IN THE HIGH COURT OF DELHI AT NEW DELHI

EX. P. 372 of 2010

Reserved on: May 21, 2012
Decision on: July 13, 2012

UNIVERSAL TRACTOR HOLDING LLC ..... Decree Holder
Through: Mr. Dharmendra Rautray and
Ms. Tara Shahani, Advocates.

Versus

ESCORTS LIMITED ..... Judgment Debtor
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Simran Mehta, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
13.07.2012

1. The Decree Holder ('DH'), Universal Tractor Holding LLC ('UTH'), a limited liability company incorporated in Delaware, United States of America ('USA') has filed this petition seeking enforcement of a foreign Award dated 24th/26th August 2010 whereby it was held that UTH was entitled to recover US Dollars ('USD') 475,000 along with interest at 11.25% for breach of contract by the Judgment Debtor ('JD') Escorts Limited ('Escorts'). UTH was further held entitled to pre-judgment interest at 11.25% on USD 125,000, being the balance amount due under the third instalment from 30th May 2007 until payment and interest at 11.25% on USD 350,000 being the amount due under the fourth instalment from 10th August 2007 until payment. UTH was also entitled to counsel fees in the sum of USD 51,030.37, expenses to the extent of USD 25,388.15 and costs and fees of the arbitrators in the sum of USD 19,347.48.

Background Facts

2. The background to the present petition is that on 28th December 2006 UTH entered into a Membership Interest Purchase Agreement ('Agreement') with Escorts Agri Machinery Inc. ('EAMI'), a Delaware corporation, whereby UTH agreed to sell its 49% interest, represented by 49 Membership Units ('MUs') in Beaver Creek Holdings, LLC ('BCH'), also a Delaware corporation. EAMI agreed to buy the aforementioned 49% interest of UTH in BCH for a total price of USD 1.2 million in four instalments. EAMI owned 51% interest in BCH represented by 51 MUs. The JD Escorts Ltd. is the successor-in-interest of EAMI.

3. According to UTH, EAMI the first two instalments totaling USD 675,000 within the stipulated time, i.e., by 3rd March 2007 and 20th April 2007 respectively. Accordingly, UTH delivered the assignments of 20 MUs and 7.25 MUs respectively on the first and second closing dates respectively to EAMI. However, EAMI defaulted on the third and fourth instalment payments. A sum of USD 175,000 was to be paid under the third closing on or before 30th May 2007 and USD 350,000 was to be paid under the fourth closing on or before 10th August 2007. EAMI made a partial payment of USD 50,000 towards the third instalment and no payment under the fourth instalment despite repeated reminders by UTH.

4. On 13th October 2008 UTH filed a law suit against EAMI and Escorts before the Wake County Superior Court ('WCSC') in the State of North Carolina ('NC'), USA. EAMI and Escorts were duly served with the summons in the said suit. This is evidenced by a copy of a 'Stipulation' dated 12th November 2008 signed by counsel for UTH as well as counsel for both EAMI and Escorts, Mr. Michael Ostrander.

5. On 30th December 2008 a motion to dismiss was filed in the WCSC on behalf of EAMI and Escorts by Mr. Ostrander referring to the arbitration clause in the Agreement. On 19th June 2009 the WCSC, NC, with the consent of the parties, passed an 'Agreed Order' in terms of which it was agreed that UTH's claims against EAMI would be submitted to arbitration before an Arbitral Tribunal ('AT') of the American Arbitration Association ('AAA'). *Inter alia* it was agreed and recorded in the order dated 19th June 2009 as under:

> "7. Plaintiff and EAMI agree that the agreement to arbitrate contained in this consent order supplants Paragraph 7 of the LLC Membership Interest Purchase Agreement dated 28th December 2006. The language of the arbitration shall be English and the Award given by the arbitrator shall be final and binding on the parties. The arbitration shall apply the law of the State of Delaware to the merits of the parties' dispute, without reference to rules of conflict of laws. The cost for and in connection with the arbitration shall be borne by the party against whom the Award has been made by the arbitrators. The arbitration proceedings shall not have any effect on the performance of those parts of this Agreement that are not in dispute, or in respect of which no difference has arisen between the parties, or for which performance has been given.
>
> 8. The parties agree that entry of this order resolves defendants' motion to dismiss. The Court shall retain jurisdiction for the purposes of entering an order confirming the arbitration decision pursuant to the Federal Arbitration Act.
>
> Now, therefore, it is hereby ordered that this action is stayed pending completion of arbitration in accordance with the foregoing situations, which are made part of this Order, and that the Court shall retain jurisdiction for further proceedings as may be necessary following completion of arbitration."

