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

Date of Decision: 18th February, 2019

+ **EX.P. 164/2015 and EX.APPL.(OS) 1229/2015**

TRAMMO AG

..... Decree Holder

Through: Mr. Rajiv Nayar, Sr. Advocate with
Mr. Omar Ahmad and Mr. Nirman,
Advocates (M: 9873274989).

versus

MMTC LIMITED

..... Judgement Debtor

Through: Mr. Debal Kumar Banerji, Sr.
Advocate with Ms. Suman Yadav and
Mr. Ayush Dhawan, Advocates (M:
9910044138).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition seeks execution of award dated 25th November, 2014 passed under the aegis of Indian Council of Arbitration. The relevant portion of the said award is as under:-

“63. Based on the foregoing, the Tribunal hereby makes issues and publishes this Final Award as follows:

a. The Respondent shall pay the Claimant the sum of US\$ 3,465,000 with interest thereon computed at the rate of 12% per annum from 4th of January 2012 up to the date of this Award. From the day after the date of this Award up to the date of payment interest shall be payable at the rate of 18% per annum;

b. The Respondent shall pay the Claimant the sum of US\$ 8,252.50 with interest thereon computed at the rate of 12% per annum from 4th January 2012 up to the date of this Award. From the day after the date of this Award up to the date of payment interest shall be payable at the

rate of 18% per annum;

c. The Respondent shall pay the Claimant the sum of USD 103,146.58 being legal costs.

d. The Respondent shall pay the fees and expenses of the Tribunal as follows:

i. The Tribunal's travel costs and expenses of the sum of USD 11,801.84;

ii. The Tribunal's fees amounting to the total of Indian Rupees 4,473,000.

Where any such fees and expenses have been paid by the Claimant, the Respondent shall fully reimburse the Claimant for the same.

e. The Respondent shall pay to the ICA the sum of Indian Rupees USD 1,157,000 towards the administrative fees of the ICA. Where any such fees have been paid by the Claimant, the Respondent shall fully reimburse the Claimant for the same.

f. The Respondent shall pay the Claimant the sum USD 51,999.84 towards payment of Lloyd Michaux's costs and Claimant's witnesses and representatives travel expenses costs;

g. The Respondent shall pay the Claimant the sum of Indian Rupees 526,276 towards Claimant's expense for hotel and local travel;

h. The Respondent shall bear the whole of its own legal fees and costs in connection with the Arbitration; and

i. All other claims of the Claimant and the claims of the Respondent are dismissed."

2. A challenge to the award was made under Section 34 of the Indian Arbitration Act, 1996 however, the same was dismissed vide judgement dated 11th March, 2015.

3. The present execution petition was filed on 21st April, 2015 upon the dismissal of the Section 34 petition.

4. Thereafter, MMTC preferred an appeal to the Ld. Division Bench of

this Court, which was dismissed vide judgement dated 22nd January, 2016. MMTC, thereafter preferred a Special Leave Petition to the Supreme Court, which was again dismissed on 14th November, 2018. A review petition was also filed by MMTC before the Supreme Court, which is now stated to have been dismissed on 12th February, 2019.

5. The award, which has finally been upheld by the Supreme Court is sought to be executed by way of the present petition. The only question is in respect of the foreign exchange rate to be applied as the award is in US dollars. The issue to be considered is - What is the foreign exchange rate to be applied? Whether the same should be calculated on the basis of conversion rate on the date of the award or on the date of dismissal of the Section 34 petition or on the date of dismissal of the SLP or on the date of dismissal of the review petition or finally on the date when the execution petition is being disposed of.

6. Ld. counsel for the Decree Holder relies upon the judgement of the Supreme Court in *Forasol versus Oil and Natural Gas Commission, 1984 (supp) SCC 263*, and states that *Forasol* is clear and categorical. It lays down the principle that the date of final dismissal or decision would govern the rate of exchange that should be adopted for conversion. He relied upon paragraphs 24, 41, 42, 43, 44, 53 & 70 of *Forasol*.

7. He further relies upon two judgements of this Court in *Furest Day Lawson Limited v Jindal Exports Limited (2012) 194 DLT 439* and *Progetto Grano S.P.A. v Shri Lal Mahal Limited Ex. P. No. 52/2012, (Decided on 29th May, 2014)*. In these decisions, the date of dismissal of the SLP against the order rejecting the objections under Section 48 of the 1996 Act was taken as the date of conversion.

