

Supreme Court

Honorable Justice Dr. Anand Mohan Bhattarai

Honorable Justice Sushmalata Mathema

Order

Order Date: 2079/2/12 (corresponding to 26 May, 2022)

Case No.: 076-WO-0330

Case: Certiorari et.al.

Writ Petitioner: Mr. Raveesh Bafna, Executive Director (DIN 02962084) and authorized representative of Sanghi Brothers (Indore) Pvt. Ltd. a Company registered under the Indian Company Act, 1956, located at 6 Manoramaganj, Indore – 452001

Vs.

Respondent: High Court, Patan, Lalitpur et.al.

- It is seen that India has entered a reservation to the New York Convention, that in order to obtain the status of reciprocity, Indian law requires the relevant matter to be listed in the Official Gazette, and that Indian courts have acted in accordance with this legal provision. India's legal framework has not recognized reciprocity in relation to Nepal, and the authority to determine whether reciprocity exists lies with the Central Government of India. As that authority has not been exercised and no notification has been published in the Official Gazette, there is no basis to be satisfied that an award rendered by an Indian arbitrator meets the requirements of Section 34 of Nepal's Arbitration Act, 2055. In such a situation, the argument advanced by the petitioner that Nepal could ignore the reservations made by India under international law and the provisions of the Indian Arbitration Act, 1996, and apply other unrelated laws to approach the Indian courts; or that an award made in Nepal can be enforced in India on the basis of reciprocity cannot be accepted.

(Para 10)

On behalf of the writ petitioner: Learned advocate duo Mr. Yadab Prasad Dhungana and Mr, Saroj Shrestha

On behalf of the Opponent: Learned Senior Advocate Mr. Purnaman Shakya and Mr. Niranjan Acharya and Learned Advocate Mr. Jagat Shrestha, Mr. Raju Shakya and Mr. Bheshraj Neupane

Precedents Cited:

Relevant Laws:

- Arbitration Act, 2055

Order

Justice Ananda Mohan Bhattarai: The summary of the facts and the order relating to the present writ petition submitted within the jurisdiction of this court pursuant to Article 46 and Article 133 (2) of the Constitution of Nepal are as follows:

Fact Section

An MOU was executed on 17 July 2013 between the Indian company Sanghi Brothers (Indore) Pvt. Ltd. as the purchaser and the Nepali company Prabhu Helicopter Pvt. Ltd. (formerly known as Muktinath Airlines Pvt. Ltd.) as the seller for the purchase and sale of a helicopter (“a helicopter R44 Raven II, Serial No. 13006; Registration 9N AJW”). A dispute arose regarding the implementation of the said MOU, and, in accordance with the dispute-resolution clause contained therein, the matter was submitted for arbitration pursuant to the Indian Arbitration and Conciliation Act, 1996. By the Judgment/Order of 15 October 2015 of the Hon’ble Supreme Court of India rendered by the then Honorable Justice Ranjan Gogoi (now Chief Justice), the dispute was referred to Justice Mukul Mudgal (Former Chief Justice, Punjab & Haryana High Court) for adjudication. In the said dispute, the arbitral award directed that the respondent, Prabhu Helicopter Pvt. Ltd., shall pay to the writ petitioner, Sanghi Brothers (Indore) Pvt. Ltd., the sum of INR 84,67,776 (Indian Rupees Eighty-Four Lakh Sixty-Seven Thousand Seven Hundred Seventy-Six only), together with an additional 2% annual interest over and above the prevailing rate of interest until the date of payment. Based on the revised arbitral award rendered by the Indian arbitrator on 27 December 2017 (2074/09/12 B.S.) at New Delhi, India, where both the petitioner and the respondent were duly represented, the petitioner sought enforcement of the awarded amount. Accordingly, on behalf of Sanghi Brothers (Indore) Pvt. Ltd., an application pursuant to Section 34 of the Arbitration Act, 2055, Rule 13 of the Arbitration Court Procedure Regulation, 2059, and Section 37 of the Mutual Legal Assistance Act, 207 was filed before the High Court, Patan, requesting enforcement of the said arbitral award.