Arbitral Proceedings

6. Accordingly, UTH filed its claims before AAA on 9th July 2009. On

17th September 2009, in accordance with the Scheme of Amalgamation approved by the High Court of Punjab and Haryana (hereafter 'the P&H High Court'), EAMI which was the wholly owned subsidiary of Escorts, merged with Escorts. According to the Scheme of Amalgamation, *inter alia*, as regards the pending proceedings involving EAMI, it was stated as under:

> "**12. Legal Proceedings**
> 12.1 "Save and except the legal proceedings filed or may be filed by Universal Tractor Holdings LLC c/o Hartzell & Whiteman LLP having its office at 2626, Glenwood Ave, Ste., 500, Raleigh NC- 27608, and/or any other creditor or for and on behalf of the creditors of any subsidiary of the Transferor Company, which shall be dealt with in accordance with Laws of the State of Delaware; USA. (i.e., the place of registration of the Transferor Company), all legal proceedings of whatever nature by or against the Transferor Company pending and/or arising at or after the appointed date as and from the effective date shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme of Arrangement or by anything contained in this Scheme but shall be continued and enforced by or against the Transferee Company in the manner and to the same extent as would or might have been continued and enforced by or against the Transferor Company."

7. On 13th October 2009 EAMI filed a Certificate of Merger with the Secretary of State of Delaware showing the amalgamation of EAMI with Escorts. The Secretary of State of Delaware issued a Certificate of Merger dated 16th October 2009.

8. On 14th December 2009 UTH filed a motion before the AT to amend its arbitration application to substitute Escorts for EAMI. In the said application, UTH made a reference to the Certificate of Merger of EAMI with Escorts in terms of which Escorts had agreed to assume all the debts and obligations of EAMI. The said application was opposed by EAMI by referring to Clause 12.1 of the Scheme of Amalgamation which was

referred to in the order dated 17th September 2009 of the P&H High Court approving the Scheme of Amalgamation in terms of which the arbitral proceedings had to be defended only by EAMI as if the merger had not taken place. It was contended that the consent order dated 19th June 2009 of the WCSC did not require Escorts to participate in the arbitration proceedings. On 8th January 2010 the AT allowed UTH's motion and substituted Escorts for EAMI in the arbitral proceedings. On 13th January 2010 UTH filed its First Amendment to the complaint before the AT. No reply thereto was filed by Escorts.

9. On 3rd February 2010 Escorts filed a suit in the Court of Civil Judge (Senior Division), Faridabad, Haryana for a declaration that the Agreement dated 28th December 2006 was neither binding on nor enforceable against Escorts. The further declaration sought was that in view of the agreed order dated 19th June 2009 passed by the WCSC, NC and the order dated 17th September 2009 of the P&H High Court, UTH could not seek any claim against Escorts for any loss suffered on account of any alleged defaults or breach of any obligation by EAMI. An injunction was sought to restrain UTH from invoking any clause of the Agreement dated 28th December 2006. No stay was granted by the civil court in Faridabad. UTH filed an application in the same Court under Section 8 of the Arbitration and Conciliation Act, 1996 ('Act') seeking dismissal of the suit. The said suit is stated to be pending awaiting the outcome of the present proceedings.

10. On 15th March 2010, EAMI filed an application before the AT through Mr. Michael Ostrander for stay of further arbitral proceedings. The said stay application was rejected by the AT by its order dated 30th March 2010. On 20th April 2010 the AT postponed the hearings to the

week of 26th July 2010. On 5th May 2010 the AT passed an order by which the arbitration case caption would show that Escorts was the Respondent. At this stage, on 19th May 2010, Mr. Michael A. Ostrander wrote to AAA as under:

"

May 19, 2010

Ms. Amanda Jackson,
American Arbitration Association
2200, Century Parkway,
Atlanta, GA 30345.

Re: American Arbitration Association Case No.: 311070030009.

Dear Ms. Jackson,

I have received an invoice from the American Arbitration Association ('AAA') directed to Escorts Limited dated May 8, 2010. Please note that I represented Escorts Agri Machinery, Inc. in the above referenced matter. Following the panel's Order dated January 8, 2010, Escorts Limited was substituted for Escorts Agri Machinery, Inc. as the Defendant in this case. I do not represent Escorts Limited in this matter. My client is no longer a party in this case. Please advise the panel accordingly. I have advised Mr. Whiteman by copy of this correspondence.

