Via video conferencing

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

Date of Decision:- 02.09.2020

\+ E.A. 679/2019 & I.A. 6946/2019 in OMP (ENF.) (COMM.) 31/2019

KAL AIRWAYS PVT. LTD. ..... Decree Holder

Through Mr.Maninder Singh, Sr.Adv. & Mr.ASL Sundaresan, Sr.Adv with Ms.Nandini Gore, Ms.Natasha Sahrawat, Mr.Raghvendra Pratap Singh, Mr.Jasvir Singh Sabharwal, Mr.Prabhas Bajaj, Advs.

versus

M/S SPICEJET LTD. & ANR. ..... Judgement Debtor

Through Mr.Neeraj Kaul, Sr.Adv & Mr.Abhinav Vashisht, Sr.Adv. with Mr.Atul Sharma, Mr.Abhishek Sharma, Mr.Abhinav Sharma, Mr.Kashish Arora, Mr.Samar Kachwaha, Mr.Kapil Rustagi, Mr.Ramachandra Madan, Ms.Akshita Sachdeva, Advs.

\+ E.A. 680/2019 & I.A. 6947/2019 in OMP (ENF.) (COMM.) 32/2019

MR. KALANITHI MARAN ..... Decree Holder

Through Mr.Maninder Singh, Sr.Adv. with Mr.ASL Sundaresan, Sr.Adv, Ms.Nandini Gore, Ms.Natasha Sahrawat, Mr.Raghvendra Pratap Singh, Mr.Jasvir Singh Sabharwal, Mr.Prabhas Bajaj, Advs.

versus

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Through Mr.Neeraj Kaul, Sr.Adv & Mr.Abhinav Vashisht, Sr.Adv. with Mr.Atul Sharma, Mr.Abhishek Sharma, Mr.Abhinav Sharma, Mr.Kashish Arora, Mr.Samar Kachwaha, Mr.Kapil Rustagi, Mr.Ramachandra Madan, Ms.Akshita Sachdeva, Advs.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. By way of this common order, four applications filed by the Decree Holder (DH), two each in the two enforcement petitions, one filed by M/s KAL Airways Private Limited and the other by Mr. Kalanithi Maran are being decided. Since the applications filed in the two petitions are similar in nature and both the enforcement petitions pertain to the same award, only the applications in OMP (ENF.) (COMM.) 31/2019 are being referred to for the sake of convenience.

2. Vide these two applications, being E.A. 679/2019 and E.A. 6946/2019, the DHs primarily seek a direction to the judgment debtors (JDs) to deposit the interest component of the awarded sum, with a further direction for deposit of upto date interest on the entire awarded sum. The DHs have also sought an additional prayer to restrain the JDs from allotting, transferring, issuing, alienating and/or pledging and/or creating any third-party interest and/or encumbrance over any of the promoter shares of the JD No.1 Company.

3. Before dealing with the rival submissions of the parties, it may be apposite to note the brief factual matrix as is relevant for adjudication of these applications. The DHs are the former promoters and majority shareholders of the JD No. 1 Company, an airline company, and were holding 58.46% stake therein. As the JD No.1 started facing financial difficulties from the year 2013, the DHs, being

desirous of reviving the company, entered into a Sale Purchase Agreement (SPA) with the JD No.2 on 29.01.2015. Under this agreement, besides other mutually agreed upon arrangements between the parties, the DH were to be allotted certain warrants and non-convertible redeemable cumulative preference shares (CRPS) in two tranches, the details whereof are not relevant for the purpose of deciding these applications. As the DHs were not issued the warrants and the CRPS in accordance with the obligations under the SPA, the DHs invoked arbitration and also preferred petitions under Section 9 of the Act before this Court being OMP(I) 71/2016 and 72/2016, *inter alia* seeking directions to the JDs to deposit a sum of INR 835 crores, which according to them, was the then value of these untransferred warrants and CRPS. These petitions were disposed of on 29.07.2016, by directing the JDs to deposit a sum of INR 579 crores with this Court, which amount, the Court found had been in fact paid by the DHs towards the value of the warrants and CRPS shares.

4. The JDs, being aggrieved with the aforesaid order directing deposit of a sum of INR 579 crores, approached the Division Bench by way of appeals under Section 37 of the Act being FAO(OS)(Comm) 61/2016 and 62/2016. Though the Division Bench did not find any merit in the appeals, the direction for deposit of INR 579 Crores was modified vide order dated 03.07.2017 by permitting the JDs to furnish a Bank Guarantee for a sum of INR 329 crores and making a cash deposit of the remaining sum of INR 250 crores. The JDs unsuccessfully challenged this order before the Hon'ble Supreme Court and, consequently, secured the amount in accordance with the

directions of the Division Bench. After these amounts had been secured, the arbitration between the parties resulted in an award dated 20.07.2018, whereunder the claims of the DHs and some counterclaims of the JDs were allowed with the following directions:

> *"60. The SSPA dated 29.01.2015 is the mother agreement and constitutes the entire agreement between the parties. It only needs to be noted that the Claims of the Claimants and the Counter Claim by the Respondent have their matrix on the SSPA dated 29.01.2015. Therefore, the stand about non-arbitrability and/ or Jack of jurisdiction of the Tribunal is without any substance. In effect and essence, it is held that the Claims/Counter Claim arising from and in relation to the SSPA are within the jurisdiction of the Tribunal.*
>
> *In conclusion, we hold as follows:-*
>
> *(l) The Claimants are entitled to refund of Rs.308,21,89,461/- from the Respondents.*
>
> *(2) The parties shall explore the possibility of giving effect to and exercise the option as described in detail. In case the efforts do not fortify, the Respondents shall within a period of one month thereafter refund the amount in question i.e. Rs.270,86,99,209/- to the Claimant No. 2 (which is arrived at after adjusting the counterclaim of Rs.100 Crores which has been allowed)*
>
> *(3) Since the amount covered by conclusion (1) was with the Respondents since November 2015, they would have become liable to pay interest on the same Though, interest at the rate of 18% per annum has been claimed, we are of the view that since Respondent No.1 Company took over a huge liability and also paid interest on the tax amount payable by the Claimants, interest at the rate of 12% on Rs.308,21 ,89,461/- would be appropriate. The amount has to be accordingly calculated for about 30 months. Additionally, in view of the finding relating to the CRPS claim and the proved position that the Respondents have paid interest / servicing charges of around Rs.29 Crores, the counter claim to that extent is allowed.*
>
> *(4) So far as costs are concerned, in view of the factual scenario involved, both parties are directed to bear their respective costs. The Cost of Arbitration (fee of Arbitrators, expenses including travel., hotel expenses etc. of the Arbitrators, venue and Secretarial*

assistance) shall be borne equally by the parties.

(5) In case the payments, as directed, to be made by the Respondents are not so made within two months from the relevant date, the Claimants shall be entitled to interest @ 18% from the last date of the due date in terms of this Award.

(6) Claims / counter claims other than those dealt with above and specifically granted stand rejected.

(7) The parties have furnished stamp papers ofRs.500/- each with undertaking to pay the deficit, if any, as and when called upon to do so.

(8) The place of Arbitration is declared to be New Delhi .

Signed by Members of the Tribunal on the 20"1 day of July, 2018. Pronounced at New Delhi on 20th day of July, 2018."

5. As is evident, the Arbitral Tribunal granted two months' time to the JDs to pay the sum of INR 308,21,89,461/- to the DHs along with pre-award and *pendente lite* interest @ 12% p.a. w.e.f. 01.11.2015. The Arbitral Tribunal also directed the JDs to refund the sum of INR 270,86,99,209/- paid by the DHs towards the value of warrants within a period of one month from the date on which the parties come to a conclusion that the options exercised by the DH could not be acted upon. Admittedly, the options exercised by the DHs for issuance of warrants could not fructify and, therefore, this amount of INR 270,86,99,209/- became payable w.e.f. 01.09.2018, while the sum of INR 308,21,89,461/- along with pre-award and *pendente lite* interest @ 12% p.a. became payable on 21.09.2019. The award also stipulated that incase the JDs failed to make payment within the prescribed time, the DHs would also be entitled to post-award interest @ 18% on the sum awarded.

6. The award has been challenged both by the DHs and the JDs, which challenge is pending consideration before this Court in a batch

of four petitions, including OMP (COMM) 450/2018. The challenge to the award by the DHs is primarily on account of non-restitution of their shareholding and non-grant of pre-award and *pendente lite* interest accruing on the sum of INR 270,86,99,209/-, while the JDs are aggrieved by direction of refund of the aforesaid sum of INR 270,86,99,209 as also the by award of interest in favour of the DHs. It is an admitted position that the operation of the award has not been stayed in any of the four petitions.

7. Since this Court did not grant a stay of the Award dated 20.07.2018 in any of the Section 34 petitions, the present enforcement petitions came to be filed on 15.02.2019. When the present enforcement petition was taken up for consideration for the first time on 25.03.2019, having been adjourned on 19.02.2019 at the request of the DH, the JDs informed the court of the pending settlement talks between the parties. In order to prove its bonafide, the JDs also suggested that the sum of INR 250 crores it deposited with this Court, pursuant to the orders of the learned Division Bench in FAO (OS)(Comm) 61/2016 and 62/2016, be released to the DH subject to an undertaking furnished by the DH that incase the settlement talks failed and this Court directed repatriation of this amount, the same would be duly effected within the time granted by this Court. The amount of INR 250 crores was thereafter released in favour of the DH. On 06.05.2019, the DH moved the present application being EA. 6946/2019 seeking a direction to the JDs to deposit the shortfall of INR 276 crores. As per the DH, this amount comprised of INR 100 crores towards the shortfall in the principal amount deposited as also a

sum of INR 1,76,68,79,708.05/- payable towards interest on the awarded sum calculated till 13.05.2019.