The contents of the writ petition filed on behalf of Sanghi Brothers (Indore) Pvt. Ltd. before this court on 2076/07/04 (corresponding to) are as follows: For the purpose of enforcing a decision rendered by a foreign court, there existed no impediment to enforcing the said award under the Convention on the Recognition and Enforcement of Arbitral Awards, 1958 (New York Convention) to which both Nepal and India are signatories and pursuant to Section 34 of the Arbitration Act, 2055. While the matter seeking enforcement of the award was still under consideration before the High Court, Patan, the respondent approached the District Court, Saket, New Delhi. The court held that jurisdiction over the matter lay with the High Court and, therefore, ordered that the application could not be proceeded with, returning it with a direction that an application may be filed before the appropriate forum within four weeks. Despite this, no application has been filed before the Indian High Court on behalf of the respondent Prabhu Helicopter Pvt. Ltd. There is no legal obstacle in India in enforcing an arbitral award, whether rendered in a reciprocating or non-reciprocating country through the Indian courts. The Central Government of India has also not issued or communicated any notification that would bar the enforcement in India of an arbitral award rendered in Nepal. Likewise, both Nepal and India are members of the SAARC Arbitration Council, and both countries have ratified the relevant agreement. In this context, the cooperative relationship maintained by both States indicates that there is no impediment to enforcing in India an arbitral award rendered in Nepal, nor in enforcing in Nepal an arbitral award rendered in India. In this situation, by the order dated 2076/03/24 (attested on 2076/04/28) issued by the Joint Commercial Bench of the High Court, Patan, it was held that the application seeking enforcement of the arbitral award dated 2074/09/12 (27 December, 2017) rendered by the Indian arbitrator, Justice Mukul Mudgal, could not be granted. As a result of that order, the petitioner’s constitutional and legal

rights guaranteed under Articles 18 and 25 of the Constitution of Nepal, 2072, Section 34 of the Arbitration Act, 2055, and Section 37 of the Mutual Legal Assistance Act, 2070, were infringed. In the absence of any other effective remedy for the enforcement of those rights, the petitioner seeks to have the order dated 2076/03/24 of the High Court, Patan, wherein it was determined that the revised arbitral award issued on 27 December 2017 (2074/09/12) in New Delhi, India, with representation of both the petitioner and the respondent, need not be enforced quashed by issuing an order of certiorari. The petitioner further seeks enforcement of the said arbitral award, keeping in view the application filed by Sanghi Brothers (Indore) Pvt. Ltd. before the High Court, Patan, Lalitpur, pursuant to Rule 13 of the Arbitration (Court Procedure) Rules, 2059, for enforcement of the award. Additionally, until the final disposal of the appeal and Application No. 17, filed before this Honorable court against the order dated 2071/09/30 issued by the then Appellate Court, Patan, the petitioner prays that an interim order be issued pursuant to Rule 49 (1) (2) of the Supreme Court Regulation, 2074, directing the respondents not to undertake or cause to undertake any act contrary to the said order of 2071/09/30.

An order had been set aside by this court on 2076/07/07 (corresponding to) which reads as follows: What has transpired this matter? Provided, there are any grounds and reasons thereof, as to why the order should not be issued, respondent no. 1 is hereby ordered to submit a rejoinder through the Office of the Attorney General within 15 days excluding the period of travel and respondents no. 2 and 3 are hereby ordered to submit their rejoinder in person or through their representative and it is hereby ordered to provide a copy of the order and the writ petition along with the summon with notification to the Office of the Attorney General and to submit the case file upon receipt of the rejoinder or upon expiry of the limitation period.

The rejoinder submitted on behalf of High Court, Patan before this court on 2076/07/21 (corresponding to) reads as follows: In the present case, the application seeking enforcement of the arbitral award rendered on 2074/09/12 by the Indian arbitrator, Justice Mukul Mudgal, had already been finally adjudicated by this court through the order dated 2076/03/24, thereby disposing of the application. As no constitutional or legal right of the respondents had been infringed by that order, the issuance of an order of certiorari including mandamus as demanded by the petitioner is not warranted.

