

Order for Security for Costs Against an Indian Party

- In English Proceedings

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n application for security for costs is a popular and effective tool employed by English lawyers, in English proceedings, to protect a

Defendant against the risk that the Claimant will not comply with an English Court Costs Order.

One of the grounds on which the Defendant can request the Court to make an Order for security for costs is on the basis that the Claimant is resident outside the Jurisdiction of the Courts of England and Wales.

An application for security for costs can therefore be made against a Claimant from India. However before an order for security for costs is made, the Defendant is required to satisfy the Court of two legal requirements:

First, there will be obstacles to or a burden of enforcement of a subsequent order for costs in the context of the particular foreign Claimant or Country concerned; and

Second, having regard to all the circumstances in the case, it will be just to make an Order for Security for Costs.

The first requirement is commonly known as 'the Nasser test'. It is usually difficult for a Defendant to persuade the Court to make an Order for security for costs in cases where the United Kingdom has reciprocal arrangements for recognition and enforcement of judgments with the foreign country concerned, or where the foreign

country has procedures in place for recognising English Court Judgments. The United Kingdom has such treaties in place with various Commonwealth and Common law Countries.

A few years ago my firm was involved in the case of Sadruddin Hashwani -v- Nurdin Jivraj [2010] EWCA Civ 83, in which Lord Justice Mummery of the Court of Appeal dismissed an application for security for costs and held that it would be unjust to make such an Order against a Claimant resident in Pakistan. He concluded this on the basis that the United Kingdom and Pakistan had a reciprocal arrangement for the enforcement of English Court Judgments. The applicant, Mr. Jivraj, argued that the political circumstances prevailing in Pakistan, including the suspension of senior members of the Judiciary by the Government, constituted an obstacle under the Nasser test. This argument was rejected by the Court and no Order for security for costs was made.

In so far the second requirement is concerned, the English Court takes into consideration various factors to decide whether it would be just to make an Order for security for costs. The English Court usually does not make an order for security for costs:

- Where the Claimant can prove that such an Order could stifle its claim. This is because Article 6 (1) of the European Convention on Human Right ('ECHR') confirms that everyone has a right to a fair trial.

- If, at the time of the application, the claim appears highly likely to succeed. However, the Court does not encourage parties to engage in detailed arguments over the merits of the case.

- In cases where the Defendant has made a Counterclaim and the same issues, as in the Claim, also arise on the Counterclaim. [W](#)



Kartik Mittal is a Solicitor at Zaiwalla & Co. LLP, and specialises in international commercial dispute resolution and arbitration. He has successfully represented Indian clients' including Indian Oil Corporation, PEC Limited, Nav Bharat International Limited and Tamil Nadu Electricity Board in their disputes in London.



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