carry out a case-specific analysis to determine whether a given transaction, claim or dispute is of sovereign or non-sovereign nature for the purpose of deciding whether a foreign state can claim immunity from a court's jurisdiction in India [12].

Further, foreign states do not enjoy immunity in proceedings that are not suits or which, whether suits or not, are governed by special statutes. Since the exceptions to sovereign immunity in India are essentially premised on non-sovereign acts and functions of foreign states, and largely on the commercial contractual nature of transactions, once a court is found to have jurisdiction on account of application of one of the exceptions it is unlikely that any other principal or doctrine would interfere with the exercise of such jurisdiction [13].

In *Union of India v Bilash Chand Jain and Ors*,<sup>7</sup> the Calcutta High Court observed that if on examination of any transaction it appears that the state acted in the matters in question as a sovereign, then courts would not exercise jurisdiction. However, the court proceeded to also observe that it would be difficult to establish this in cases involving ordinary commercial matters. Further, if the contract in question confers exclusive jurisdiction on some foreign court, then, subject to other facts and circumstances, Indian courts may refuse to entertain the dispute in view of such conferment. It may be noted that there is no precedent in Indian law where after a case has been held to fall under an exception to sovereign immunity, the court has been prevented from assuming jurisdiction due to any other doctrine or principle.

**Proceedings against a state enterprise:** Under Indian law, a state enterprise or a similar entity discharging public functions is treated on the same footing as the state insofar as its amenability to court's jurisdiction is concerned. There are a number of precedents where corporate veil has been pierced in India to ascertain whether a given entity is equivalent to state, by virtue of the ownership and control of the state on such entity or the nature of functions discharged by it. However, such exercise has been directed towards determination of the fact whether the given

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<sup>6</sup>116 (2005) DLT 444.

<sup>7</sup>(2001) 3 CALLT 352 HC

entity would be entitled to immunity (Kenya Airlines case, New Central Jute Mills case<sup>8</sup>) and there is no precedent for piercing the corporate veil to subject a foreign state to the proceedings.

**Interim or injunctive relief:** There is no specific carve out for interim or injunctive relief being granted in cases where a state is party and the provisions on interim relief under the general civil law apply. The grant of interim relief merits specific evaluation of prima facie cases of the parties by courts. Interim relief can be in the form of injunction orders, directive orders, interim stay orders, etc.

Courts adjudicate applications for interim relief of injunction by conducting a review of the following factors:

- whether there is a prima facie case in favour of the party seeking interim relief;
- if irreparable injury is likely to be caused to the applicant if the interim relief is not granted; and,
- if the balance of convenience lies in favour of the party requesting for the interim relief.

Once the dispute is subject to an Indian court's jurisdiction and if the court grants interim relief then the parties to the proceeding are bound to comply with it. The final relief can be in the nature of specific performance, damages, permanent injunctions, recovery of monies, eviction from immovable property, etc.

**Service of process:** Indian law does not identify a specific court that must be served with process before proceedings against a state or its organs and instrumentalities are initiated. However, as stated in previous answers, the government's prior written consent is required before instituting a suit against a state under section 86 of CPC. Furthermore, section 8 of The Diplomatic Relations (Vienna Convention) Act, 1972 restricts admission<sup>9</sup> into the grounds of the diplomatic mission, for the purposes of conducting civil proceedings, without the permission of the mission chief by civil servants, government officials or other state authorities [14]. For which the Ministry of Foreign Affairs may issue those permissions. Process may be served on a state through its diplomatic mission with the prior consent of the head of the mission obtained through Ministry of External Affairs.

**Domestic legislation on the extent of exemptions for prosecution:** While there is no exhaustive Indian legislation pertaining to enforcement immunity, section 86(3) of the CPC provides that no decree shall be executed against the property of any foreign state, except with the consent of the government. The requirement of such consent is over and above the requirement of the consent to sue. Subject to the receipt of the government's consent, a decree may be executed against a state.

Additionally, section 86(5) of CPC specifies that: (i) no foreign national ruler/President, (ii) no diplomat or ambassador from a foreign nation; (iii) no high commissioner in a nation of the Commonwealth, or (iv) any foreign

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<sup>8</sup>New Central Jute Mills Co. Ltd. And ... vs The State Of West Bengal And Ors on 17 January, 1963

<sup>9</sup><http://legislative.gov.in/sites/default/files/A1972-43.pdf>

state personnel or retinue personnel, the Ambassador or Envoy of a foreign state or of the High Commission shall be kept in compliance with any clause of the CPC; CPC shall specify.

**Application of civil procedure codes and other similar codes:** Section 86(3) is the relevant provision for initiating enforcement and implementation of a foreign policy decree and mandates the requirement of obtaining prior written approval of the government. Once the consent is granted, the provisions in the CPC for execution of decrees apply subject to the provisions of section 86(5) of the CPC and the immunity available to foreign states in respect of some of their properties. There is no precedent adjudicating upon the application of Indian debt collection statute (i.e., the Recovery of Debts and Bankruptcy Act 1993 (DRT Act)) to execution of a decree obtained against a foreign state.