The rejoinder submitted by Icchha Bahadur Dangol, authorized representative of Prabhu Helicopter Pvt. Ltd., before this court on 2076/8/9 (corresponding to) reads as follows: Since both Nepal and India have signed the UN Convention on the Recognition and Enforcement of Arbitral Awards, 1958 (hereinafter referred to as the *New York Convention*), there is no dispute that both nations are parties to the Convention. However, it is likewise undisputed that, for the New York Convention to become effective within the respective States, the domestic legal arrangements adopted by each country are determinative. In this context, it is indisputable that with respect to Nepal, the provisions of Section 34 of the Arbitration Act, 2055 are applicable, whereas, with respect to India, Section 44 of the Indian Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Indian Arbitration Act) is applicable. The writ petitioner had filed an application before the High Court, Patan, seeking an enforcement of the award under the aforesaid legal provisions. The High Court, Patan, examined the matter and rendered an order determining whether enforcement of the award would be permissible under the relevant arbitration laws of Nepal and India. The writ petitioner has not been able to demonstrate that the High Court's interpretation of the legal provisions of Section 34 and Section 44 of the Indian legal provision otherwise. Subsection (2) of Section 34 of the Arbitration Act, 2055 specifies various provisions for the enforcement of an arbitral award. The said Subsection (2) under (a) to (f) enumerates various provisions and the High Court has held that from among the provisions enumerated from (a) to (f), the provision under (e) has not been fulfilled. Under this provision, enforcement is permissible where "the country whose law governs the person seeking

enforcement, or the law of the country where the arbitration took place, does not provide for any legal impediment to the enforcement of an arbitral award made in Nepal.” Pursuant to the Indian legal provision, in order to implement the arbitral award rendered in Nepal, In view of this, and since Indian law does not prohibit enforcement of an award made in Nepal, conditions prescribed under Section 44 of the Indian arbitration and Conciliation Act, 1996, must be fulfilled. Accordingly, the provision underlines that “In one of such territories, the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies”, and therefore, it is clear that, since the Central Government of India has not yet recognized the arbitral award made in Nepal for enforcement nor published a notification in the Official Gazette to that effect, an arbitral award made in India cannot presently be enforced under Nepalese judicial jurisdiction. Therefore, since there is no error in the High Court’s interpretation of the law in its decision dated 2076/03/24, the present writ petition is liable to be dismissed.

In this regard, the Court, by its order dated 2076/12/04, directed that the petitioner should disclose the provisions under Section 34 (2) (e) of the Arbitration Act, 2055, concerning the enforcement of an arbitral award made in Nepal in India, the status of reciprocity, produce any records, notifications, or other documents (if any) issued by the Government of India in this connection. The order further directed to submit pursuant to the rule cases of similar nature.

The submission made by Sanghi Brothers Pvt. Ltd. before this court on 2077/08/24 (corresponding to) is as follows: The legal framework in India for the enforcement of arbitral awards made in Nepal or any other foreign country is not non-existent. The Convention on the Recognition and Enforcement of Arbitral Awards, 1958 was ratified by India on 13 July 1960 and by Nepal on 4 March 1998. Accordingly, under Section 34 (2) of Nepal’s Arbitration Act, 2055 and Section 44 of India’s Arbitration and Conciliation Act, 1996, an arbitral award rendered in a foreign country is enforceable in both the countries. Under Section 44 of India’s Arbitration and Conciliation Act, 1996, an arbitral award made in a foreign country that has ratified the New York Convention can be directly enforced in India. For the purpose of enforcing an award made abroad, if the relevant foreign country is stated to have reciprocal provisions and the same is published in the Official Gazette, it indicates that the Indian Government has, in compliance with the conditions of the Arbitration and Conciliation Act, 1996, recognized the foreign State as having reciprocal status, thereby enabling the direct enforcement of an arbitral award made in that country.

