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

+ **EFA (OS) 18/2018 & CM APPL. 49130/2018 (for stay)**

**NATIONAL AGRICULTURAL COOPERATIVE
MARKETING FEDERATION OF INDIA LTD.**

.... Appellant

Through Mr. Sachin Dutta, Senior Advocate
with Mr. Sunil J. Mathews, Mr.
Aaditya Vijay Kumar, Ms. Liza
Baruah, Ms. Akshita Katoch, Ms.
Ayushi Kumar and Mr. Anurag
Tiwari, Advocates.

versus

ALIMENTA S.A.

..... Respondent

Through Mr. Arvind K. Nigam, Senior
Advocate with Mr. Shailendra
Swaroop, Ms. Aparajita Swaroop,
Mr. Mikhil Sharda and Mr. Mehtaap
Singh Sandhu, Advocates.

CORAM:

**JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA**

ORDER
28.11.2018

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Dr. S. Muralidhar, J.:

1. This is an appeal by the National Agricultural Cooperative Marketing Federation (NAFED), the Judgment Debtor (JD), against an order dated 31st October, 2018 passed by the learned Single Judge in EA (OS) 392 of 2017 filed by Alimenta S.A. the Respondent Decree Holder (DH) for a direction to the JD to deposit the decretal amount with interest.

2. There is a long history to the present appeal. However, since the impugned order has been passed at an interlocutory stage in the execution proceedings, a brief recapitulation of the facts is sufficient.

3. This is a 38-year old litigation and the end is nowhere in sight. The first contract between the parties was entered into on 12th January, 1980 whereby the JD was to export to the DH 5000 MTs of HPS groundnut @ US Dollar (USD) 765 per metric tonne (PMT). Only 1900 MTs came to be exported. A second contract was entered on 3rd April, 1980 for export of 4000 MTs of HPS Groundnut @USD 770 PMT. The said quantity was not supplied to the DH.

4. While the merits of the matter need not be discussed, the fact is that the DH instituted arbitration proceedings before the Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA), London against the JD for recovery way back on 13th February, 1981. Eight years thereafter, on 15th November 1989, FOSFA passed an Award directing the JD to pay the DH (a) USD 4,681,000 being the difference between the contract price of USD 765 Per MT plus USD 15 per MT for double bags; (b) settlement price USD 2275 Per MT plus USD 15PMT for double bags as damages; (c) with interest thereon at the rate of 10.5% from 13th February, 1981 to the date of the Award.

5. The JD's appeal to the Board of Appeal of FOSFA was disposed of on 14th September, 1990 whereby the JD was directed to pay the DH within 15 days from the date of the Award:

- (a) sum of USD 4,526,000 being the difference between the contract price of USD 765 PMT;
- (b) plus 15 PMT for double bags as damages with interest thereon;
- (c) with interest at the rate of 11.25% per annum from 13th February, 1981 to the date of the Award.

6. The DH then filed Suit No. 1885 of 1993 in this Court under Sections 5 and 6 of the Foreign Award (Recognition and Enforcement) Act, 1961 (FARE Act) seeking enforcement of the original and Appellate Awards. Seven years thereafter on 28th January, 2000 the Award was made a decree of the Court. As per the decree, the DH was entitled to the amounts determined by the Appellate Authority by the Appellate Award dated 14th September, 1990.

7. The JD then filed FAO (OS) No. 205 of 2000 against the above decree dated 28th January, 2000 before a Division Bench (DB) of this Court.

8. During the pendency of the said appeal, an interim order was passed by the DB of this Court on 28th February, 2001 which was taken in appeal by the DH to the Supreme Court. The order of the DB admitting the appeal was also separately challenged. By an order dated 5th April 2002, the Supreme Court disposed of both SLPs of the DH, on the condition that the JD shall deposit a Bank Guarantee (BG) for the principal amount within 8 weeks with the Registrar General of this Court, failing which the stay order dated 28th February, 2001 passed by the DB would stand vacated. Apparently this order was complied with.

9. On 9th September 2002, the DH filed an Execution Petition No. 204 of 2002 in this Court seeking execution of the decree dated 28th January, 2000 passed in Suit No. 1885 of 1993.

10. On 6th September 2010, ten years after the JD's appeal had been filed, this Court by a majority of 2:1 held that the said appeal FAO (OS) No. 205 of 2000 was not maintainable. Against the said order the JD filed a SLP (C) No. 28325 of 2010 (now Civil Appeal No. 665/2012) in the Supreme Court. Another SLP (C) 35065 of 2010 was filed by the JD challenging the original decree dated 28th January 2000 passed by the learned Single Judge.