8. On the other hand, Ld. counsel appearing for the Judgment Debtor has submitted a calculation sheet to quantify the amount payable. The various options of dates have also been set out in the said calculation sheet and it is submitted by the Ld. counsel that the date of disposal of the petition under Section 34 of the Act, i.e. 11th March, 2015 should be taken as the date for applying the foreign exchange rate for conversion. It is further pointed out by Ld. senior counsel that the decree holder itself had quantified the award as being Rs. 32 crores on the date of award, by paying stamp duty on the award to the tune of Rs.3,50,000/-. Since the present execution petition seeks enforcement of the said award, the calculation should be by taking Rs 32 crores as the awarded amount in favour of the decree holder.

9. It is further submitted that the judgements relied upon by the decree holder are in respect of foreign awards, which are not automatically enforceable in India. They would be considered as decrees only when the objections against the award are finally decided. Per contra, a domestic award attains the flavour of a decree, if there is no challenge to the same and the time for challenge to the award has expired. Where a challenge is made, the relevant date is the date when the same is rejected.

10. Ld. counsel for the Decree Holder submits that the contract itself was in dollars and the Decree Holder, being a foreign company, preferred to obtain the decretal amount in dollars.

11. This court has heard the counsels for the parties. In this execution petition the only question that needs to be decided is as to what should be the conversion rate which is to be applied for execution of the decree.

12. As can be noticed above, the award has not prescribed the rate of conversion but has only granted to the Claimant/Decree Holder a sum of

USD 3,465,000 (excluding interest, demurrage and costs). The challenge to the award has failed finally. The various dates that could be applicable for applying the rate of conversion are:

- 1) Rate as on the date of award i.e. 25th November, 2014;
- 2) Rate as on the date of disposal of the Section 34 petition i.e. 11th March, 2015;
- 3) Rate as on the date of disposal of the appeal by the Division Bench i.e. 22nd January, 2016;
- 4) Rate as on the date of disposal of the SLP i.e. 14th November, 2018 ;
- 5) Rate as on the date of dismissal of the review petition i.e. 12th February, 2019;

13. The Decree Holder submits that it should be the last of these dates i.e. 12th February, 2019.

14. The issue as to what should be the relevant date for the conversion rate to be applied to awards or decrees made in a foreign currency was considered by the Supreme Court in *Forasol (supra)*. The Supreme Court enumerated the various dates that could be considered, in paragraph 24 and 25 as under:

“24. In an action to recover an amount payable in a foreign currency, five dates compete for selection by the Court as the proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided. These dates are:

- (1) the date when the amount has become due and payable;*
- (2) the date of commencement of the action;*

- (3) the date of the decree;
- (4) the date when the court orders execution to issue;
- and
- (5) the date when the decretal amount is paid or realised.

25. In a case where a decree has been passed by the Court in terms of an award made in a foreign currency a sixth date also enters the competition, namely, the date of the award. The case before us is one in which a decree in terms of such an award has been passed by the Court.”

15. Paragraph 41 onwards, the Supreme Court observes that taking the date when the amount became due and payable, would be inequitable. The second date i.e. date of commencement of action was also rejected. Insofar as the date of decree is concerned, the Supreme Court observed as under:

“43. We will now consider the feasibility of selecting the third date, namely, the date of the decree. A decree crystallizes the amount payable by the defendant to the plaintiff and it is the decree which entitles the judgment-creditor to recover the judgment debt through the processes of law. An objection which can, however, be taken to selecting this date is that the decree of the trial court is not the final decree for there may be appeals or other proceedings against it in superior courts and by the time the matter is finally determined, the rate of exchange prevailing on that date may be nowhere near that which prevailed at the date of the decree of the trial court. To select the date of the decree of the trial court as the conversion date would, therefore, be to adopt as unrealistic a standard as the “breach date”. This difficulty is, however, easily overcome by selecting the date when the action is finally disposed of, in the sense that the decree becomes final and binding between the parties after all remedies against it are exhausted. This can be achieved by the court which hears the appeal providing that the date of its decree or other proceedings in which the decree is challenged would be the date for conversion of the foreign currency sum into Indian

rupees in cases where the decree has not been executed in the mean time. The real objection to selecting this date, however, is that a money decree and the payment by the judgment debtor of the judgment debt under it are two vastly different matters widely separated by successive execution applications and objections thereto unless the judgment-debtor chooses to pay up the judgment debt of his own accord which is generally not the case. In the vast majority of cases a money decree is required to be enforced by execution.”