For the purpose of enforcing an arbitral award made in a non-convention/non-reciprocating territory, the award itself may be annexed as the primary evidence. Alternatively, the award may first be converted into a judgment/decreed by a court of the country where the arbitration was conducted, and such judgment/decreed may then be included as the principal evidence. Thereafter, an enforcement proceeding can be initiated by filing a suit for the purpose of execution. Proceedings of a civil nature under the Code of Civil Procedure, 1908 (“the CPC”) are also applicable to a case where an arbitral award, or such award converted into a judgment/decreed, is filed as the principal evidence. Such an arbitral award or the converted judgment/decreed is deemed to possess evidentiary value under Section 86 of the Indian Evidence Act, 1872. Consequently, for the purposes of Section 34 (2) (e) of Nepal’s Arbitration Act, 2055, there appears to be no legal impediment to enforcing an arbitral award made in Nepal in India, or an arbitral award made in India in Nepal.

Further, in order to make the SAARC Arbitration Council (SAARCO) effective, each Member State has representation in SAARCO. For this purpose, India is represented by a Joint Secretary (Legal & Treaties Division) from the Ministry of External Affairs, while Nepal is represented at the Under-Secretary level from the Ministry of Law and Justice. Since both India and Nepal have been cooperating at international, regional, and bilateral levels to resolve disputes through arbitration and

to enforce arbitral awards made abroad, it is submitted that there is no legal impediment to enforcing an arbitral award rendered in India in Nepal, or an arbitral award rendered in Nepal in India.

An order had been set aside by this court on 2078/12/08 (corresponding to) directing the submission of the decision of High Court, Patan in the arbitral award rendered between Sanghi Brothers Pvt. Ltd. and Prabhu Helicopter Pvt. Ltd. (Case No. 074CB-0171), the original case file and to submit the same before the court upon receipt of the case files.

Decision of this Court

According to the rules, the present writ petition, listed in the daily cause list for adjudication, was presented before the Bench. Learned Advocates Mr. Yadab Prasad Dhungana and Mr. Saroj Shrestha, on behalf of the petitioner, Sanghi Brothers (Indore) Pvt. Ltd., argued that pursuant to the MOU dated 17 July 2013 between Muktinath Pvt. Ltd. and Sanghi Brothers, the helicopter to be sold was kept as collateral by Muktinath Airlines Pvt. Ltd. in a bank, which gave rise to a dispute under the agreement. In order to resolve the dispute, as provided in the MOU, the matter was submitted before the Indian arbitrator Justice Mukul Mudgal, who awarded Muktinath Airlines Pvt. Ltd. to provide for the compensation. When an application was filed before the High Court, Patan for enforcement of this award, the application was dismissed. The main objective of the SAARC Arbitration Council (SAARCO) is to “assist in the enforcement of arbitral awards.” Since both Nepal and India have representation in SAARCO, learned counsels submitted that the order dated 2076/03/24 of the High Court, Patan, refusing enforcement of the award of the Indian arbitrator, was unjust, and accordingly prayed that the said order be quashed and that an order of mandamus along with any other appropriate order be issued to facilitate the enforcement of the arbitral award.

Similarly, on behalf of the respondents, Learned Senior Advocates Mr. Purnaman Shakya and Mr. Niranjana Acharya, along with learned advocates Mr. Jagat Shrestha, Mr. Raju Shakya, and Mr. Bheshraj Neupane, submitted that, so far, there is no evidence on record, including the annexed certified copy, to show that the Central Government of India has recognized the arbitral award made in Nepal for enforcement and published a notification in the Official Gazette to that effect. Under Section 44 of the Indian Arbitration and Conciliation Act, 1996, an arbitral award made abroad cannot be enforced if it has not been gazetted. In this context, as the petitioner has not been able to establish otherwise, it is clear that the High Court’s decision that the award made by the Indian arbitrator pursuant to Section 34 (2) (e) of Nepal’s Arbitration Act, 2055, cannot be enforced is legally valid. The respondents submitted that, although the petitioner has referred to the establishment of the SAARC Arbitration Council, the Council is concerned only with treaties between States at the national/regional level and does not cover agreements or understandings between private individuals. Enforcement of an arbitral award made in India in Nepal falls under the legal provisions of Section 34 (2) (e) of Nepal’s Arbitration Act, 2055 and Section 44 of India’s Arbitration and Conciliation Act, 1996. Accordingly, the learned advocates argued that the writ petition should be dismissed.

