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

3 & 29 (***Reportable***)

\+ **EA Nos. 790-91 of 2012 in EX.P. 168 of 1998**

FUERST DAY LAWSON LTD. ..... Decree Holder

Through: Mr. Dushyant Dave, Sr. Advocate with Ms. Sangeeta Bharti, Mr. Ashish Kumar & Mr. Vikrant Nagpal, Advocates

versus

JINDAL EXPORTS LTD. ..... Judgement Debtor

Through: Mr. Anil Kher, Sr. Advocate with Ms. Anne Mathew, Advocate

AND

\+ **EA No.789 of 2012 in EX.P. 169 of 1998**

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CORAM: JUSTICE S. MURALIDHAR

O R D E R

% 05.11.2012

1. These are applications filed by the Judgment Debtor ('JD'), Jindal Exports Limited ('JEL'), seeking certain directions in the execution petitions.

2. The background to these applications is that there were two foreign Awards, one dated 13th August 1996 and the other dated 16th October 1996 in favour of the Decree Holder ('DH'), Fuerst Day Lawson (FDL), a company incorporated in the United Kingdom ('UK') and against the JD.

3. The DH filed Execution Petition No.168 of 1998, seeking enforcement of foreign Award dated 13th August 1996 and Execution Petition No.169 of 1998 seeking enforcement of the foreign Award dated 16th October 1996 in this Court on 31st July 1998. In both the execution petitions, on 4th August 1998, an order was passed by this Court, directing issuance of warrants of attachment against the JD in respect of its properties described in the schedules to the execution petitions.

4. The JD filed OMP No.29 of 2003 in Ex.P. No.168 of 1998 and OMP No.204 of 1998 in Ex.P. No.169 of 1998, challenging the enforceability of both the Awards. Both the OMPs were dismissed by a detailed order dated 11th December 2009. The prayer of the DH for award of interest was

declined. The JD was directed to deposit the decretal amount within a period of twelve weeks.

5. Special Leave Petition (SLP) Nos.13626-13629 of 2010 filed by the JD against the order dated 11th December 2009 were dismissed by the Supreme Court by the following order on 30th August 2012:

> **"SLP(C) Nos.13626-13629 of 2010**
>
> Delay condoned.
>
> Mr. S.K. Bagaria, learned senior advocate appearing for the petitioner, raised two or three questions of law that we might have felt tempted to examine in some detail. However, in the facts and circumstances of this case, specially having regard to the conduct of the petitioner in course of the arbitration proceeding, before the High Court and in presenting the facts of the case to this Court in the synopsis to the special leave petitions, we are totally disinclined to entertain the special leave petition and to consider points raised on behalf of the petitioner.
>
> The special leave petitions are dismissed but with no order as to costs."

6. It may be mentioned that the SLPs by the DH on the question of interest are pending consideration before the Supreme Court.

7. After the dismissal of the SLPs filed by the JD, the DH addressed a letter dated 10th September 2012, calling upon the JD to pay the decretal amount in respect of both the foreign Awards by specifying the exchange rate, as

notified by the Reserve Bank of India ('RBI'), as on 30th August 2012.

8. Orders were passed by the Court from time to time regarding deposit by the JD of bonds in the execution proceedings for securing the decretal amount.

9. The JD has filed the aforementioned applications thereafter, seeking the following directions:

(i) EA No.790 of 2012 in Ex. P. No.168 of 1998 filed by the JD for a direction to permit it to open the sealed covers and withdraw the old RBI Bonds amounting to Rs. 1.80 crores under Certificate Nos.TBSHC541505163 and TBSHC541505164 and for a further direction that the original RBI Bonds amounting to Rs.1.80 crores under Certificate Nos.TBSHC541506284 and TBSHC541506285 be kept in a sealed cover in the safe custody of the Court.

(ii) EA No.791 of 2012 has been filed by the JD for a direction that the amounts payable by it to the DH under the two foreign Awards should be calculated by making adjustments as per the agreement of the parties as stated in paras 15 to 17 of the said application in the sum of Rs. 2,89,67,369.90 and the Bonds/cash deposit remaining after payment of the amounts to the DH should be released to the JD.