16. After holding so, the Supreme Court proceeds to consider as to whether the proper date of conversion would be the date the Court orders execution. The Supreme Court, in paragraph 46, after taking into consideration the various steps that may be required to be taken by the Court to execute the decree, has observed as under:

“46. The above difficulties would rule out the taking of the date when the court grants an application for execution as the date of conversion and would make inapplicable to our courts the Rule laid down in the Miliangos case”

17. Thereafter, the Supreme Court considered the question as to whether the date of payment would be the relevant date for considering the applicable rate of conversion. This, according to the Court, would be writ with practical and procedural difficulties, including those in respect of payment of court fee, pecuniary limit and execution. On the basis of all these aspects, the Supreme Court held as under:

“48.....These difficulties would rule out both the date when the court orders execution to issue and the date of payment of the decretal debt to be taken as the date of conversion.”

18. Thus, the Supreme Court ruled out the date of execution of the order

as the date of payment for being the date when conversion is to be applied. Further, since execution has to be for a specific sum 'due upon the decree', as per Order 21 Rule 11(2)(g) CPC, the Court observed as under:

“52. For the above reason, it is not possible for us to accept the date of payment or realization of the decretal debt as the proper date for the rate of conversion.

53. This then leaves us with only three dates from which to make our selection, namely, the date when the amount became payable, the date of the filing of the suit and the date of the judgment, that is, the date of passing the decree. It would be fairer to both the parties for the Court to take the latest of these dates, namely, the date of passing the decree, that is, the date of the judgment.”

19. Thus, in paragraph 53, only three dates were left for consideration as relevant i.e. the date when the amount became payable, the date of filing of the suit and the date of judgment i.e. date of passing of the decree. In case of suits, therefore, the Supreme Court held that it would be fair to both the parties to take the last of these dates i.e. the date of passing of the decree as the date of judgment. The Supreme Court then reversed the conclusion of the Delhi High Court, which held that in case of an award, which directs the payments of a sum in foreign currency, the proper date for conversion of foreign currency would be the date of the award. After considering the various judgments of the courts in UK, the Supreme Court held that the scheme of enforcement under the English Arbitration Act of 1950 and that under the Arbitration Act of 1940 in India being different, the judgment in ***Jugoslavenska Oceanska Plovidba v Castle Investment Co. Inc., (1973) 3 All ER 498*** was not applicable. Since the provisions for enforcement of an

award under the English Arbitration Act of 1950 and the Foreign Awards (Recognition and Enforcement), 1961 in India are different, the Supreme Court held that in view of Section 17 of the Arbitration Act, 1940, the date when the Court upholds the award becomes the date of decree. Paragraph 66 of the judgment is set out herein below:

*“66. Under Section 17 of our Arbitration Act, judgment is to be pronounced “according to the award”. The marginal note to the section speaks of “judgment in terms of award”. Under Section 26(1) of the English Act, once leave is given, an award becomes enforceable in the same manner as a judgment or order “to the same effect”. The words “to the same effect” were interpreted in the *Jugoslavenska* case [(1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)] not as meaning “in the same terms” but as meaning having “the same effect”, that is, as having the same effect as a judgment or order given in an action brought on the award. Granting leave under Section 26(1) of the English Act and pronouncing judgment according to the award and passing a decree under Section 17 of our Act, therefore, mean different things and have different results. A judgment according to the award under Section 17 of our Act will speak only from the date of the judgment which will not be the case under Section 26(1), for while in the first case what will be enforceable by the processes of law, namely, execution, will be the decree passed in terms of the award, in the second case it will be the award itself, unless the applicant desires to have judgment entered in terms of the award which he is not required to do as pointed out above.”*

20. The Supreme Court then rejected the ruling in the *Jugoslavenska* (*supra*) in the following terms:

*“69. For the reasons set out above, we are of the opinion that the rule in the *Jugoslavenska* case [(1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)]*

cannot be applied to this country and the fact that a decree is in terms of an award for a sum of money expressed in a foreign currency makes no difference to the date to be taken by the court for converting into Indian currency the foreign currency sum directed to be paid under the award and that such date should also be the date of the decree.”