11. In both SLPs on 24th January 2011, the following order was passed by the Supreme Court:

“On 25.10.2010 we had directed interim stay of the impugned judgment of the High Court subject to deposit of the amount due as per the award with further interest on the same rate within eight weeks with a further direction that the amount when so deposited shall be kept in a fixed deposit with a nationalised bank for a period of one year.

The petitioner-Federation has made an application for modification. They have prayed that the interim stay can be modified so that they can furnish bank guarantee instead of depositing the amount. Alternatively they have sought permission to deposit only the principal amount and sought dispensing of the requirement of deposit of interest.

The said application for modification is opposed by the respondent.

On the facts and circumstances, we are of the view that interest of justice would be served if the order is modified as under:

(A) The petitioner shall deposit 50% of the amount- due under the award with interest up to date within eight weeks from today.

(B) The petitioner shall furnish unconditional bank guarantee in favour of the Secretary General, Supreme Court of India for the remaining 50% of the amount to be in force for a period of one year initially and to be renewed thereafter until the disposal of the matter, within the said period of eight weeks. The bank guarantee to be furnished will be not only the 50% of the amount due as on date but also the interest that will I become due from one year from today.

(C) The respondent is permitted to draw the 50% amount that may be deposited by the petitioner subject to furnishing a similar unconditional bank guarantees for the same.

I.A. is disposed of accordingly.

List these matters in April, 2011 on a non-miscellaneous day.”

12. This was followed by an order dated 7th April 2011 of the Supreme Court in the above SLPs, which reads as under:

“The petitioner has filed an application (I.A.No.2 of 2011) for modification of the interim order dated 24.1.2011. We have heard learned senior counsel for both the parties. In place of the directions issued on 24.1.2011, we issue the following directions with reference to interim stay:

(a) The petitioner shall furnish a bank guarantee for the entire award amount and interest up to date within twelve weeks from today (less Rs. 22.5 crores of which the bank guarantee has already been furnished in favour of the Registrar, Delhi High Court).

(b) The Registrar, Delhi High Court is directed to enforce and

encash the earlier bank guarantee for Rs. 22.5 crores furnished by petitioner and release the said sum of Rs. 22.5 crores to the respondent subject to furnishing an unconditional bank guarantee for the said sum

In view of the above, the execution of the decree is stayed.

I.A.No.2 of 2011 is disposed of accordingly.

List the matter after two weeks.”

13. On 17th January 2012, while granting leave to appeal, the Supreme Court passed the following order in both SLPs:

“Heard Mr. Shanti Bhushan, learned senior counsel for the petitioner and Mr. S.K. Dholakia, learned senior counsel for the respondent.

Delay condoned.

Leave granted.

Hearing expedited.

Prayer for interim relief:

We wanted to know from Mr. Shanti Bhushan, learned senior counsel for the appellant as to whether the bank guarantee, as directed in clause (a) of the order dated April 7, 2011 passed by this Court, has been furnished by the appellant or not.

Mr. Shanti Bhushan replied in the negative.

In the circumstances, prayer for interim relief is rejected. The respondent shall be at liberty to enforce the decree dated January 28, 2000 passed by the High Court of Delhi.

I.A. No. 3 of 2011 in SLP (C) No. 28325 of 2010:

In view of the aforesaid order, I.A. No. 3 for modification of

order dated April 7, 2011 does not survive and is dismissed accordingly.”

14. In the meanwhile, noticing there was an error in the decree that was drawn up, with the amount payable to the DH being shown as USD 4526 only instead of USD 4,526,000 the JD moved an application for correction of the decree. After the correction was ordered by the learned Single Judge, that order was taken in appeal to the DB by the JD. Ultimately that appeal of the JD was also dismissed by the DB.

15. After this process was complete, pursuant to the liberty granted to it by the Supreme Court, the DH filed EA (OS) 392/2017 before the learned Single Judge of this Court in the pending Ex P 204 of 2002 seeking direction to the JD to deposit the decretal amount along with interest.

16. On the above facts three issues were identified by the learned Single Judge in the impugned order for being addressed:

(a) Upon which amount the interest @ 18% p.a. is payable viz., either upon the principal amount of \$4,526,000 or upon the consolidated amount viz. the principal amount coupled with interest @ 11.25% p.a. as on date of decree;

(b) The relevant date of the applicability of conversion rate; and

(c) The adjustment of the amount so deposited by the JD till date.

17. As far as issue (a) was concerned, the learned Single Judge noted the submissions of the JD on the basis of the judgment of this Court in ***Indian Oil Corporation Ltd. v. G. S. Jain and Associates* SCC Online Del 4700**, which held that interest be charged only on the principal amount as there was no provision to charge the interest upon interest in the Arbitration Act 1940 ('1940 Act'), the learned Single Judge noticed that the said judgment was premised on the earlier judgment of this Court in ***Pt. Munshi Ram v. DDA (2011) 163 PLR 20*** and of the Supreme Court in ***State of Haryana v. S.L. Arora (2010) 3 SCC 690***.

