

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 29th November 2018
Pronounced on: 17th December 2018

+

EFA (OS) 19/2017

ROYAL CONSTRUCTION COMPANY PVT. LTD. Appellant
Through: Mr. Sanjay Hegde, Sr. Advocate with
Dr. S. Ritam Khare & Ms. Urvi
Kuthiala Malik, Advocates.

versus

NATIONAL PROJECTS CONSTRUCTION Respondent
Through: Mr. Dhruv Mehta, Sr. Advocate with
Mr. Rajat Arora & Ms. Vishalakshi
Singh, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA**

JUDGMENT

Dr. S. Muralidhar, J.:

1. This is an appeal against an order dated 26th May 2017 passed by the learned Single Judge of this Court in Ex.P.131/2015 filed by the Appellant/Decree Holder ('DH') against National Projects Construction Corporation Limited ('NPCC') which is the Respondent/Judgment Debtor ('JD'). By the impugned order, the learned Single Judge has held that "for the purposes of conversion of US dollars to Indian Rupees, the exchange rate as prevalent on the date of the agreement dated (29.06.1982) would be applicable".

2. The background facts have been set out in some detail in the impugned judgment of the learned Single Judge. Nevertheless, for the purposes of the present appeal, they may be briefly recapitulated.

3. The DH entered into an agreement dated 29th June 1982 with the JD for execution of various construction works to be carried out in Iraq. The work was to be completed within 22 months. The contract value of the work was of the order of Iraqi Dinars ('ID') 7,83,834/- converted into US Dollars ('USD') at the agreed rate of exchange of ID 1 = USD 3.37778.

4. The above rate of exchange was to remain constant for all payments during the currency of the contract. Disputes arose between the parties primarily on account of the inability of the work to proceed on account of the ongoing war between Iran and Iraq at the relevant time. Pursuant to the arbitration clause in the agreement, the disputes were referred to arbitration in 1991. The sole arbitrator rendered a final Award, nearly 20 years after the agreement, on 10th August 2002.

5. *Inter alia*, in terms of the said Award, the JD was required to pay the DH ID 2,23,777.14/- along with interest @ 12% p.a. from the date of the commencement of arbitration proceedings, i.e. 26th September 1988, up to the date of payment. The JD was also to pay the DH Rs.20,00,000/- along with interest @ 12% p.a. in respect of one claim arising from the Bank Guarantee ('BG') encashed by the JD. It was further directed that "the amount payable in ID shall be convertible into USD as per the original agreement dated 29th June 1982. It was further directed that "all payments of settlement in foreign exchange shall be made as per original agreement

and Government rules”.

6. The JD challenged the Award in a petition under Section 34 of the Arbitration and Conciliation Act 1996 ('1996 Act'). That petition, OMP No.374/2002, was dismissed by a learned Single Judge by an order dated 26th May 2008. The JD then appealed to the Division Bench (DB) by way of FAO (OS) 589/2009. By an interim order dated 26th November 2009, the DB directed the JD to deposit the principal amount, pursuant to which, a sum of Rs.1,14,48,374.35/- was deposited by the JD “ostensibly towards the principal amount of the award”. By an order dated 9th March 2010, the DB directed this amount to be invested in a fixed deposit initially for a period of one year with automatic renewal. Later, the JD deposited a further sum of Rs.35,51,626/- thus depositing Rs.1.5 crores in all. This amount was thereafter released to the DH.

7. On 19th May 2014, the DB disposed of FAO (OS) 589/2009. At the outset, the DB noted in its order that counsel for the JD was, on instructions, pressing the appeal “limited to the rate at which learned arbitrator has awarded interest”. It was further stated that “challenge to the award on other grounds is given up”. The DB noted that 35% of the payment in terms of the contract had to be released in ID and the remainder had to be converted into USD at the agreed exchange rates of ID 1 = USD 3.37778.

8. In para 7 of the order dated 19th May 2014, the DB noted that counsel for DH stated that the DH would be happy to receive the payment in Indian rupees. It also noted that the JD had deposited the aforementioned sum of Rs.1,14,48,374.35/- by converting the awarded sum which was in ID to

USD by applying the formula of ID 1 = USD 3.37778 and multiplying the same as per the conversion rate of USD to Indian Rupee.

9. The further sum of Rs.35,51,626/- was also asked to be deposited because “an issue arose whether the appellant should deposit the principal amount by applying the conversion rate when the award was pronounced or of some other date”. The DB further noted that, by an order dated 8th November 2011, the amount deposited by the JD was directed to be paid to the DH subject to furnishing a security for restitution should the appeal succeed.

10. The question that arose before the DB was “on the subject of interest payable, which as per the award is 12% p.a.” According to the DB:

“Since the appellant is now paying to the respondent, the sum payable in Indian Rupees by converting the entire awarded sum, which is in Iraqi Dinars to US Dollars, at the agreed formula of 1 Iraqi Dinar equal to 3.37778 US Dollars, interest of justice would suffice if the agreed rate of interest is brought down to 6% per annum as per the award from the date thereof till payment.”