21. Thereafter, the Supreme Court considered the scheme under the Arbitration Act, 1940 whereby a suit was required to be filed for enforcement of the award and observed as under:

“70. It would be convenient if we now set out the practice, which according to us, ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court. It is unnecessary for us to categorize the cases in which such a claim can be made and decreed. They have been sufficiently indicated in the English decisions referred to by us above. Such instances can, however, never, be exhausted because the law cannot afford to be static but must constantly develop and progress as the society to which it applies, changes its complexion and old ideologies and concepts are discarded and replaced by new. Suffice it to say that the case with which we are concerned was one which fell in this category. In such a suit, the plaintiff, who has not received the amount due to him in a foreign currency, and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount

became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment. For the purposes of court fees and jurisdiction the plaintiff should, however, value his claim in the suit by converting the foreign currency sum claimed by him into Indian rupees at the rate of exchange prevailing on the date of the filing of the suit or the date nearest or most nearly preceding such date, stating in his plaint what such rate of exchange is. He should further give an undertaking in the plaint that he would make good the deficiency in the court-fees, if any, if at the date of the judgment, at the rate of exchange then prevailing, the rupee equivalent of the foreign currency sum decreed is higher than that mentioned in the plaint for the purposes of court-fees and jurisdiction. At the hearing of such a suit, before passing the decree, the court should call upon the plaintiff to prove the rate of exchange prevailing on the date of the judgment or on

the date nearest or most nearly preceding the date of the judgment. If necessary, after delivering judgment on all other issues, the court may stand over the rest of the judgment and the passing of the decree and adjourn the matter to enable the plaintiff to prove such rate of exchange. The decree to be passed by the court should be one which orders the defendant to pay to the plaintiff the foreign currency sum adjudged by the court subject to the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted, and in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the equivalent of such foreign currency sum converted into Indian rupees at the rate of exchange proved before the court as aforesaid. In the event of the decree being challenged in appeal or other proceedings and such appeal or other proceedings being decided in whole or in part in favour of the plaintiff, the appellate court or the court hearing the application in the other proceedings challenging the decree should follow the same procedure as the trial court for the purpose of ascertaining the rate of exchange prevailing on the date of its appellate decree or of its order on such application or on the date nearest or most nearly preceding the date of such decree or order. If such rate of exchange is different from the rate in the decree which has been challenged, the court should make the necessary modification with respect to the rate of exchange by its appellate decree or final order. In all such cases, execution can only issue for the rupee equivalent specified in the decree, appellate decree or final order, as the case may be. These questions, of course, would not arise if pending appeal or other proceedings adopted by the defendant the decree has been executed or the money thereunder received by the plaintiff.

22. However, in respect of arbitration the specific observations of the Court are as under:

“71. Turning now to arbitrations, on principle there can be and should be no difference between an award made by arbitrators or an umpire and a decree of a court. In the type of cases we are concerned with here just as the courts have power to make a decree for a sum of money expressed in a foreign currency subject to the limitations and conditions we have set out above, the arbitrators or umpire have the power to make an award for a sum of money expressed in a foreign currency. The arbitrators or umpire should, however, provide in the award for the rate of exchange at which the sum awarded in a foreign currency should be converted in the events mentioned above. This may be done by the arbitrators or umpire taking either the rate of exchange prevailing on the date of the award or the date nearest or most nearly preceding the date of the award or by directing that the rate of exchange at which conversion is to be made would be the date when the court pronounces judgment according to the award and passes the decree in terms thereof or the date nearest or most nearly preceding the date of the judgment as the court may determine. If the arbitrators or umpire omit to provide for the rate of conversion, this would not by itself be sufficient to invalidate the award. The court may either remit the award under Section 16 of the Arbitration Act, 1940, for the purpose of fixing the date of conversion or may do so itself taking the date of conversion as the date of its judgment or the date nearest or most nearly preceding it, following the procedure outlined above for the purpose of proof of the rate of exchange prevailing on such date. If, however, the person liable under such an award desires to make payment of the sum in foreign currency awarded by the arbitrators or umpire without the award being made a rule of the court, he would be at liberty to do so after obtaining the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973.”