After hearing the reasoned arguments of the learned counsels appearing on behalf of the petitioner and the respondents, and upon examining the record of proceedings along with the writ petition, it appears that the main questions for consideration are: whether an arbitral award made in India can be enforced in Nepal; whether the decision of the High Court, Patan, is erroneous; and whether the reliefs sought in the writ petition warrant issuance of the orders prayed for.

- 2 In order to address the above-mentioned questions, the present dispute appears to relate to the Memorandum of Understanding (MOU) dated 17 July 2013 executed between the Indian company Sanghi Brothers (Indore) Pvt. Ltd. as the purchaser and the Nepali company Prabhu Helicopter Pvt. Ltd. (formerly Muktinath Airlines Pvt. Ltd.) as the seller, for the purpose of

purchase and sale of a helicopter. A dispute arose between the parties regarding the implementation of the said MOU. In accordance with the dispute-resolution clause contained therein, the matter was submitted for arbitration under the Indian Arbitration and Conciliation Act, 1996 before Justice Mukul Mudgal (Former Chief Justice, Punjab & Haryana High Court). During the arbitration proceedings, which also included representation of the present respondent, Prabhu Helicopter Pvt. Ltd., the arbitrator awarded that the petitioner, Sanghi Brothers (Indore) Pvt. Ltd., shall be paid by the respondent, Prabhu Helicopter Pvt. Ltd., INR 84,67,776 (Indian Rupees Eighty-Four Lakh Sixty-Seven Thousand Seven Hundred Seventy-Six only), together with an additional 2% annual interest over and above the prevailing rate of interest until the date of payment. This award was rendered on 27 December 2017 (2074/09/12 B.S.). The petitioner, Sanghi Brothers (Indore) Pvt. Ltd., filed an application before the High Court, Patan for enforcement of the arbitral award. However, the High Court, Patan, dismissed the application on 2076/03/24, holding that the award rendered by the Indian arbitrator could not be enforced. Alleging that the said decision was legally erroneous, the petitioner sought to have the order set aside and sought for an order of mandamus directing the respondents to comply with the arbitral award dated 27 December 2017 (2074/09/12 B.S.) rendered by the Indian arbitrator. The petitioner accordingly filed the present writ petition before this court under Articles 46 and 133 of the Constitution of Nepal.

3. In this context, the primary question to be determined is whether an arbitral award rendered in India can be enforced in Nepal. To answer this, the existing laws of both Nepal and India, as well as the fact that both countries are parties to the relevant legal instruments, must be considered¹. Further, the petitioner has referred to the Agreement for the Establishment of the SAARC Arbitration Council, 2005, which was ratified by India on 28 December 2005 and by Nepal on 20 March 2007, and contended that, under this regional agreement, the award rendered by the Indian arbitrator must also be enforced. Accordingly, it is necessary to examine whether, in accordance with this agreement, the award rendered by the Indian arbitrator can be enforced in Nepal.
4. In this context, it must be clarified at the outset that, under Article 126 of the Constitution of Nepal, the judicial authority vested in the courts of Nepal is to be exercised in accordance with the Constitution, other laws, and the recognized principles of justice. This forms the foundation of our administration of justice. Theoretically as well, a court of a sovereign State must examine and base its determination of a dispute on its own Constitution and laws. The application of binding agreements entered into by the State is limited to the extent that such application is binding with the Constitution and the law. It is the basic principle that any State remains sovereign, and the meaning and implications of this principle cannot be ignored by domestic courts in the exercise of judicial authority. In the present dispute as well, this court cannot disregard the constitutional and jurisprudential context within which it must operate.
5. In the present dispute, it is noted that the petitioner, while filing the application before the High Court, Patan, sought the invocation of Section 34 of the Arbitration Act, 2055 for the enforcement of the award rendered in India by the Indian arbitrator. Under Subsection (1) of Section 34 of the Arbitration Act, 2055, it is provided that “the party seeking enforcement of an award made abroad shall submit an application to the High Court along with the following documents”, namely: (a) the original arbitral award or a certified copy thereof; (b) the original agreement or a certified copy thereof; and (c) a formal translation into Nepali provided, the arbitral award is not in the Nepali language. It is noted that the opponents have not disputed that