Please let me know if you have any questions. With kindest regards, I am.

Sincerely,
Sd/-
(Michael A. Ostrander)"

11. Following this, AAA requested Mr. Ostrander to inform it as to who in Escorts should the future correspondence and notices be addressed to. It appears that although till 3rd June 2010 no reply was received by AAA to the said request, from 9th June 2010 onwards emails were sent to Mr. G.B.Mathur of Escorts who thereafter kept corresponding on email with

Ms. Amanda Jackson of AAA. Meanwhile in letters addressed to AAA, counsel for UTH stated that they had been informed by Mr. Ostrander that Escorts would not appear at the arbitral hearings thereafter. On 6th July 2010 AAA sent to Mr. Mathur by email a formal notice that the hearing in the arbitral proceedings would commence on 30th July 2010. On 16th July 2010, Mr. Mathur wrote to the AAA stating *inter alia* that Escorts was not submitting to the jurisdiction of the AT and that it had filed a civil suit in Faridabad for stay of the arbitral proceedings. Accordingly Escorts sought postponement of the hearing in the arbitral proceedings till the hearing of the suit. UTH opposed this request. On 21st July 2010 the AT rejected Mr. Mathur's request and a copy of the said order was sent by AAA to Mr. Mathur by email the following day. Meanwhile Mr. Mathur sent another long email to the AAA seeking postponement as the time given was short. On 23rd July 2010 Mr. Mathur sent an email to AAA reiterating Escort's opposition to the jurisdiction of the AT and the validity of the arbitral proceedings and stated that Escorts would not be appearing on 30th July 2010 before the AT. On 27th July 2010 Mr. Mathur was informed by email by the AAA that the AT had reviewed his emails and decided to proceed with the hearing on 30th July 2010. After UTH's arbitration brief was served on Mr. Mathur by email on 27th July 2010, he sent an email on 28th July 2010 protesting against the paucity of time to respond. At the final hearing of the arbitral proceedings on 30th July 2010 Escorts was not represented. On 24th/26th August 2010, the AT passed a unanimous Award in the manner noted earlier.

The present proceedings

12. UTH filed the present petition on 19th November 2010. By an order dated 26th November 2010 notice was directed to issue to the JD. Pursuant to the order dated 25th January 2011 an affidavit was filed by

UTH stating that in light of the decision of the Supreme Court in ***Forasol v. Oil and Natural Gas Commission 1984 (Supp) SCC 263*** this Court should issue directions regarding payment of the Indian Rupee ('INR') equivalent of the foreign currency at the rate of exchange prevailing on the date of the decree. On 26th April 2011 learned counsel for the JD submitted that the order dated 25th January 2011 had not been fully complied with by the DH. Further time was granted for this purpose as well as for the JD to file a reply. On 16th August 2011 a further affidavit was filed by UTH showing the calculation of the decretal amount at the rate of 1 USD = INR 45. Interest was calculated up to 25th August 2011.

The case of Escorts

13. In its reply filed on 8th September 2011 Escorts contends that it was not privy to the Agreement and therefore there was no arbitration agreement between it and UTH and therefore it could have never been made party to the arbitral proceedings. Reliance is placed on the decisions in ***Indowind Energy Limited v.Wescare (India) Limited (2010) 5 SCC 306*** and ***S.N.Prasad Hitek Industries (Bihar) Limited v. Monnet Finance Limited (2011) 1 SCC 320***. It is submitted that the Award in question against it was without jurisdiction and a nullity. In terms of Clause 12.1 of the Scheme of Amalgamation approved by the P&H High Court, any proposed, future or pending legal proceedings between UTH and EAMI could not be continued or enforced against Escorts. This was also the position under Section 252 (a) of the Delaware General Corporation Law. The arbitral proceedings arising out of the order dated 19th June 2009 of the WCSC, NC could have been continued and enforced by UTH only against EAMI.

14. Escorts submits that UTH originally owned 49% interest in BCH, while EAMI originally owned 51% interest. BCH, in turn, owned 51%

interest in Farmtrac, North Carolina, LLC, ('Farmtrac') having its office at Delaware. EAMI owned 49% interest in Farmtrac which is engaged in the business of selling farm tractors and related farming equipment. Since 18th January 2008 Farmtrac was under the control of a Court appointed Receiver and was under the process of liquidation as per the laws of Delaware, USA on the motion initiated by the creditors of Farmtrac. Since the shareholding in Farmtrac was BCH's only operating asset, the shareholding interest of UTH in BCH was rendered worthless and EAMI was not in a position to make payment towards UTH's 49% interest in BCH. It was submitted that as a result of frustration of the Agreement the performance by EAMI of its obligations had to be excused. Further even UTH did not deliver the remaining portion of its MUs in BCH to EAMI.