23. From a reading of paragraph 71 it is clear that the Ld. Arbitrator has the power to make the award for a sum in foreign currency, however, the rate of exchange at which the sums were awarded in a foreign currency should be provided in the award itself. If the Ld. Arbitrator failed to provide the rate of conversion, it would not invalidate the award. The Court has the option of remitting the award under the 1940 and 1961 Acts or take the rate of conversion on the day of its judgement or the date nearest or nearly preceding it. This procedure outlined in paragraphs 70 and 71 of the **Forasol** judgment would apply in the context of an award passed in a foreign currency under 1940 Act. Ld. Counsels for the Decree Holder have also relied upon **Fuerst Day Lawson Limited v Jindal Exports Limited (supra)** and **Progetto Grano S.P.A. versus Shri Lal Mahal Limited (supra)** Both these judgments, however, relate to enforcement of a foreign award.

24. In **Fuerst Day Lawson**, this Court held as under:

“16. In Forasol v. Oil and Natural Gas Commission, the enforcement proceedings were under the 1940 Act. What was sought to be enforced was a foreign Award in French francs. The Court has passed the decree, in terms of an Award without fixing any date for conversion of French francs into Indian Rupees. When an application was filed for execution of the decree, the question that arose for determination concerned the relevant date for conversion of the French francs into Indian Rupees. The Supreme Court held that the date of the decree should be the relevant date for conversion because it was on that date that all the objections to the Award were rejected, the Award was made rule of the Court and a decree drawn-up.

17. By analogy, under the 1996 Act, the crucial date would be the date on which the objections to the enforcement of the foreign Award are finally rejected

and the foreign Award becomes enforceable as such. That is when “the award should be deemed to be a decree” under Section 49 of the 1996 Act. Therefore, under the scheme of 1996 Act, where the enforcement to the foreign Award is sought, the relevant date for conversion of the decretal amount expressed in foreign currency into Indian Rupees would be the date of final rejection of the objections to the enforcement of the foreign Award. In the present cases, that date is undoubtedly 30th August 2012, the date on which the SLPs filed by the JD were finally dismissed by the Supreme Court. It was then, in terms of Section 49 of the 1996 Act, that both the foreign Awards became enforceable and were deemed to be decrees.

25. In **Progetto Grano** a Ld. Single Judge of this Court held as under:-

“24. It would follow that only after objections filed by the person opposing the execution of the award are adjudicated upon by the court, and rejected, the award would become enforceable. These objections would be filed under Section 48 of the 1996 Act. In view of the above there is no merit in the contentions of the judgment debtor claiming that the date of the Award is the relevant date. In the present case the date would be date of dismissal of the appeal by the Supreme Court.

25. The judgment debtor has taken various objections arguing that the relevant date should be the date of the Award. I will deal with the said objections.

26. The objection of the judgment debtor that the judgment of this High Court in the case of Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (supra) is per incuriam, is a contention without merits. In the judgments of the Supreme Court with the same title namely Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2001) 6 SCC 356 and Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2011) 8 SCC 333, the Supreme Court had reiterated that the Award itself would be deemed to be a

decree of the Court. This proposition does not, in any way, change the fact that decree becomes executable only after the objections under Section 48 of the 1996 Act are finally adjudicated upon and thereafter in case of rejection of the same the Award becomes enforceable under Section 49 of the said Act.

27. There is also no merit in the second contention of the judgment debtor that at best, if the arguments of the decree holder are accepted, it is the date when the objection under Section 48 of the 1996 Act were dismissed by this Court, that would be the relevant date namely, 9.02.2012. Against the said order dated 9.02.2012, the judgment debtor had filed an appeal before the Supreme Court which was finally disposed of on 8.07.2013. It is only thereafter that the Award became enforceable as envisaged under Section 49 of the 1996 Act.

28. In fact, a perusal of the order of this Court dated 8.08.2012 would show that the Supreme Court had passed certain interim orders. Hence the judgment debtor could not execute the Award at that stage. It is only after the disposal of the appeal by the Supreme Court that the amount deposited in the Court was directed to be released to the decree holder on 23.09.2013.

29. There is also no merit in the next submission of the judgment debtor that the relevant date would at best be 9.2.2012, as in the pleadings, written submissions and calculations as filed on affidavit, the decree holder has only sought the date of conversion for calculation of rupee equivalent as on 9.02.2012. The learned counsel for the decree holder has explained that all these pleadings which are being referred to by the judgment debtor were filed before the judgment of the Supreme Court dated 8.07.2013.

30. Accordingly, I hold that the relevant date for

calculation of the rupee equivalent of the Award amount to Indian rupees is 8.07.2013.”