11. The DB then addressed itself to the question: “what should be the date fixed for conversion of US dollars amount into Indian Rupees?” The DB then answered the issue as under:

“We are of the opinion that the date of conversion should be the one when the award was pronounced on account of the fact that if the award was satisfied on said date the appellant would be paid 35% in Iraqi Dinar. Said 35% of the sum awarded would virtually have no value then and even today. As regards the remaining 65% paid by converting the Iraqi Dinar into US Dollars, the respondent would firstly have the benefit of a

virtually nil value Dinar being converted into valuable currency and thereafter payment being received in Indian Rupees.”

12. The appeal was disposed of in the above terms. The security furnished by the DH was discharged and the remaining amount as per the award modified by the DB was to be recovered by the DH from the JD on execution.

13. The review petition filed by the JD against the aforementioned order stood dismissed by the DB. Aggrieved by both orders, the JD filed Civil Appeal Nos. 2543-44/2015 in the Supreme Court. By an order dated 24th February 2015, the appeals were allowed and both orders passed by the DB were set aside by the Supreme Court. The operative portion of the said order reads as under:

“The issue that arises for consideration is whether the High Court should have fixed the date of conversion contrary to the agreement and contrary to the award which is in consonance with the agreement and further reduced the rate of interest. In our considered opinion, when the learned arbitrator had already, in clear terms, stated the date of conversion would be as per the original agreement dated 29.06.1982, the same could not have been changed. That apart, we do not see any justification to change the rate of interest as has been determined by the learned arbitrator. It needs no special emphasis to state that while dealing with an appeal from an order rejecting an application under Section 34 and the principles relating to arbitration. The High Court would not have passed such an Order terming it as "mid-way approach".

In view of the aforesaid, we allow the appeals and set aside both the orders passed by the High Court. Needless to emphasize, whatever the directions given in the award by the learned arbitrator shall govern the field. The amount that has

been deposited before this Court in pursuance of the order dated 08.12.2014 be refunded to the appellant. There shall be no order as to costs.”

14. Thereafter, Ex.P.Nos.131/2015 and 192/2015 filed by the DH along with the pending applications were heard by the learned Single Judge and the impugned order dated 26th May 2017 was passed, accepting the plea of the JD that for converting the awarded amount into Indian Rupees, “the date of conversion would have to be taken as the same, i.e. the date of the agreement”. In other words, the learned Single Judge accepted the plea of the JD that, according to the operative portion of the order of the Supreme Court, the date of conversion would be the date of the agreement itself, i.e. 29th June 1982.

15. This Court has heard the submissions of Mr. Sanjay Hegde, learned Senior Counsel appearing for the DH, and Mr. Dhruv Mehta, learned Senior Counsel appearing for the JD.

16. The issue with which we are concerned is the date of conversion from USD to Indian Rupees. Earlier, the DB had, by its order dated 19th May 2014, stated that this would be the date of the Award, i.e. 10th August 2002. However, that was set aside by the Supreme Court by observing that such a ‘mid-way approach’ was not acceptable.

17. A careful perusal of the order of the Supreme Court would reveal that there were two issues that engaged it. One concerned the rate of interest. In that regard, the Supreme Court stated that it did not see “any justification to change the rate of interest as has been determined by the learned Arbitrator”.

Strangely, this was an observation made in the JD's appeals before the Supreme Court. The JD was obviously not aggrieved by the DB lowering the rate of interest from 12% p.a. that was awarded by the Arbitrator to 6% p.a.

18. What the JD wanted to urge before the Supreme Court was that the date of conversion should be the date of the agreement itself, i.e. 29th June 1982. The question, therefore, is whether the Supreme Court actually accepted this plea of the JD?

19. Here, the Court finds that although the Supreme Court has set aside the order of the DB which stated that the date of conversion should be the date of the Award, it did not categorically accept the plea of the JD either that it is the date of the agreement which would be the date of conversion. The *ratio decidendi* of the order of the Supreme Court appears to be that the party should stick to the agreement. It is for this reason that it was stated to that "whatever the directions given in the award by the learned Arbitrator shall govern the field".

20. The Supreme Court did not specifically deal with the question as to what was the date of conversion from USD to Indian Rupee should be. According to it, the arbitrator had, in clear terms, stated that "the date of conversion would be as per the original agreement dated 29th June 1982" and in that view of the matter, "the same could not have been changed".

21. The learned arbitrator, in fact, did not speak of the date of conversion. He only spoke of the rate of conversion which was already fixed in the

agreement. He used that rate of conversion and in the final award in the operative portion stuck to specifying the awarded amount in ID (except the amount pertaining to the encashment of bank guarantee) and stated that this amount payable in ID “shall be converted into US Dollars as per the original agreement dated 29th June 1982”. Therefore, the arbitrator had no occasion to determine the relevant date of conversion from USD to Indian Rupees. Clearly, if one went by the Award, the date of conversion from ID to USD would not be the date of the agreement but the date of the Award. This was because the expression “as per the agreement” does not mean the date of the agreement itself. It only means that the conversion should happen in accordance with what the agreement envisages.