¹ There is no dispute between the parties that the said international convention was ratified by India on 13 July 1960 and by Nepal on 4 March 1998.

these conditions have not been fulfilled. The issue in dispute here pertains to Subsection (2) of Section 34 of the Arbitration Act, 2055. The subsection provides that: “Where Nepal is a party to any treaty governing the recognition and enforcement of arbitral awards made abroad, an arbitral award made in the territory of a foreign State party to such treaty, after the commencement of this Act, shall be recognized and enforced in Nepal in accordance with the provisions of the treaty and subject to the conditions set out below. The conditions specified are as follows: (a) the arbitration was conducted and the award rendered in accordance with the law and procedure specified in the agreement; (b) the parties were duly informed of the arbitration proceedings in a timely manner; (c) the award was limited to the matters submitted to the arbitrator under the agreement; and (d) the award has become final and binding under the law of the country in which it was made. It is noted that there is no dispute regarding the matters prescribed from (a) to (d). The principal dispute here relates to the main provision of Subsection (2) of Section 34 and the matters mentioned in clause (e) thereof, the interpretation of which has become necessary for the determination of the present controversy. In this context, Section 34 (2) (e) provides that: “If the law of the country of the party seeking enforcement, or the law of the country in which the arbitration was conducted, does not preclude enforcement, an arbitral award made in Nepal may be enforced.” In the present dispute, reading the main sentence of Subsection (2) together with clause (e), it is evident that Nepal is a State Party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), and India likewise is a Party to the same Convention. The arbitral award in dispute was rendered after both Nepal and India had become States parties to the Convention. This much is clear. However, with regard to the phrase in the main provision of Section 34 (2) — “subject to the provisions of the treaty and the conditions specified therein”—it is necessary to examine what conditions India, as a party to the Convention, has specified, and how those conditions are interpreted and applied under Indian law. This must be considered in light of the principles followed by the Convention as well as the legal framework under Indian law. The New York Convention recognizes the principle of reciprocity in the enforcement of arbitral awards between State parties. In general terms, under the principle of reciprocity, a State party to the Convention does not discriminate between arbitral awards rendered domestically under its own law and those rendered abroad under foreign law. On the basis of reciprocity, just as awards made through arbitration within its own territory are enforced in the territory of another State party, awards made abroad are also enforced in the State’s own territory. Sub-article (3) of Article 1 of the New York Convention further clarifies the principle of reciprocity, providing that a “State party, upon signing, ratifying, or acceding to the Convention, may declare that on the basis of reciprocity, it will recognize and enforce agreements made in the territory of another State party²”. Relying on this provision, when India ratified the Convention on 13 July 1960, it made two reservations³: (a) that only agreements concluded within the territory of a State party to the Convention would be recognized and enforced; and (b) that only arbitral awards arising out of disputes of a commercial nature would be enforceable. Due to the reservations made by India and the provisions enacted in its domestic law for implementing the Convention, so far India has recognized and enforced arbitral awards only from about four dozen States party to the New York Convention. While it is also argued on behalf of the respondents that there are

² When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

³ In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India." See <https://www.newyorkconvention.org/countries>

currently 170 States party to the Convention, learned counsels for the petitioner have been unable to refute or otherwise address this assertion in the course of arguments.