Thus, in both these cases the date of dismissal of the SLPs was taken as the final date for conversion.

26. In the present case, the award is a domestic award, though the Decree Holder/Claimant is a foreign company. The schemes of the 1940 and 1996 Acts are considerably different. Under the 1940 Act, the successful party in an arbitration would file a suit seeking judgment in terms of the award under Section 17, and anyone who wished to challenge the award, could file an application under Section 30 & 33 of the 1940 Act. Under the 1996 Act, however, once the award is passed, under Section 36 as it stood before the 2015 Amendment, it was enforceable as a decree of the Court in either of the following two situations.

- 1) When the time for challenge under Section 34 had expired or
- 2) The challenge to the award had failed.

27. Section 36, as it stood when the objections under Section 34 were rejected by a Ld. Single Judge of this Court, read as under:

“36. Enforcement. – Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as it were a decree of the court.”

Post the 2015 Amendment to the 1996 Act, Section 36 reads as under:

“36. Enforcement. – (1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then subject to the provisions

of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner, as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing;

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)”

Thus, the same principles that apply to suits, would apply to arbitral awards, under the 1996 Act. The award is a decree automatically when the time for filing objections expires or when the objections are decided finally. Thus, a domestic award, pre -2015 and post 2015 has the trappings of a decree.

28. The principles in *Forasol* have also been considered in ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644***. In this case, the Supreme Court held that the date of conversion should be the date when the award attained the finality. The relevant paragraph of the said judgment reads as under:

“119. The first date, i.e., the date when the amount

became due and payable, was not accepted by the Court for the reason that it cannot be said to be just, fair or equitable because in a case where the rate of exchange has gone against the plaintiff, the defendant escapes by paying a lesser sum than what he was bound to and thus is the gainer by his default while in the converse case where the rate of exchange has gone against the defendant, the defendant would be subject to a much greater burden than what he should bear. The Court felt that the same criticism would apply to the second of the dates, namely, the date of the commencement of the action or suit because suits are not often disposed of for an unconscionably long time and if we take into account the time that would be spent in appeals, further appeals, and revision and review applications which may be filed, the longevity of the litigation is doubled, if not tripled, so that none can with any certainty predict even a probable date for its termination. As regards the third date, namely, the date of the decree, the Court observed that a decree crystallizes the amount payable by the defendant to the plaintiff and it is the decree which entitles the judgment-creditor to recover the judgment debt through the processes of law. Dealing with the objection that the date of the decree of the trial court is not final decree for there may be appeals or other proceedings against it in superior courts and by the time the matter is finally determined, the rate of exchange prevailing on that date may be nowhere near that which prevailed at the date of the decree of the trial court, it was observed that this difficulty is easily overcome by selecting the date when the action is finally disposed of, in the sense that the decree becomes final and binding between the parties after all remedies against it are exhausted. As regards the fourth date, i.e., the date when the court orders execution to issue, it was felt that execution of a decree is not a simple matter because it involves execution of

a money decree and the judgment-debtor's property has to be attached and pending attachment a third party, at times set up by the judgment-debtor, may prefer a claim to the attached property which will have to be investigated and determined by the executing court and even where no claim is preferred the attached property cannot be brought to sale immediately and certain formalities have to be complied with and even after the sale has taken place, the judgment-debtor may further hold up the receipt of the sale proceeds by the decree-holder by raising objection to the conduct of the sale and at times, a fresh auction sale may have to be held if the auction-purchaser commits default in paying the balance of the purchase price and a considerable time would thus elapse between the date when the court orders execution to issue and the date of the receipt of the sale proceeds by the decree-holder. It was also pointed out that at times the judgment debt is not recovered in full when the attached property is sold in execution and further application for execution may become necessary and this would lead to an anomalous position for the Court would have to fix the rate of exchange, which may be different from each application for execution. A further difficulty that was pointed out by the court was that execution can only issue for a sum expressed in Indian currency and it cannot be for a sum which would be determined and fixed by the executing court at the time of granting an execution application. With regard to the fifth date, namely, the date of payment, the Court felt that there were three practical and procedural difficulties namely, payment of court fees, the pecuniary limits of the jurisdiction of courts and execution. Keeping in view the considerations referred to above, this Court declined to adopt the rule laid down in Miliangos case [1976 AC 443 : (1975) 3 All ER 801] and held that it would be fair to both the parties to take the date of

passing the decree, i.e., the date of judgment. The said date was also held applicable to a case where a decree is made in terms of an award made in a foreign currency.”