8. When these applications were listed before this Court on 06.05.2019, the parties were granted time to explore the possibility of an amicable settlement, but on 31.07.2019, when it transpired that no settlement was possible, the court issued notice in this application as also in the enforcement petitions. On the next date, the Court, after noticing the fact that there was no challenge by the JDs to the award of INR 308,21,89,461/-, as also the fact that the DHs had been paid a sum of INR 250 crores, accepted the DHs' plea that the JDs should be directed to pay a further sum of INR 58,21,89,461/- to the DH. Consequently, on 20.09.2019, this Court directed Yes Bank, which had issued the bank guarantees at the request of the JDs, to release this sum in favour of the DHs by deducting the same from the bank guarantee. With these directions, this Court disposed of these enforcement petitions by granting liberty to the DHs to file a fresh petition once the Section 34 petitions were decided. Notably, liberty was also granted to the DH to approach the Court in case there was any change in the status of the JDs.

9. Barely twenty days after the disposal of the enforcement petition, the DHs once again approached this Court by way of E.A. No. 679/2019 filed on 11.10.2019 with a grievance that the JDs were planning an initial public offer (IPO) for its cargo unit and that the creation of a subsidiary company for this purpose would seriously impact the current equity capital ratio of the JDs. The DHs plea was that this creation of an IPO would constitute a major change in the

state of the JD No.1 and, therefore, notice was issued in this application on 15.10.2019, to which the parties filed their reply and rejoinder. Although the hearing was deferred till 28.01.2020, but the matter was adjourned to 26.03.2020 at the joint request of parties. However, by 26.03.2020, the regular functioning of the Court was suspended on account of the global pandemic and the matter could not be taken up thereafter. In these circumstances, the DHs, on 06.08.2020, preferred the applications seeking early hearing of their earlier applications and also sought a direction to the JDs to deposit a sum of INR 360 crores with this Court. In view of the no objection given by the learned counsel for the JDs as also the grievance raised by the DHs that the JD No.1 had suffered huge losses in the last one year and EA No. 6946/2019, after being revived, was directed to be listed today along with E.A. No. 679/2020. Consequently, both the applications have been taken up for consideration today.

10. In support of these applications, learned senior counsel for the Decree Holders have primarily urged that once there is no stay of the award, there is no reason as to why the JDs should not be directed to deposit the entire sum awarded by the Tribunal along with up to date interest accruing on the entire awarded sum. By placing reliance on the decision of the Hon'ble Supreme Court in ***Hyder Consulting (UK) Ltd. Vs. Governor, State of Orissa*** *(2016) 6 SCC 362*, Mr Maninder Singh, learned senior counsel submits that the *total sum awarded* by an Arbitral Tribunal would include pre-award and pendente lite interest, if any, awarded by the Tribunal and, therefore, the JDs ought to be directed to deposit the entire awarded sum and not merely the

sum of INR 579 crores, which amount was awarded only against the main claims. He, thus, contends that the pre-award and pendete lite interest @ 12% p.a. on the sum of INR 308,21,89,461/- for the period between 01.11.2015 and 20.07.2018 which is 1,00,62,29,304.58/-, would qualify as a part of the total sum awarded by the Tribunal. Mr. Singh further submits that the JDs are also liable to deposit the upto date post-award interest accruing on the total sum awarded. It is further submitted that the JDs are liable to pay interest @ 12% p.a. w.e.f. the date of the passing of the award, 21.07.2018, till 20.09.2018, i.e., the period of two months granted by the Tribunal to the JDs to pay the awarded amount. The JDs are thereafter liable to pay interest @ 18% on the entire awarded amount of INR 270,86,99,209/- and INR 308,21,89,461/-. He submits that the up to date interest in respect of the payment of sum of INR 308,21,89,46/- works out to INR 1,68,99,42,764.18 while the interest payable on the sum of INR 2,70,86,99,209/-, wherein only the post-award interest has been allowed, works out to INR 97,78,03,308.98/-. For this purpose, a detailed chart setting out the calculations was handed over in Court, which has been taken on record and produced hereinbelow.