15. It is submitted by Escorts that the present enforcement petition filed under Order 21 Rule 11 Code of Civil Procedure, 1908 ('CPC') is not maintainable as such since enforcement of a foreign Award had to be sought in terms of Section 48 of the Act. The Award has been passed on patently erroneous interpretation of an order dated 17th September 2009 passed by the P&H High Court. It is asserted that Escorts had never acquiesced in the initiation of arbitral proceedings against it by UTH. Escorts further contends that the procedure followed by the AT was violative of the principles of natural justice and that Escorts was denied an opportunity of effectively defending itself in the arbitral proceedings. The substitution of EAMI by Escorts as ordered by the AT was without notice to Escorts. Escorts was given only three days' time from 27th July 2010 to 30th July 2010 to engage and brief a counsel conversant with the law of the State of Delaware. It is further pointed out that in the suit pending in the Faridabad, UTH had not filed its written statement and the outcome of those proceedings had a bearing on the validity of the Award. It is

submitted that the Award was patently illegal and its enforcement would be opposed to the public policy of India in terms of Section 48 of the Act.

The case of UTH

16. A rejoinder was filed by UTH pointing out that after the judgment of the Supreme Court in ***Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2001) 6 SCC 356*** there was no need to file separate petitions for enforcement and execution. It is stated that by virtue of merger of Escorts with EAMI as evidenced by the Certificate of Merger filed with the Secretary of State of Delaware on 13th October 2009, read with the unconditional consent given by EAMI for reference of the disputes to arbitration as was recorded in the order dated 19th June 2009 of WCSC, the Award in question was enforceable against Escorts as such. It is reiterated by virtue of the merger of EAMI with Escorts, all of EAMI's obligations and liabilities under the Agreement dated 28th December 2006 stood transferred to Escorts. Under Clause 8 (k) of the agreement dated 28th December 2006 the laws of the State of Delaware were applicable. Under Section 261 of the Delaware General Corporation Law, Escorts stepped into the shoes of EAMI consequent upon the merger and it was rightly substituted for EAMI in the arbitration proceedings.

17. It is submitted by UTH that in terms of Clause 12.1 of the Scheme of Amalgamation approved by the P&H High Court, the pending litigation between UTH and EAMI had to be decided in accordance with the laws of Delaware. UTH denies that the agreement was rendered incapable of being performed on account of Farmtrac going into liquidation. UTH has in its rejoinder adverted to the proceedings for appointment of a court receiver for Farmtrac which revealed that Escorts had indulged in fraudulent invoicing to siphon off huge amounts from Farmtrac for orders

that were in fact not placed with Escorts. As regards the opportunity of defending itself, it is pointed that till 19th May 2010 Mr. Ostrander represented Escorts in the arbitral proceedings and took the false plea to the contrary. Escorts had sufficient opportunity of making alternative arrangements if it chose to. Having deliberately stayed away from the arbitral proceedings, Escorts cannot be heard to complain of violation of natural justice. It is denied that the Award is opposed to the public policy of India and it is reiterated that it is enforceable as such under Section 48 read with Section 49 of the Act.

18. Arguments on behalf of UTH were advanced by Mr. Dharmendra Rautray, learned counsel. On behalf of Escorts, Mr. Simran Mehta, learned counsel made submissions.

19. Both counsel reiterated the respective stands of the parties as emanating in the pleadings referred to earlier. In addition an issue raised during the course of arguments by the learned counsel for the JD was whether the Award in question was required to be 'recognised' in terms of the Federal Arbitration Act ('FAA') of the USA before it could be enforced under the Act in India. Mr. Mehta referred to the "agreed order" dated 19th June 2009 of the WCSC wherein it was mentioned that "the Court shall retain jurisdiction for the purposes of entering an order confirming the arbitration decision pursuant to the FAA." On the other hand, it was the stand of Mr. Rautray that under the New York Convention, the requirement of double *exequatur* has now been dispensed. This permitted enforcement of a foreign Award rendered in a Convention country without the Award having to be 'recognised' in separate proceedings in the country where it was pronounced. Both counsel referred to commentaries and case law which will be discussed

hereafter.

Issues that arise for consideration

20. On the basis of the pleadings and submissions, the following issues arise for consideration by the Court in the present proceedings:

(a) Can the Award in question be straightaway enforced in proceedings under Sections 48 and 49 of the Act, without it first being 'recognised' under the FAA of the U.S.A?