7. In this context, examining the provisions for the implementation of the New York Convention, it is observed that under Indian law, Part II of the Arbitration and Conciliation Act, 1996, titled “Enforcement of Certain Foreign Awards,” and Chapter I therein deals specifically with New York Convention Awards. Further, under Section 44 (2) of the same Chapter, even among States parties to the New York Convention, the federal government must be satisfied that reciprocal arrangements for enforcement of the Convention have been made in the concerned State, and it is mandatory that such recognition be published in the Official Gazette for the Convention to be applicable⁴. Accordingly, under Indian law, enforcement of an arbitral award made in Nepal requires compliance with the conditions set out in Section 44 of the Arbitration and Conciliation Act, 1996. That is, the central government of India must be satisfied that a reciprocal arrangement exists under Nepalese law, and must notify Nepal in the Official Gazette⁵, just as it does for other countries, in order for the award to be enforceable in India. However, under the said legal framework, there is no documentary evidence on record showing that India has notified Nepal in the Official Gazette for recognition of arbitral awards made in Nepal. In such circumstances, as per clause (e) of Subsection (2) of Section 34 of Nepal’s Arbitration Act, 2055, it must be concluded that there is presently no legal mechanism in place under which an arbitral award made in Nepal can be enforced in India. In other words, since the law of the country of the party seeking enforcement does not provide for enforcement of an arbitral award made in Nepal, it cannot be said that the Indian legal framework has recognized the principle of reciprocity in favor of Nepal.
7. On the one hand, the situation is as stated above; on the other hand, Nepal, by becoming a party to the New York Convention, has accepted the principle of reciprocity⁶. This means that Nepal has recognized the principle of reciprocity in deciding whether to recognize and enforce an arbitral award rendered in the territory of another State party. In accordance with this commitment made as a party to the Convention, Subsection (2) (e) of Section 34 of Nepal’s Arbitration Act, 2055, likewise bases the recognition and enforcement of an arbitral award on the principle of reciprocity. Nepal has not imposed any additional legal conditions beyond reciprocity. However, the requirement under Indian law to publish a notification in the Official Gazette for the implementation of the New York Convention prevents either country from being fully confident that equal status and reciprocity exist in the enforcement of the Convention in both jurisdictions.
8. The principle of reciprocity recognized by the New York Convention is by no means a novel principle. In ordinary terms, reciprocity refers to certain privileges or benefits granted with the expectation that the nationals of one country will receive the same treatment and advantages in

⁴ 44. Definition.—In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960— (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

⁵ It is also noteworthy that Section 85 of the Arbitration and Conciliation Act, 1996 repealed the Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940), and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961).

⁶ The Kingdom of Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state. The Government of Nepal further declares that the Kingdom of Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the law of the Kingdom of Nepal” See <https://www.newyorkconvention.org/countries>

another country as the nationals of that country enjoy. It is intended to facilitate smooth transactions between States and to ensure that, at a minimum, a country's own citizens receive equal treatment in the territory of another State, without giving rise to neglect, retaliation, or any unpleasant consequence. Even as a matter of international comity, the principle of reciprocity is thus acknowledged and accepted. The concern and relevance of reciprocity lie in equitability and mutuality. With the expectation of equitability and mutuality, most countries accept reciprocity in their international relations. For this reason, reciprocity has also evolved as an important principle in private international law⁷. However, notwithstanding the above, a legal question arises as to whether the condition of reciprocity exists or not, and legal consequences may follow based on that determination. In such circumstances, a court must examine and reach a conclusion on the matter in light of its own Constitution, domestic laws, and binding international agreements.