After observing as above, the Supreme Court noted that the Division Bench in the said case had held that the rate prevailing on the date of the decree passed by the Ld. Single Judge would be the conversion rate. Paragraph 122 reads as under:

“122. While passing the decision in terms of U.S. dollars the learned Single Judge has not considered the matter of conversion of US dollars into Indian currency. The Division Bench has, however, adverted to this aspect and applying the law laid down in Forasol case the decree has been passed in terms of US dollars as well as Indian rupees on the basis of the rupee-dollar exchange rate prevailing on the date of the decree passed by the learned Single Judge. The said date was applied for the reason, that according to the Division Bench the letters patent appeal filed by Renusagar was not maintainable.”

29. In the above judgment, the Supreme Court held that the ***Forasol*** judgment is not required to be reconsidered. The Court held as under:

“The practical and procedural difficulties pointed out by this Court in Forasol case against adopting the date of payment cannot, therefore, be ignored. As at present advised, we are not satisfied that the decision in Forasol case calls for reconsideration. Since this is the only question raised in C.A. No. 379/92 filed by General Electric, the said appeal must fail.”

In Renusagar, thus the Division Bench had taken the date of the decree by the Single Judge, in respect of the foreign award, as the date for applying the rate of conversion which was upheld by the Supreme Court.

30. *Russel On Arbitration* with respect to the aspect of currency of payment opines as under:

“6-101 Currency of payment. Section 48(4) of the Arbitration Act 1996 provides that an award may order payment to be made in any currency. The proper construction of this section was considered by the House of Lords Lesotho Highlands Development Authority v Impreglio SpA where Lord Phillips explained that there are two possible way of interpreting the provision. The first is to treat it as simply conferring a procedural power to make an award in any currency, not thereby affecting the existing substantive law concerning awards in a foreign currency. This was the view favoured by the majority in Lesotho Highlands Development Authority v Impreglio SpA. The alternative approach, favoured by Lord Steyn, was that s.48(4) represented a change in the substantive law, by introducing an unconstrained power to make an award in any currency. This was rejected by the majority on the basis that if those who drafted the Act had intended to give such a broad discretion they would have done so more clearly, but the matter cannot be considered entirely free from doubt.

Assuming that the existing principles of English law do not apply to the exercise of discretion under s.48(4) then the tribunal should make the award in the proper currency of the contract under which the dispute arose unless the parties have expressly or impliedly agreed otherwise in writing. The proper currency of the contract is the currency with which payments under the contract have the closest and most real connection or, if there is none, the currency which most truly expresses the claimant’s loss. An award in a foreign currency may be enforced in England without the need to convert it to sterling.”

31. In ***Meenakshi Saxena and Ors. v. ECGC Ltd. and Ors. AIR 2018 SC 2831***, the Supreme Court, following ***Forasol***, observed as under:

“27. In the light of the ratio laid down by this Court

in determining the relevant date for conversion of currency, the first procedure to be adopted by the court is to decide the same in accordance with terms of the contract, if such a Clause is not available in the agreement then the courts have to determine the best possible date, then this Court went ahead and dealt with the procedure to be adopted. But in the present facts that exercise is not relevant as there is a specific Clause in the agreement i.e. Clause 17 which deals with rate of interest. The Clause clearly says that currency should be converted into rupees at the bank buying rate of exchange at Mumbai on the date of relevant shipment.”

32. Thus, as per the above judgement, the Court has to determine the best possible date, if the clause for conversion is not available in the contract.

33. What would be the best possible date in the present case? Recently, in **Royal Construction Company Pvt. Ltd. v. National Projects Construction, EFA (OS) 19/2017, Decided on 17th December, 2018**, a Division Bench of this Court had adopted the doctrine of merger and held as under:

“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.”

In this case, the Ld. Division Bench, after holding that the date of finality should be taken as the date when the amount becomes payable, granted

certificate of appeal to the Supreme Court.