(iii) EA No.789 of 2012 in Ex.P. No.169 of 1998 has been filed by the JD for similar reliefs as prayed for in EA No.791 of 2012 in Ex.P. No.168 of 1998.

10. Mr. Anil Kher, learned senior Counsel for the JD first submitted that under the Arbitration and Conciliation Act, 1996 ('1996 Act'), the Award itself is a decree, as has been held by the Supreme Court in this very case in ***Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2001) 6 SCC 356***. Relying on the decision in ***Forasol v. Oil and Natural Gas Commission 1984 (Supp) SCC 263***, he submitted that the rate of exchange that would be applicable for conversion of the awarded amount from US Dollars ('USD') and UK Pounds ('UKP') to Indian Rupees would be that prevalent on the date of the Award. His second submission is that in terms of the statement made by the DH in its fax message dated 7th March 1996, a copy of which is enclosed with the application, and corresponding statement made by the DH in another dispute between the parties before the High Court in the UK, the DH should be asked to set off the amount as agreed by it against the decretal amount.

11. Appearing for the DH, Ms. Sangeeta Bharti, learned counsel, has pointed out that the judgment in ***Forasol v. Oil and Natural Gas Commission*** was

delivered in the context of enforcement of a foreign Award in proceedings under the Arbitration Act, 1940 ('1940 Act'). The principle that was recognized in the said case was that the rate of exchange that would be applicable would be the date on which the objections to the Award are rejected and the Award is made rule of the Court and made enforceable as such. As regards the submission regarding set off, she submitted that since neither of the foreign Awards dealt with that issue, the DH is not agreeable to the JD setting off the said amount against the decretal amount. She added that the very same contention was raised earlier by the JD in these proceedings but did not find favour either with this Court or the Supreme Court.

12. As far as the second submission is concerned, this Court notes that it pertains to a claim by the JD in separate proceedings concerning a transaction for coriander oil in the sum of USD 79,200. The present proceedings relate to the 'menthol claim'. In a fax message dated 7th March 1996 addressed to the JD, the DH stated : "we will give you credit for the sums to become payable in respect of the coriander oil when enforcing an Award of arbitration in respect of the menthol claim". Admittedly, there are separate proceedings pending in the Commercial Court in the High Court of

Justice, Queen's Bench Division, UK concerning the menthol claim. By way of defence in those proceedings, the DH has asserted a right to set off certain amounts. However, the learned counsel for the DH is correct in her submission that neither the fax message dated 7th March 1996 nor the issue concerning the right of the DH to set off any amount against the decretal amount has been dealt with in either of the foreign Awards, the enforcement of which are now sought. In the circumstances, it is not possible for the Court in the execution proceedings to entertain any such plea of the JD. This Court can only enforce the Awards as they are. The objections to the enforcement of both Awards have been rejected by this Court and the Supreme Court.

13. As regards the first plea concerning the rate of exchange, while there can be no doubt that under the 1996 Act the Award is itself a decree, what requires to be examined for the purposes of determining the rate of exchange payable is the date on which the decree becomes enforceable as such. The enforcement of foreign Awards is covered by Part-II of the 1996 Act. Chapter-I concerns the New York Convention Awards. Under Section 46 of the 1996 Act, any foreign Award which is enforceable under Chapter-I shall be treated as binding for all purposes on the parties to the Award. Section 48

of the 1996 Act sets out the grounds on which the enforcement of a foreign Award can be resisted by the party against whom such enforcement is sought. Under Section 49 of the 1996 Act, the Award is deemed to be a decree of the Court that is seized of the enforcement proceedings only "where the Court is satisfied that the foreign award is enforceable under this Chapter". In other words, till such time the objections filed by the JD to the enforcement of an Award are not disposed of, the foreign Award does become enforceable as such.