Calculation as per the DH						
Warrants:				*Period of Calculation*		
Amount to be received:			***3,08,21,89,461.00***			
Partially received on 30th April 2019			***2,50,00,00,000.00***			
Amount Received on 4th October 2019			***58,21,89,461.00***			

Balance to be received		***A***	-			
Date of the Orders:		*20th July, 2018 & 20th September 2019*		***Start Date***	***End Date***	***No. of Day-s***
Interest payable @ 12% from 1st November 2015 to 20th July 2018	***3,08,21,89,461.00***	*993*	*1,00,62,29,304.58*	*01-Nov-15*	*20-Jul-18*	*993*
Interest payable @ 12% from 21st July 2018 to 20th September 2018	***3,08,21,89,461.00***	*62*	*6,28,25,998.88*	*21-Jul-18*	*20-Sep-18*	*62*
Interest payable @ 18% from 21st September 2018 to 30th April 2019	***3,08,21,89,461.00***	*222*	*33,74,36,413.32*	*21-Sep-18*	*30-Apr-19*	*222*
Interest payable @ 18% from 1st May 2019 to 4th October 2019	***58,21,89,461.00***	*157*	*4,50,75,819.64*	*01-May-19*	*04-Oct-19*	*157*
Total Interest Receivable upto 4th October 2019		***C***	***1,45,15,67,536.42***			***1277***
Interest for non-payment of the above interest:(Till 1st September 2020)	*1,45,15,67,536.42*	***F***	*23,83,75,227.76*	*05-Oct-19*	*01-Sep-20*	*333*
Total:(A+C+F)			***1,68,99,42,764.18***			
CRPS:				*Period Calculation:*		
Amount to be		***B***	***2,70,86,99,2***			

Signature Not Verified
Signed By:GARIMA MADAN
Location:
Signing Date:05.09.2020
22:01:20

received:			***09.00***			
Date of the Orders:		*20th July, 2018*		***Start Date***	***En-d Dat-e***	***No. of Da-ys***
No Interest payable from 1st August'2018 to 31st August'2018		*31*	*-*	*01-Aug-18*	*31-Aug-18*	*31*
Interest payable @ 18% from 1st September 2018 to 31st October 2018		*61*	*8,14,83,609.08*	*01-Sep-18*	*31-Oct-18*	*61*
Interest payable @ 18% from 1st November 2018 to 01st September 2020		*671*	*89,63,19,699.90*	*01-Nov-18*	*01-Sep-20*	*671*
Total Interest Receivable upto 01st September 2020		***D***	***97,78,03,308.98***			***763***
Total:(B+D):			***3,68,65,02,517.98***			
SUMMARY:						
Principal Receivable - A						
Principal Receivable - B			*2,70,86,99,209.00*			
*Principal Receivable without Interest - E) *(Money Deposited in City Union Bank for the overdraft*			*1,00,00,00,000.00*			

facility availed by Spicejet Ltd.						
Total Principal Amount Receivable:(A+ B+E)			***3,70,86,99,209.00***			
Interest Receivable - C+F			*1,68,99,42,764.18*			
Interest Receivable - D			*97,78,03,308.98*			
Total Interest Receivable:(C+ F+D)			***2,66,77,46,073.16***			
Total Principal + Interest Receivable:			***6,37,64,45,282.16***			

11. By referring to this Chart, Mr. Singh submits that as against the sum of INR 679,71,17,974.58/- awarded by the Tribunal (which amount comprises of INR 308,21,89,461/- towards warrants+ 270,86,99,209/- towards CRPS+ INR 100,62,29,304.58/- towards interest component), the DHs have only received a sum of INR 308,21,89,461 and are yet to receive a sum of INR 371,49,28,513.58/- out of the awarded sum. It is further submitted that even though the JDs have furnished a bank guarantee for a sum of INR 270,86,99,209/-, they ought to be directed to deposit the entire amount of INR 371,49,28,513.58/-. He, thus, contends that not only should the JDs deposit the entire awarded sum, but also upto date post-award interest in terms of the directions of the Tribunal which, according to the DHs, is INR 68,37,13,459/- and INR 97,78,03,308.98/-.

12. It is submitted that even though the petition was initially disposed of on 20.09.2019, in view of the DH's apprehension that after disposal of the enforcement petitions, the JDs were likely to take steps to prejudice the rights of the DHs under the Award, liberty was granted to the DHs to approach the Court in the event of any subsequent development with respect to the status of the JD No. 1. It is submitted that immediately after the disposal of the petition, the JDs floated an IPO of the cargo unit of JD No.1 Company and since this action of the JDs would have seriously prejudiced the value of the DHs' shareholding therein, the DHs were compelled to approach this Court by way of the application being E.A. 679/2019. It is submitted that while this application was pending adjudication, the DHs learnt that the JDs had started suffering losses and were not even following the prescribed accounting standards, which became evident from their audit reports. It is further submitted that the DHs also had an apprehension that the JD No.1 was fudging its accounts and therefore it had no other alternative except to approach this Court for early disposal of its applications being EA 6946/2019 and 679/2020. It is submitted that the copies of the Auditor's reports placed on record by the DHs clearly shows that the JD No.1 is suffering huge losses and therefore there is every likelihood that even after the JDs' challenge to the award are rejected, the DHs may not be able to recover any amount from the JDs. It is submitted that the JDs' plea that in view of the order passed on 20.09.2019, DHs are not entitled to seek a prayer for deposit of the entire awarded sum with up to date interest , is liable to be rejected as the facts now brought on record clearly show that the

status of the JDs have changed in the meanwhile and, therefore, the DHs prayers strictly fall in line with the liberty granted to it by this Court while disposing of the petition. It is, therefore, prayed that, in line with the directions passed by the Apex Court and this Court in similar matter, the JDs ought to be directed to deposit the entire awarded amount along with up to date interest.