18. The learned Single Judge noted that the judgment in ***State of Haryana v. S.L. Arora* (supra)** stood overruled by a three-Judge Bench of the Supreme Court in ***Hyder Consulting (U. K.) Limited v. Governor State of Orissa (2015) 2 SCC 189***. It has now been clarified by the Supreme Court that interest is payable on the composite sum of principal plus interest. Issue (a) was answered in favour of the DH.

19. As regard issue (b), the learned Single Judge noted that the decree dated 28th January 2000 contained a direction that the JD "shall make payment of any loss on account of exchange variation between the date of Award and the date of actual payment." The learned Single Judge interpreted this to mean:

"27. This direction rather protects the decree holder at all times on account of exchange rate variation between the date of award and the date of actual payment and it makes sure the decree

holder do not lose any money on account of lengthy litigation as in the present case, viz. of more than 35 years.”

20. The learned Single Judge rejected the plea of the JD that the Supreme Court was yet to decide the validity of the Award, and since the LPA in this Court was held to be not maintainable, so the exchange rate as on the date of the decree i.e. 28th January 2000, should apply. The decision in ***Kunhayammed v. State of Kerala AIR 2000 SC 2587*** was held to be distinguishable on facts. Reference was made to the observations in the said judgment to the effect that the doctrine of merger was “not of universal application. The nature of the jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.” Reference was also made to the decision in ***Rishabh Chand Jain v. Ginesh Chandra Jain (2016) 6 SCC 675***. It was held that in the present case, “the judgment dated 06.09.2010 passed by the learned third Judge in FAO (OS) 205/2000 would be regarded as the appellate decree into which the trial Court decree dated 28.01.2000 in CS(OS) 1885/1993 stands merged.”

21. The learned Single Judge then discussed the decisions of this Court in ***Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. 194 (2012) DLT 439*** and ***Progetto Grano S.P.A. v. Shri Lal Mahal Ltd.*** (decision dated 29th May 2014 in Ex P 52 of 2012), both of which in turn discussed the decisions in ***Forasol v. Oil and Natural Gas Commission 1984 Supp***

SCC 263 and *Renusagar Power Co. Ltd. v. General Electric Co. 1994*

Supp (1) SCC 644. Thereafter, the learned Single Judge held as follows:

“35. Nevertheless, even the date of dismissal of appeal would not be of much relevance since in the present case the award protects the petitioner from any losses on account of variation in the exchange rate from the date of award till the date of payment and hence there shall be no impediment if exchange rate as of today is taken and the judgment debtor is directed to deposit the amount of award viz. the principal amount plus interest on date of decree with interest @18% p.a. calculated upon such consolidated sum. This shall, perhaps also act as a warning against protracted litigation as this one. The issue (b) is decided accordingly.”

22. As regards issue (c), the learned Single Judge deferred the case to 30th November 2018 for arguments and asked the DH to submit calculations in terms of para 35 of the impugned order.

23. This Court has heard the submissions of Mr. Sachin Datta, learned Senior counsel for the JD and Mr. Arvind Nigam, learned Senior counsel for the DH.

24. On issue (a), Mr. Datta contested the decision on the first issue on the basis that the judgment in *Hyder Consulting (U. K.) Limited (supra)* interpreted the expression ‘sum’ in the context of Section 31 (7) of the Arbitration and Conciliation Act 1996 (the A&C Act) whereas in the present case Section 29 of the 1940 Act would apply.

25. In reply, it is pointed out by Mr. Nigam for the DH that the governing law as far as the present arbitration is concerned is the English law. This was never questioned by the JD at any point of time. He referred to the

earlier round of litigation whereby this issue was settled. He pointed out that this was the reason why the DH sought enforcement of the decree under the FARE Act.

26. Undoubtedly in the present case we are dealing with a foreign Award passed in an international commercial arbitration adjudicating disputes arising between the DH and JD from the first of the two contracts entered into on 12th January 1980. In an earlier round of litigation between the parties the JD had sought to refer the disputes arising from both the contracts i.e. the first one dated 12th January 1980 and the second one dated 3rd April 1980 to arbitration by filing applications in this Court under Section 33 of the 1940 Act. By an order dated 11th December, 1981 a learned Single Judge of this Court accepted the plea of the JD as regards maintainability of the application only as regards the second contract dated 3rd April, 1980. However, as regards the first contract dated 12th January 1980, it was held that it was governed by the Arbitration Clause incorporated therein and only the English law applied. Both the DH and JD filed appeals before the Supreme Court both of which were dismissed by the Supreme Court in *Alimenta S.A. v. NAFED (1987) 1 SCC 615*. The decision of the learned Single Judge of this Court holding that the 1940 Act did not apply to the disputes arising from the contract dated 12th January 1980 was upheld.