In *Ethiopian Airlines*, the Supreme Court held that since the Consumer Protection Act 1986 (CPA) did not provide for specific application of section 86, CPC to proceedings before consumer forums, section 86 was not applicable to such proceedings. This ruling was delivered in light of section 13(4) of the CPA, which incorporates certain specific CPC provisions into the CPA. Since the DRT Act also contains a provision similar to section 13(4) of the CPA, that is, section 22, which incorporates, inter alia, the same provisions of the CPC into the DRT Act, but not section 86, it can be said that in view of the ruling in *Ethiopian Airlines*, section 86, CPC would not apply to proceedings under the DRT Act. This would mean that enforcement proceedings on the basis of a The DRT Act may allow for the decree obtained against a foreign State. In compliance with paragraph 86(3) of the CPC, government authorization against the property of a State will be necessary to implement it. Therefore, a previous declaration of a court's authority is not permission for further protection of state land.

India is a party to the Vienna Convention on Diplomatic Relations 1961 and has given effect to the same by enacting The Diplomatic Relations (Vienna Convention) Act 1972. Pursuant to this Act, the properties and assets specified there under are immune from enforcement or execution [15].

The Calcutta High Court in *Union of India & Ors v Bilash Chand Jain & Ors*<sup>10</sup>(*Bilash Chand*) has held that any checks over and above the restrictions specified in the Vienna Convention Act are not necessary for executing decrees against foreign states. Moreover, the court held that an execution applicant need not specify the property being sought to be acted against in execution proceedings while applying for the government's consent to the execution proceedings. While this judgment was subsequently set aside by the Supreme Court, the point before the Supreme Court was whether the High Court could have directed the government to grant the consent for execution proceedings. The Supreme Court set aside the High Court's direction issued to the government to grant the consent and remanded the matter to the government to reconsider the request for grant of the consent.

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<sup>10</sup>(2001) 3 CALLT 352 HC



While India is a signatory to the 2004 UN Convention on State Immunities of Jurisdiction and its Property, which explicitly forbids property from the use, or intended, for business purposes of central banks or other monetary authority of a state, however, this Convention is still not in effect [8].

**Test for enforcement:** There is no such test developed by domestic jurisprudence. While India is a signatories, for the purposes of businesses, of central banks ou other monetary agencies of a State, to the 2004 UN Agreement on State Immunities and its ownership, which expressly forbids or intends to use properties of central banks.

**Specific provisions<sup>11</sup>:** India is a signatory to the 1946 UN Convention on rights and privileges and has adopted the protections and rights given there under the UN Act 1947 (UN Privileges Law). The government is allowed to apply to all foreign bodies, according to article 3 of this Act, the rights and immunities given under the Act. The International Solar Alliance and the Afro Asian Rural Reconstitution Organization, Asia and the Pacific Technology Transition Centre are some of the international bodies to which privileges and immunities are applied.

Further legal presence in or functioning within the foreign organizations. By virtue of section 2 of the Schedule to the UN Privileges Act, international organizations covered there under, and their immunity from all types of litigation, to enjoy their assets andwealth, except where immunity is expressly claimed off waivers. Thus, such international organizations cannot be subjected to proceedings before a court unless they expressly waive immunity.

In India, the international organizations covered under the UN Privileges Act enjoy absolute immunity against enforcement. Section 2 of the Schedule to the UN Privileges Act clearly states that any waiver of immunity shall not extend to execution proceedings.

**Recent developments:** There have been a few cases recently where the Indian courts have assessed jurisdictional immunity of the states in the context of performance of non-sovereign functions. It is noteworthy that while under section 86(6) of CPC, the government is required to give a reasonable opportunity to be heard to the person making a request for consent for filing a suit against a foreign state, in the Rita Solomon case, the High Court of Delhi held that the government is also required to provide an opportunity of hearing to the foreign state before deciding the application seeking the consent.

Additionally, while the statutory interment and existing position was that in cases where the government denied the consent for filing a suit against a foreign state, it was required to give a reasoned order, in Rita Solomon<sup>12</sup> the court held that even in the cases where the government chooses to grant the consent for filing a suit against a foreign state,

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<sup>11</sup><https://www.lexology.com/library/detail>

<sup>12</sup>Rita Solomon & Ors. vs The Republic Of Italy & Anr. on 1 May, 2019



it is required to specify the condition out of the four conditions specified in section 86(2) of the CPC that forms the basis for the decision.

## Conclusion

A big feature of international human rights law is sovereign immunity. It is tragic and accidental as a result of the harassment of non-diplomats by the wide-ranging terminology of the Vienna Convention on international affairs and by federal tribunals on international relations to the State Department. There are even more examples of retrospective diplomatic privileges to be had despite the victories of the convicted in Abdulaziz and Khobragade. Even so, as new lawsuits occur, the judiciary ought not to be required to ignore deception or misunderstanding in order to uphold the opinions of diplomacy of the federal states. Diplomacy involves cooperative, transparent international ties – not supercilious demands for protections.

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