22. With the dispute between the parties being determined by the arbitrator only on 10th August 2002, clearly, the date of such conversion from ID to USD cannot be the date of agreement. The Supreme Court, in one sense, was therefore emphasizing what the Award had already determined, namely that the conversion from ID to USD had to be on the date of the Award with the rate of conversion already being fixed in the agreement itself.

23. To be fair to the DH, even they do not dispute that in order to calculate the awarded amount, the amount awarded by the arbitrator in ID had to be multiplied by the exchange rate, i.e. convert ID into USD at the rate already specified in the agreement of ID 1 = USD 3.7778.

24. The dispute actually arises only as regards the further conversion from USD to Indian Rupees. If, for the purposes of the conversion from ID to USD, the date of the Award was relevant, so would it be for the further

conversion from USD to Indian Rupees. This is perhaps what weighed with the DB of this Court when it passed the order dated 19th May 2014. With that order having been set aside by the Supreme Court, the question is again at large as to what should be the date for conversion from USD to Indian Rupees. This was not an issue dealt with by the arbitrator. The Supreme Court's order is clear that one has to follow only the Award passed by the arbitrator for this purpose.

25. To the Court, it appears that, in a 36-year old dispute, if one were to apply the doctrine of merger, the date that the Award would be seen to have attained finality would be 24th February 2015. That was the date when the Supreme Court categorically stated that “whatever the directions given in the award by the learned Arbitrator shall govern the field”. In other words, the Award was upheld in its totality by the Supreme Court.

26. The dispute which began in 1991 ended in 2015, i.e. after 24 years, in favour of the DH on merits. In the circumstances, to now hold that the relevant date for conversion from USD to Indian Rupees should be 29th June 1982, i.e. 20 years prior even to the date of the award, would be contrary to what was intended by the arbitrator. Certainly, as far as this Court can see, such a result was not envisaged by the order dated 24th February 2015 of the Supreme Court either.

27. Consequently, this Court is not able to agree with the learned Single Judge that, in the present case, the relevant date of conversion from USD to Indian Rupees should be 29th June 1982.

28. The doctrine of merger would certainly apply in a case of this nature with the award having been challenged first under Section 34 of the 1996 Act before the learned Single Judge, then before the Division Bench, and finally before the Supreme Court by the JD. If, therefore, the date of the Award, which itself is a decree under the 1996 Act, in effect is postponed to the date of it attaining finality, i.e. 24th February 2015, then that should be taken to be the date when the amount becomes payable and that would be considered to be the relevant date for conversion.

29. Considering that interim payments have also been made and, for the purpose of those payments, the rate that was applicable on the date of such payment was taken into consideration, in the considered view of the Court, it is the date on which the amount becomes payable that should be considered to be the relevant date for conversion from USD to Indian Rupees. In terms of the judgment in *Forasol v. Oil and Natural Gas Commission 1984 Supp(1) SCC 263* where a decree was passed in terms of foreign currency, the date of conversion would be as specified in the decree or on the date when such decree becomes final and enforceable.

30. For the above reasons, the Court sets aside the impugned order of the learned Single Judge.

31. The question that still requires to be answered is what is the relevant date for applying a rate of exchange of USD to Indian Rupees in terms of the Award. As already noted, the Supreme Court has set aside the earlier order of the DB of this Court which opined that it should be the date of the Award.

The Supreme Court observed that it should be in terms of the agreement. However, the agreement only envisaged payment in USD and not in Indian rupees. If the DH is prepared to accept payment in USD then obviously the awarded sum is easy to determine since the rate of exchange from ID to USD is already pre-determined. However, since the DH has agreed to receive payment in Indian rupees the question remains. In terms of the law declared by the Supreme Court in *Forasol v. Oil and Natural Gas Commission* (*supra*) since the Award, and the decree passed in terms thereof specifies the sum in USD, and the date of conversion having not been specified in the decree, would have to be the date when such decree becomes final and enforceable.

32. While in the normal course, that date would be that on which the appeals were finally disposed of by the Supreme Court thereby making the Award enforceable, i.e. 24th February 2015, the Supreme Court has by its order of that date observed that it had to be as per the original agreement dated 29th June 1982. As noted already, the said agreement is silent on conversion from USD to Indian rupees. It, therefore, becomes necessary for the parties to be permitted to get the issue clarified by the Supreme Court.

33. In the circumstances, while setting aside the impugned order of the learned Single Judge and disposing of this appeal, this Court in terms of Article 134-A of the Constitution read with Article 133 (1) (a) thereof grants the parties leave to appeal to the Supreme Court by certifying that this case involves the following substantial question of law of general importance which requires to be decided by the Supreme Court:

‘In terms of the agreement dated 29th June 1982 between the parties and in light of the judgment dated 24th February 2015 of the Supreme Court of India in Civil Appeal Nos. 2543-44/2015, what should be the relevant date for conversion of the awarded sum from USD to Indian rupees?’

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 17, 2018

mw