14. It is argued on behalf of the JD that the foreign Awards were enforced on 4th August 1998 when this Court directed the issuance of warrants of attachment of the JD's properties. This submission is misconceived for the simple reason that the orders for issuance of warrants of attachment were only by way of an interim measure to ensure that the decretal amount is secured and that the property and assets of the JD are available for enforcement at the time of final disposal of the execution petitions. If the JD had not filed any objection to the enforcement of the foreign Awards, it was possible for the JD to argue that the DH cannot, by delaying the filing of the execution petitions for a period of nearly two years after the date of the foreign Awards, insist that the rate of exchange as prevalent on the date of

such filing of the execution petitions should apply. The fact, however, remains that by filing objections to the enforcement of the Awards, the JD prevented the DH from realizing the decretal amounts payable to it under the two foreign Awards.

15. It was then urged that there was no stay of the payment of the decretal amount to the DH under the two foreign Awards even when the objections filed by the JD were pending in the Court. This submission is again without merit. Till such time the objections to the enforcement of the Awards were not decided, the Court could not have ordered payment of any amount or encashment of the bonds furnished by the JD to the Court, as that would have rendered the objection petitions infructuous. The fact is that the JD did delay the enforcement of the foreign Awards by filing two OMPs which ultimately stood rejected by the dismissal of the JD's SLPs by the Supreme Court on 30th August 2012.

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.

18. At this stage, Mr. Kher sought some time to seek instructions on whether the JD is prepared to make the payment of the decretal amount in USD or UKP instead of paying it in Indian Rupees. The case was passed over till 4 p.m. for that purpose. When the matter was taken up at 4 p.m., Mr. Kher informed the Court that the JD was prepared to make the payment of the decretal amount in USD and UKP. He stated on instructions that no prior permission of RBI was required for that purpose, and that the payment could be made by way of Telegraphic Transfer ('TT'). He offered to make the payments in two instalments with there being a *pro rata* release of the Bonds furnished by the JD in the Court upon payment of each instalment.

19. Ms. Bharti submitted that although the payment of interest to the DH by the JD was pending in the Supreme Court, the JD should pay interest on the decretal amount for the period from 30th August 2012 till the date of actual payment.

20. In response to the above submissions, Mr. Kher stated on instructions that the JD undertakes to make the payment of the entire decretal amount under both the foreign Awards in USD and UKP in two instalments on or before 23rd November 2012.

21. In view of the above statement of Mr. Kher, made on instructions, this Court does not consider it necessary to direct the JD to pay interest on the decretal amount from 30th August 2012 till the date of payment, so long as the entire decretal amounts are paid, as undertaken by the JD, on or before 23rd November 2012.

22. Resultantly, the applications are disposed of in the following manner:

(i) As undertaken by it before the Court, the JD will pay to the DH on or before 16th November 2012 the amount payable in respect of foreign Award dated 13th August 1996, i.e., USD 408,060 and UKP 2120 by way of TT. Upon making such payments, the JD will be permitted to withdraw from the Court the RBI bonds furnished by it to the extent of the value of 50%. This will be done by ensuring that the value of the bonds that remains in the Court constitutes 50% of the total value of the RBI bonds that are presently deposited with the Court.

(ii) As undertaken by it, the JD will pay to the DH, on or before 23rd November 2012, the amounts in respect of foreign Award dated 16th October 1996, i.e., USD 478,050 and UKP 1220. Upon making of the

said payments to the DH, the JD is permitted to withdraw the remaining RBI Bonds deposited with this Court. The old RBI Bonds earlier deposited will also be returned to the JD.

(iii) The Registry will release the RBI Bonds in each instance only upon confirmation by the DH that it has received the payment, as directed and as undertaken by the JD.

(iv) Since the payments are being made in USD and UKP, the DH will furnish to the JD within two days the relevant account details to enable the JD to make the payment by way of TT.

Ex.P. Nos.168 of 1998 and 169 of 1998

23. List for compliance on 26th November 2012.

24. A copy of this order be given *Dasti* under the signature of Court Master.

S. MURALIDHAR, J.

NOVEMBER 05, 2012
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