13. On the other hand, learned counsel for the JDs have vehemently opposed the applications by urging at the outset that the present applications are barred by the doctrine of res judicata. Once this Court had disposed of the enforcement petition along with EA 6946/2019 on 20.09.2019, it is evident that the Court did not find any merit in the DHs prayer for a direction to the JD for deposit of interest. It is submitted that the present hearing is akin to seeking a review and attempts to reagitate an issue which this Court previously did not find favour in. It is submitted that this would imply that there would never be any finality to the orders passed by this Court since parties like the DHs would approach the Court at its whim, claiming interests accruing on an awarded sum every subsequent month. It is submitted that the DHs, having failed to challenge the order dated 20.09.2020 till date and having accepted the payment of INR 58,21,89,461/-, it is estopped from now once again raising the issue of deposit of interest or deposit of the sum of INR 270,86,99,209/-. It is submitted that merely because liberty was granted to the DHs to approach the Court in case of any change in circumstances, the same cannot be used a ruse to approach the Court on such frivolous grounds as contained in the application. It is submitted that the leave granted by this Court was

intended to cover only such situations where the JD No.1 was going into liquidation or bankruptcy and not merely on the ground that the JDs are planning to come with an IPO for its cargo unit. It is submitted that even though JD No.1 has not finally come out with an IPO, but even otherwise any decision to invite IPOs would only have enhanced the value of the JD No.1. On the aspect of the auditor's report, it is submitted, by drawing my attention to Note 11 of the Auditor's Report dated 29.07.2020, specifically the portion which shows that the losses reflected in the balance sheet for the year ending on 31.03.2020 is mainly a result of the adverse foreign exchange rates, fuel prices, pricing pressures and the early impact of the global pandemic triggered by COVID-19. It is submitted that in this very note, the auditors also opined that notwithstanding the company's financial losses, the measures taken by the company which includes *inter alia* enhancement of customer experience, improving selling and distribution, revenue management, fleet rationalization, optimizing aircraft visualization, management and employee compensation revisions will help the JDs achieve profitable operations and raise funds as necessary in order to meet its liabilities as they fall due. It is further submitted that the balance sheet also reveals that actual losses suffered by the JDs as on 31.03.2020 are lesser than that reported for the financial year ending on 31.03.2019. It is submitted that in these circumstances, the apprehensions of the DH that the financial health of the JDs is in any sort of decline is completely baseless and unjustified.

14. It is next submitted that the Tribunal had found the DHs liable for various breaches under the terms of the SPA, but it still erroneously proceeded to award interest in their favour which direction was wholly without any basis and has already been challenged before this Court. It is submitted that even the conduct of the DHs has been inconsistent as, notwithstanding the Tribunal's rejection of their prayers for damages and restitution of their shareholding, the DHs are still insisting on securing the same by any means necessary. For that purpose, the DHs have been adopting varying tactics to compel the JDs to hand over the sums of interest under dispute, which spans over challenging the JD's decision to come out with an IPO on its cargo units and now the report of the auditor dated 29.07.2020. It is prayed that since the DHs are not entitled to claim any interest whatsoever, the present applications be dismissed with costs.

15. I have heard learned counsel for the parties and perused the record.

16. The admitted position which emerges from the record is that the JDs have only paid a sum of INR 308,21,89,461/- and have furnished a bank guarantee for a sum of INR 2,70,86,99,209/-. There is also no dispute on the aspect that the interest component of the awarded sum which works out to INR 1,00,62,29,304.58/-, has neither been deposited by the JDs nor has any bank guarantee been furnished for this amount. In essence, this amount, which is a part of the awarded sum, remains unsecured as on date. It is also an admitted position that till date no post-award interest has been deposited by the JDs. The

JDs, while not denying the aforesaid position, have opposed the applications on two primary grounds. Firstly, since the enforcement petition stood disposed of on 20.09.2019 by this Court, after observing that the DHs were already in receipt of the sum of INR 308,21,89,461/- which was payable to it and that no further amount was required to be paid to the DHs at that stage, any question of further payments owed by the JDs could only be arrived at once the Section 34 petitions were finally decided. The JDs have vehemently argued that the decision of this Court to dispose of the application as well as the petition on 20.09.2019 binds the present issue sought to be urged, by virtue of the doctrine of red judicata. The JDs' second ground for opposition is that, without prejudice to the above, the liberty granted to the DHs on 20.09.2019 does not apply in the present case since there is no material change in the circumstances of the JDs.