27. Mr. Datta contends that while the 1940 Act may not apply to the Award which is a foreign one, Section 4 (1) of the FARE Act states that for the purpose of enforcement a foreign award shall be treated as if it were an

Award on a matter referred to arbitration in India. Therefore, according to him, for the purpose of interest Section 29 of the 1940 Act would apply.

28. The present round of litigation concerns the enforcement of a foreign Award which decides the disputes between the DH and JD arising of the first contract dated 12th January 1980 in favour of the DH. Once it has been held by the Supreme Court in this very case between the parties that the disputes would be decided in accordance with the English law and not the 1940 Act, the question of invoking the 1940 Act only to decide whether interest is payable only on the principal sum or the composite sum of principal plus interest does not arise. Section 4 (1) of the FARE Act cannot, and does not bring in the 1940 Act for the purpose of calculating the interest payable. That is an issue pertaining to the substantive Award and the amount payable thereunder and does not pertain to its enforceability which issue alone is dealt with under the FARE Act.

29. The learned Single Judge has rightly held that after the decision in *Hyder Consulting (U. K.) Limited v. Governor State of Orissa* (*supra*), the earlier decision in *State of Haryana v. S.L. Arora* (*supra*) relied upon by this Court in *Indian Oil Corporation Ltd. v. G. S. Jain and Associates* (*supra*) was no longer good law. The reasons given by the learned Single Judge in accepting the plea of the DH as far as issue (a) is concerned are valid and call for no interference.

30. Turning to issue (b), Mr. Datta reiterated the submissions before the learned Single Judge that the relevant date for applying the rate of

exchange had to be the date of the decree since the doctrine of merger would not apply where an appeal was held to be not maintainable.

31. It must be recalled that in this case, the appeal of the JD on the merits of the Award is pending decision in the Supreme Court. In that sense the question of actual merger of the decree with the judgment of the Supreme Court is an uncertain event in the future. In the 38 years of the dispute nothing has been paid to the DH till date despite the Award in its favour being made a decree of the Court way back on 28th January 2000. The logical extension of the submission of Mr. Datta would mean that a JD by filing one appeal after the other can indefinitely postpone the calculation of the decretal amount and claim that till the appeal are finally decided, the decretal amount cannot be calculated and nothing requires to be paid. In the facts of the present case, such an argument cannot be accepted as it goes against the very spirit of the orders passed by the Courts, including the Supreme Court from time to time.

32. It will be recalled that on three occasions during the pendency of its SLPs before the Supreme Court, interim orders were passed in favour of the JD conditional upon it fulfilling the terms to which it was subject by those orders. Except depositing in this Court a sum of Rs. 22.50 crores pursuant to an order dated 5th April 2002, the JD has never been unable to comply with the conditions imposed by the interim order dated 25th October 2010 modified by the interim orders dated 24th January and 7th April 2011 of the Supreme Court. This led the Supreme Court to specifically permit the DH, by its order dated 17th January 2012, to proceed

to enforce the decree without subjecting the DH to any conditions. The unstated premise was that payments made to the DH would be subject to the final outcome of the appeals.

33. In this scenario, the plea that the rate of exchange would be that applicable on the date of the decree dated 28th January 2000 cannot be countenanced and was rightly rejected by the learned Single Judge. With the date of final decision of the Supreme Court in the pending appeals being an uncertain one and not in the near future, the decision of the learned Single Judge that it should be that applicable on the date of the impugned order appears to be a fair and reasonable one.

34. Accordingly, this Court finds no grounds to interfere with the well-reasoned order dated 31st October 2018 of the learned Single Judge.

35. Before concluding it requires to be noted that when this appeal was first heard on 27th November 2018, Mr. Datta appearing for the Appellant sought a day's time to seek instructions if the Appellant was prepared to deposit in this Court the entire amount owed to the DH in terms of the impugned order of the learned Single Judge within a particular time frame, as a condition for the Court to consider the appeal and keep in abeyance the enforcement of the decree. Today, Mr. Datta informed the Court that his instructions were that the JD would not be able to deposit the above sum. The Court then proceeded to hear the appeal on merits.

36. The appeal and the application for stay are dismissed.

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37. Exemption allowed subject to all just exceptions.

38. A copy of this order be given *dasti* to learned counsel for the parties.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

NOVEMBER 28, 2018

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