9. In this context, it appears that, at the time India ratified the New York Convention, it made certain reservations regarding reciprocity. Accordingly, Indian courts have treated the publication of a notification in the Official Gazette as a mandatory requirement to authenticate reciprocity under Indian law. If a foreign State has not been notified in the Official Gazette, the courts take the position that an arbitral award rendered in that State will not be enforced in India. In one case, it has been expressly held that, despite South Africa being a Party to the New York Convention, an arbitral award made in that country would not be recognized in India because South Africa had not been notified in the Official Gazette of India⁸.
10. In the context of the Indian legal framework and judicial practice, even after the filing of the present writ petition, this court, by order dated 2076/12/04, had directed that the petitioner to clarify the provisions in India regarding enforcement of an arbitral award made in Nepal under Subsection (2) (e) of Section 34 of the Arbitration Act, 2055, the status of reciprocity, produce records, notifications, or other documents (if any) issued by the Government of India in this regard. However, no response or documents showing that Nepal has been notified in the Official Gazette under Section 44 of the Indian Arbitration and Conciliation Act, 1996 were produced by the petitioner. Instead, the petitioner merely reiterated the contents already mentioned in the writ petition in their response. It is seen that India has entered a reservation to the New York Convention, that in order to obtain the status of reciprocity, Indian law requires the relevant matter to be listed in the Official Gazette, and that Indian courts have acted in accordance with this legal provision. India's legal framework has not recognized reciprocity in relation to Nepal, and the authority to determine whether reciprocity exists lies with the Central Government of India. As that authority has not been exercised and no notification has been published in the Official Gazette, there is no basis to be satisfied that an award rendered by an Indian arbitrator meets the requirements of Section 34 of Nepal's Arbitration Act, 2055. In such a situation, the argument advanced by the petitioner that Nepal could ignore the reservations made by India under international law and the provisions of the Indian Arbitration Act, 1996, and apply other unrelated laws to approach the Indian courts; or that an award made in Nepal can be enforced in India on the basis of reciprocity cannot be accepted.
11. In this context, it is noted that the petitioner has also relied on Section 37 of Nepal's Mutual Legal Assistance Act, 2070, as well as the SAARC Arbitration Council. As regards the Mutual Legal Assistance Act, 2070, although Section 37 provides for special enforcement of judgments

⁷ Young-Joon Mok, The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 21 Case W. Res. J. Int'l L. 123 (1989).

⁸ Swiss Singapore Overseas Enterprises Pvt. Ltd. v. M/V African Trader, High Court of Gujarat, India, 7 February 2005, Civil Application No. 23 of 2005.

from foreign courts, such enforcement requires a bilateral treaty under Section 3 (1) of the same Act. No records or documents were produced to show that such a treaty exists with India. Similarly, it is also noted that the petitioner had relied on the SAARC Arbitration Council. The Agreement for the establishing of SAARC Arbitration Council, 2005, concluded among South Asian nations, provides for the establishment of an Arbitration Council with the objective of promoting investment among Member states and developing a regional-level institutional arbitration mechanism for the protection of investors. The agreement also sets out the objectives, functions, powers, and duties of the Council. These matters are not relevant in the present dispute, and it is also not apparent that the said Agreement could have any impact on the New York Convention or the Indian legal framework. Consequently, it cannot be deemed that the conditions under Subsection (2) (e) of Section 34 of the Arbitration Act, 2055 are satisfied.

12. Accordingly, in view of the above-mentioned reasons, considering the legal frameworks of both countries, the New York Convention, and the reservations made by India therein, it is apparent that the award of a sole arbitrator made in India cannot be enforced in Nepal. Therefore, the award dated 27 December 2017 (2074/9/12 B.S.) issued by the Indian arbitrator Justice Mukul Mudgal cannot be enforced under Section 44 (2) of the Indian Arbitration and Conciliation Act, 1996 and Subsection (2) (e) of Section 34 of Nepal's Arbitration Act, 2055. In this context, the decision of the High Court, Patan, dated 2076/3/24, rejecting the petition, is in accordance with law, and there is no ground to issue the order as prayed for by the petitioner. The present writ petition is hereby quashed. It is hereby ordered to remove the writ petition from the case registry and upload the order electronically and to submit the case file to the Record Section.

Concurring with the above Opinion

Honorable Justice Sushma Lata Mathema

Bench Officer: Binita Bharati/Research Assistance: Diksha Dhital

Dated: Year 2079 of the Month of Jestha Date 12 Day 5

(corresponding to)