17. From the above, it is evident that undoubtedly, the JDs' primary opposition to the prayer for deposit of the interest amount is that the present issue is barred by the doctrine of res judicata since this Court, on 20.09.2019, had already examined its prayers for deposit of interest and disposed of the applications by issuing directions as were relevant at that time. It has been vehemently urged, and in my view rightly so, that the legal principles of res judicata and constructive res judicata are applicable in execution proceedings. However, whether the doctrine of res judicata would bar the consideration of these applications cannot be decided in isolation and it would be necessary to examine the order dated 20.09.2019, in the light of the DHs plea that the present applications have been filed only as per the liberty

granted by this Court, and do not amount to readjudication of the matter. The relevant extract of the order dated 20.09.2019 reads as under:

> *"5. These petitions are disposed of with liberty to the petitioner to file fresh petition after the decision on the objections under Section 34 of the Arbitration and Conciliation Act.*
> *6. Learned senior counsel for the decree holder submits that in the event of any subsequent development with respect to the status of the judgment debtor, they shall approach this Court. The decree holders are at liberty to do so."*

18. A perusal of this extracted portion of the order reveals that while it is correct to say that the application and the petition were disposed of on 20.09.2019, but this disposal was qualified by this Court in a significant manner. Evidently, the DHs had been granted liberty to approach this Court in case the status of the JD No.1 Company was found to have changed in any significant manner. The specific phrase employed in the order to describe a situation for which the DHs had been granted liberty to approach this Court again was 'in the event of any subsequent development with respect to the status of the JDs. The interpretation of this phrase has differed across the aisle. The JDs believe that this clause refers to any radical change in its position, such as insolvency or bankruptcy proceedings instituted against the JDs. On the other hand, the DHs urge that the IPO offer for the cargo unit and the auditor's report show material changes in the financial health of the JD No.1 Company and, even if they are not, they still leave no manner of doubt that the financial health of the JD is suffering.

19. Moreover, it is evident that it is not as if the DHs have instituted a fresh petition seeking the reliefs sought in enforcement petition which came to be disposed of on 20.09.2019. On the other hand, what emerges is that the DHs have preferred EA 679/2019 only as per the liberty granted by this Court. Soon after the disposal of the execution petition, the JDs decided to issue IPOs on the cargo unit of JD No.1 and the DHs, upon learning of this decision, moved this Court by way of EA 679/2019 since they apprehended that such a move would have a serious impact on the current equity capital ratio of the JD No.1 Company and was a direct violation of the JDs' undertaking before this Court to refrain from diluting the equity shares of the JD No.1 Company or from selling or transferring its promoter shares. The plea of the DHs in the application was that the JDs' undertaking was taken to protect the interests of the DHs who are entitled to *inter alia* restoration of these shares, restitution of their 58.46% shareholding from the JD No. 1 and refund of the amounts paid towards Warrants and CRPS along with interest. The fact that this Court issued notice in the said application, that too within 25 days of disposing the execution petition in itself reveals that the Court, at that stage itself, was prima facie convinced of the change in circumstances.

20. Today this material change in circumstances is compounded by the picture emerging from the Independent Auditor's Report on the Quarterly and Year to Date Audited Standalone Financial Results of the JD No. 1 Company dated 29.07.2020. Although the auditor's reports were filed with the early hearing application being E.A. (OS)

733/2020, to which the JD did not file a reply, the fact remains that these reports are not disputed. The relevant extract of the auditor's report, namely Notes 3 and 11, which has triggered the apprehensions of the DHs reads as under:

> "***To***
> ***The Board of Directors of SpiceJet Limited***
>
> ***Report on the audit of the Consolidated Financial Results***
>
> ***1. Qualified Opinion***
>
> *xxx*
>
> ***2. Basis for Qualified Opinion***
>
> *xxx*
>
> ***3. Material Uncertainty Related to Going Concern***
>
> *We draw attention to Note 11 in the accompanying Statement which. indicate that the Group has accumulated losses and its net worth has been fully eroded, the Group has incurred a net loss during the current and previous year and, the Group's current liabilities exceeded its current assets as at the balance sheet date. These conditions, along with other matters set forth in Note 10, indicate the existence of a material uncertainty that may cast significant doubt about the Group's ability to continue as a going concern.*
>
> *Our opinion is not qualified in respect of this matter."*

21. The JDs have rebutted the contents of this note, by placing reliance on Note 11 furnished by the JD No.2 on behalf of the JD No.1 which reads as under:

> ***11.*** *The Company had a negative net worth of Rs 14,852 million as at March 31, 2015, after which it had been consistently profitable for three financial years up to 2017-1 R. However. due to net losses of Rs 3,160.83 million for the year ended March 31, 2019, and Rs. 9,347.61 million for the year ended March 31, 2020 (after considering the impact of the matter in note 9 above), the Company's*

