

## **Delhi High Court has held that third-party funding of legal proceedings is essential to ensure access to justice.**

In the recent judgment of *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc*<sup>1</sup>, the Division Bench of the Delhi High Court (“**Delhi HC**”) has held that third party funders play a vital role in ensuring access to justice and, in the absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due.

### **Brief Facts**

1. Tomorrow Sales Agency Private Limited (“**TSA**”) had entered into a bespoke funding agreement (“**BFA**”) with the claimants (i.e., respondent Nos 2 to 5 before the Delhi HC) (“**Claimants**”) under which TSA had agreed to provide financial assistance to the Claimants for pursuing their claim for recovery of damages against SBS Holdings Inc. (“**SBS**”/Respondent No. 1 before the Delhi HC).
2. The BFA, *inter-alia*, stated that:
  - a) TSA would provide financial assistance on a non-recourse basis; and
  - b) BFA would stand terminated if the claim raised by the Claimants was not a success.
3. Subsequent to execution of the BFA, the Claimants initiated an arbitration proceeding against SBS under rules of Singapore International Arbitration Centre (“**SIAC Rules**”). TSA was not a party to the arbitration proceedings.
4. The arbitration proceedings culminated into an award by which:
  - a) the claims raised by the Claimants was dismissed; and
  - b) the Claimants were directed to pay costs, *inter-alia* to SBS.
5. SBS filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (“**Arbitration Act**”) against TSA and the Claimants praying that TSA and the Claimants be directed to disclose details of their assets and bank accounts, furnish security to secure the costs awarded and that they be restrained from creating any third-party interest in respect of their unencumbered assets.

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<sup>1</sup> FAO(OS)(Comm) No. 59/2023 decided on May 29, 2023 by the Delhi HC.

## Finding of Single Judge

1. In the Section 9 proceedings, the Single Judge:
  - a) directed TSA and the Claimants to disclose their assets on affidavit; and
  - b) restrained TSA and the Claimants from creating third party rights in respect of their assets to the extent of the awarded amount.
2. The Single Judge held that:
  - a) Prima facie, having funded the Claimants TSA had a vested interest in the outcome of the arbitral proceedings.
  - b) A party, having funded the litigation for gain, could not escape the liability in case the result was contrary to its expectations.
  - c) A balance would have to be struck between the need to ensure access to justice through funding arrangements, and the cost that a defendant would bear in case the litigation fails due to being found meritless, as in the present case.
  - d) Prima facie, the costs levied under the Award were recoverable under the BFA.
3. The judgment of the Single Judge was challenged by TSA before the Division Bench, *inter-alia*, on the ground that it had no liability under the arbitral award and therefore no order could have been passed by the Single Judge against it.

## Finding of the Division Bench

The Division Bench set aside the judgment of the Single Judge as against TSA and held that:

1. A third party or a non-signatory to an arbitration agreement may be bound by an arbitral award only if it has been compelled to arbitrate and is a party to the arbitration proceedings.
2. Though SBS was aware that TSA was funding the arbitration proceedings, it did not implead TSA as a party to the arbitration nor did it seek any relief against TSA. Therefore, TSA could not be made liable in respect of the awarded amount.
3. The BFA did not provide for any liability on TSA to pay the costs of arbitration awarded against the Claimants.
4. Section 9 of the Arbitration Act is available in aid of enforcement of the arbitral award. Since the Award was not against TSA, it could not be enforced against TSA and consequently, no relief could be passed in the Section 9 petition against TSA.
5. There is no provision under the Code of Civil Procedure, 1908 or under any rule framed by the court which contemplates recovery of costs from persons who are not parties to the suit/action.
6. Third party funders play a vital role in ensuring access to justice. In absence of third-party funding, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due.
7. It is essential for the third-party funders to be fully aware of their exposure. They cannot be saddled with a liability which they have not undertaken. Any uncertainty in this regard would dissuade third party funders from fund litigation.

## JSA Comment

This is one of the few judgments on the issue of third-party funding in India. A significant amount of litigation is not pursued due to the costs involved in legal proceedings. This judgment should encourage third party funders to comfortably fund legal proceedings as per the terms of the funding agreement without the concern of being imposed of unknown liabilities.

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