34. In ***DLF Universal Limited & Ors. v. Koncar Generators and Motors Limited***, (2018) 190 PLR 398, the Punjab & Haryana High Court also held that the rate of conversion applicable in the case of enforcement of a foreign award would be the date when the objections came to be decided finally. Paragraph 17 of the said judgment reads as under:

“17. Enforcement of the foreign award is governed by Part 2 of 'the Act'. Section 49 deals with the situation when the foreign award is enforceable and binding. Section 48 which has been extracted above lays down conditions for enforcement of the foreign award. Section 49 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the foreign arbitral award shall be deemed to be a decree of that Court. Section 49 clearly spells out that before a foreign award is considered enforceable as a deemed decree of that Court, the Court is required to record a satisfaction that the foreign award is enforceable under this Chapter. Such determination finally comes when objections under Section 48 of 'the Act' are finally decided. In this case objections under Section 48 of 'the Act' came to be decided finally only on 01.07.2014 when the revision petition filed by the petitioner against dismissal of the objection petition under Section 48, was finally dismissed.”

35. Ideally, the arbitral award ought to have prescribed the rate of conversion. The confusion has arisen as the award has failed to provide the rate of conversion.

36. Though an arbitral award which does not prescribe the rate of conversion can still be valid, the postponement of prescribing the rate of conversion is writ with several anomalies and uncertainties. On the date

when the award is pronounced, neither party is sure of its entitlement or liability. The party which loses or decides to challenge the award, if not asked to deposit the awarded amount, may obtain huge benefits if the foreign exchange rate at the end of the challenge turns out to be in its favour. On the other hand, the party succeeding can be put to severe disadvantage if the conversion rates are not to its benefit. Further, the amount awarded continues to fluctuate till the final appeal/petition is decided and both parties proceed merely on approximations. As the parties are corporate entities, liabilities/ entitlements which are to be reflected in their balance sheets are also unpredictable.

37. There are various advantages and disadvantages in accepting or rejecting various dates which are suggested by either party for the purposes of deciding the rate of conversion. If there is a decline in the rupee, the same would benefit the succeeding party. If the rupee strengthens, it would benefit the losing party. This coupled with the rates of interest that would have to be applied would leave the awarded amount as extremely nebulous and unpredictable. Such a situation also discourages parties from settling or resolving the disputes and encourages speculative challenges to the award. The variation in the awarded amount could, in some cases run into crores of rupees only based upon the foreign exchange rate. Postponement of the date of conversion could lead to unforeseen consequences, especially in the case of foreign transactions where circumstances such as war, sanctions, devaluation of currency etc. could lead to the award being rendered merely a paper award. Such unpredictability, especially after the passing of the award is wholly avoidable. Thus, in awards where amounts claimed and awarded are in foreign currency, while not specifying the rate of conversion in the

award may not invalidate the award, it is an essential good practice for awards to specify the rate of conversion applicable, unless there are extenuating circumstances. Both the parties would then be aware of their respective liabilities or entitlements and the same would be crystalized on that date. A party which choses to challenge the award would be aware of the risks fraught in the said challenge and the successful party is compensated by means of interest, if awarded.

38. In the present case, the present execution petition was filed immediately upon the objections under Section 34 being dismissed. The Decree Holder obviously understood, rightly so, that the award became an executable decree immediately upon the challenge having failed. At that stage the awarded amount stood crystallised. What is being enforced in this case is the award, as per Section 36. Unless the award has been modified by the appellate forums leading to merger, the award as it is, is being enforced. The award acquired finality only when the Supreme Court finally dismissed the challenge to the award. Until then, this award could not be enforced, though the present execution was pending during the said period. The principle in an execution petition is that the Decree Holder should be placed in the same position as he would have been if he had received the money on the date of the award. The contract was in US Dollars. MMTC also conducts business in foreign exchange. As per the principles culled out from the above decisions, the Decree Holder is entitled to receive the sum only when finality attaches to the award, which in this case, happened on 12th February, 2019 when the review petition was dismissed by the Supreme Court.

39. Thus, the rate of conversion that ought to be applied would be 1 USD = INR 70.93, as applicable on 12th February 2019. The calculations have

been submitted by the parties.

- Accordingly, it is directed that a sum of Rs.53,16,05,138/- be paid by MMTC to the Decree Holder within four weeks;
- A further sum of Rs.61,56,276/- be also paid by MMTC to the Decree Holder within four weeks.

40. All approvals by the relevant authorities be also granted expeditiously and not later than two weeks.

41. The petition is allowed in the above terms.

**PRATHIBA M. SINGH
JUDGE**

FEBRUARY 18, 2019

MR/dk

(Corrected & released on 27th February, 2019)