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<u>negative net worth stands at Rs.15,792,65 million as at March 31, 2020 (after considering adjustments on account of Ind AS 116 implementation - Refer note 4 above. and foreign exchange losses including those referred to in Note 12 below).</u>

The losses for the year ended March 31. 2019 and March 31, 2020 have been primarily driven by adverse foreign exchange rates, fuel prices, and pricing pressures, and the early impact of COVID-19 in the period February-March 2020. On account of its operational and financial position, and the impact of the ongoing COVlD-19 pandemic (refer note 10), the Company has deferred payments to various parties, including vendors and its dues to statutory authorities. Where determinable, the Company has accrued for additional liabilities, if any, on such delays in accordance with contractual terms applicable laws and regulations and based on necessary estimates and assumptions. However, it is not practically possible to determine the amount of all such costs or any penalties or other similar consequences resulting from contractual or regulatory non-compliances. Management is confident that they will be able to negotiate settlements in order to minimise/avoid any or further penalties. In view of the foregoing, no amounts of such penalties have been recorded in these financial results.

The Company continues to imp1ement various measures such as enhancing customer experience, improving selling and distribution, revenue management, fleet rationalisation, optimising aircraft utilization, redeployment of capacity in key focus markets) management and employee compensation revisions, renegotiation of contracts and other cost control measures, to help the Company establish consistent profitable operations and cashflows in the future, Further, improvements in certain macroeconomic factors relevant to the Company's business and operations, the resumption of airlines operations (which includes the Company's expectations of the timing of re -introduction of Boeing 737 Max aircraft into its operations), as well as the renegotiations with vendors discussed in Note 10 above, are expected to increase operational efficiency and support cash-profitable operations. The Company also continues to remain confident of compensation in respect of the matier discussed in Note 9 above, Based on the foregoing and their effect on business plans and cash flow projections, management is of the view that the Company will be able to achieve profitable operations and raise *funds as necessary, in order to meet its liabilities as they fall due. Accordingly, these financial results have been prepared on the basis that the Company will be able to continue as a going concern for the foreseeable future. The auditors have drawn an emphasis of matter in their report in this regard."*

22. However, the fact remains that the independent auditor, despite the explanation sought to be given by the JD No.2 in Note 11, did not change its opinion and reiterated that the net worth of the JD No.1 Company had fully eroded. This audit report paints a grim picture of the financial health of the JD No.1 company and, after noting that the JD's current liabilities exceeded its current assets, remarks that there is a material uncertainty casting significant doubt about the ability of the Group to continue functioning. Although the JDs have expressed their disagreement with Note 3 of the Auditor's Report, they have sought to draw the attention of this Court to Note 11 of the report instead and have not disputed the balance sheet itself.

23. In the light of these facts, it is clear that the DHs have not preferred any fresh enforcement petition, but have instead sought only a revival of the enforcement petition, strictly in accordance with the liberty granted by this Court. The fact remains that Audit report dated 29.01.2020 was not placed on record in September 2019, thus it was neither relied upon by either of the parties nor considered by this Court at the time of disposing of the petitions and the applications. Undoubtedly, the auditor has opined that as on date, the JD No.1 is a loss making concern and has also expressed doubts on its ability to revive its financial health, which is a grim diagnosis for the JD No.1 Company. The DHs have contended, and in my view rightly so, that

these circumstances constitute a 'subsequent development in the status of the JD'. Thus, when this Court specifically granted the DHs the liberty to bring up the matter in such a situation, neither can the present applications be deemed as seeking review of the order dated 20.09.2019 nor can they be barred by the doctrine of red judicata. I, therefore, find that these applications strictly fall within the purview of the liberty granted by this Court.

24. The other ground taken by the JDs to oppose these applications is that the DHs, having been found to also be in breach by the Tribunal, may not be successful in defending their claim for refund of interest of INR 270 crore and that the finding of the Tribunal in this regard is likely to be set aside in the JDs' Section 34 petition. However, while exercising its powers of execution, these are not issues which this Court can delve into, since they deal with the merits of the case. Ultimately, this Court has a duty to ensure that the Award in favour of the DH is not rendered into a mere paper decree and pass appropriate directions for that purpose. Therefore, irrespective of the prospective success or failure of the JDs' challenge under Section 34 of the Act, the position as of date is that the award has admittedly not been stayed and that face has to be seen as it is by this Court.

25. The only other ground taken by the JDs to oppose these applications is that the DHs have increased their claim for interest with every successive application they file, which is dishonest and cannot be permitted since it results in this Court issuing directions to the JDs to deposit further interest on every successive day of hearing. I find merit in this contention as undoubtedly, once a party has

deposited the awarded amount in Court, it cannot be directed to deposit interest, which accrues every month, merely on account of the pendency of the petition. However, the advantage of this principle only vests in favour of the judgment debtor in case the entire award amount has been deposited before the Court as per the decree. In the present case, the entire sum awarded to the DHs, which includes pre-award and pendente lite interest as per the decision of the Hon'ble Supreme Court in ***Hyder Consulting (UK) Ltd.*** *(supra)*, has not been deposited which would result in a continuing liability of the JDs to pay post-award interest on the amount which has not been deposited yet.

26. At this stage, I may also note the JDs plea that once EA 6946/2019 was disposed of, the reliefs sought thereunder cannot be granted by this Court today. No doubt the application being E.A. 6946/2019 had been preferred by the DHs in 2019 and came to be disposed along with the enforcement petition on 20.09.2019, however a conjoint reading of the orders passed on 15.10.2019 and 06.08.2020 reveals their intent to revive both the enforcement petition and the application. In fact, the JDs had even provided their consent to have EA 6946/2019 listed before this Court for hearing. In any event, the DHs have moved both these applications in order to protect the amount awarded in their favour by the Tribunal as the interest payable and, in fact, there is a common prayer in both applications being EA 6946/2020 and EA 679/2020, i.e., to secure deposit of the amount of interest of INR 200 crores awarded on refund of payments made by the DHs for issuance of Warrants and CRPS. Thus, the EA 679/2019,

which was moved in accordance with the liberty granted to the DHs on 20.09.2019, is sufficient in itself to pass directions for deposit of the entire upto date interest amount, excluding the amount which already stands paid and deposited. The applications are, therefore, entitled to succeed.

27. Having come to the conclusion that the DHs prayer for direction to deposit the entire awarded sum and upto date interest deserves to be allowed, it is now time to determine the amounts which the JDs should be directed to deposit at this stage. As noted earlier, the sum awarded by the Tribunal comprises of three figures; INR 308,21,89,461/- towards refund of payment made towards warrants, with pre-award and pendente lite interest which amounts to INR 100,62,29,304.58/-, against this sum the JDs have paid INR 308,21,89,461/-. A further sum of INR 270,86,99,209/- towards refund of payment towards CRPS has also been awarded to the DHs, against which the JDs have already furnished a bank guarantee. Thus, admittedly, as of date, the JDs have neither deposited nor furnished any security for this sum of INR 100,62,29,304.58/-, which is a part of the sum awarded by the Tribunal. In my view, it is incumbent on the JDs to deposit this amount of INR 100,62,29,304.58/- before this Court.

28. The DHs have claimed a sum of INR 1,68,99,42,764.18 towards interest on the sum of INR 308,21,89,461.00 as pre-award, pendente lite and post-award interest, which amount however includes the sum of INR 100,62,29,304.58/-, being a part of the sum awarded. A perusal of the chart furnished by the DHs further shows that they

have also claimed a sum of INR 23,83,75,227/- towards upto date interest @ 18% p.a. on the pre-award, pendente lite and post-award interest, which, in my view, would not be appropriate to grant at this stage. Therefore, the amounts of INR 100,62,29,304.58/-, and INR 23,83,75,227/- need to deducted from the DH's claim for a sum of INR 1,68,99,42,764.18 towards post-award interest, which therefore works out to a net amount of INR 44,53,38,232/-.

29. Though the DHs have also claimed that the amount of INR 270,86,99,209/-, i.e., the amount payable for refund of payments made by the DHs towards CRPS, should also be directed to be deposited before this Court, I am of the view that this prayer ought to be rejected since this amount stands sufficiently secured by the bank guarantees. However, the DHs claim for upto date post-award interest on this sum of INR 270,86,99,209/- deserves to be accepted and, therefore, the JDs are directed to deposit this sum, i.e., INR 97,78,03,308.98/-, as well.

30. Resultantly, the applications are allowed by directing the JDs to deposit a sum of INR 242,93,70,845.56/- within a period of 6 weeks, which amount comprises of the following components:-

i. INR 100,62,29,304.58/-
ii. INR 44,53,38,232/- and
iii. INR 97,78,03,308.98/-

31. Needless to say, this deposit will be subject to any final orders passed in the present petition and would also be subject to any orders passed in the pending challenge OMP (Comm) 450/2018, 451/2018, 42/2019 and 43/2019. In the event the amount is not deposited by the

JDs within the time granted, the DHs shall be at liberty to revive their prayer seeking directions to the JDs to maintain status quo with respect to their shareholding.

32. The applications are disposed of in the aforesaid terms.

E.A. 749/2020, E.A. 750/2020 & E.A. 751/2020 in OMP (ENF.) (COMM.) 32/2019

33. In view of the order passed hereinabove, these applications do not survive for adjudication and the same are dismissed as infructuous.

OMP (ENF.) (COMM.) 31/2019 & OMP (ENF.) (COMM.) 32/2019

34. At joint request, list on 04.11.2020.

REKHA PALLI, J

SEPTEMBER 02, 2020

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