(b) Is enforcement of the Award liable to be refused on any of the grounds under Section 48 of the Act?

Maintainability of the enforcement petition

21. The Award in the present case is admittedly a foreign Award having been made in the U.S.A. to which the U.S. laws applied. The agreed order dated 19th June 2009 of the WCSC noted specifically that it had been a term of the Agreement that "The arbitration shall apply the law of the State of Delaware to the merits of the parties' dispute, without reference to rules of conflict of laws."

22. The enforcement of a foreign Award in India is governed by Part II of the Act. Chapter I of Part II pertains to New York Convention Awards. The New York Convention itself has been set out as such in the First Schedule to the Act. Chapter II of Part II of the Act governs the enforcement of Awards under the Geneva Convention, which is set out in the Second Schedule to the Act. The Award in the present case would be a New York Convention Award.

23. The submission made by the JD during arguments, and not in its written objections to the enforcement of the Award, is that the Award in

question “has not yet become binding on the parties” in terms of Article V (1) (e) of the New York Convention which language is also incorporated as such in Section 48 (1) (e) of the Act. It is also submitted that since the Award is yet to be recognised and held enforceable by the concerned U.S. Court (the WCSC) under the FAA, it cannot be sought to be enforced in a court in India. The question that arises is whether the Award was, after being pronounced, required to be ‘recognised’ or made a decree of the Court in the U.S.A. under the FAA. This requires the examination of the rule of double *exequatur*.

24. Under the Geneva Convention the burden was upon the party seeking enforcement of a foreign Award to prove the fulfilment of the conditions necessary for enforcement, one of which was that the Award had become “final” in the country in which it was made. In other words the party seeking enforcement had to show that the question of *exequatur*, i.e. the question of whether or not the foreign Award can be recognised and/or enforced had been considered and answered in the affirmative by the competent authority in the country in which the Award was made. This created problems for the enforcement of foreign Awards as the judicial authorities in some countries were of the view that the person seeking enforcement of a foreign Award should first produce an order of the court of the country in which the Award was made granting leave to enforce (such as an *exequatur*) and then only seek a similar order in the country in which enforcement was sought. This was what was termed as “double *exequatur*”.

25. The New York Convention made a significant improvement in the matter of enforceability of foreign Awards. One of the major changes it brought about was that the requirement double *exequatur* was done away

with. Secondly, the burden of proving the grounds for non-enforcement of the foreign Award was placed on the party resisting enforcement. In Dicey and Morris, ***The Conflict of Laws***, (11th Ed. at p.586) it is stated as follows:

> ". ...The Private International Law Committee in their Fifth Report suggest that an Award is "binding" if no further recourse may be had to another arbitral tribunal (e.g. an appeal tribunals) ; and that the fact that recourse may be had to a Court of law does not prevent the Award from being 'binding'. One thing seems clear: the Conference which approved the New York Convention wished to avoid a double *exequatur* of arbitration Awards, one in the country where the Award was made and the other in the country where it is sought to be enforced."

26. The seminal commentary on the New York Convention titled ***The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation (1981)***, by Albert Jan van den Berg notes (at p. 266) as follows:

> "Another improvement of the New York Convention's scheme for enforcement of an Award is the elimination of the "double *exequatur*". Under the Geneva Convention the party seeking enforcement of an Award had to prove that the Award had become "final" in the country in which it was made. In practice this could be proven only by producing an *exequatur* (leave for enforcement or the like) issued in the country in which the Award was made. As the party had also to acquire a leave for enforcement in the country in which he sought enforcement, this amounted to the system of "double *exequatur*". The thought prevailed at the New York Conference that the acquisition of a leave for enforcement in the country where the Award was made was an unnecessary time-consuming hurdle, especially since no enforcement was sought in that country. Moreover, it could lead to delaying tactics on the part of the respondent who could forestall the Award becoming final by instituting setting aside procedures in the country in which the Award was made.
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> The elimination of the "double *exequatur*" is achieved in two ways. In the first place, the word "final" is replaced by the word "binding" in order to indicate that it does not include the *exequatur* in the country of

origin (Art. V (1)(e)). In the second place, it is no longer the party seeking enforcement of the Award who has to prove that the Award has become binding in the country in which the Award is made; rather, the party against whom the enforcement is sought has to prove that the Award has not become binding."

27. As noted earlier, the First Schedule to the Act incorporates the provisions of the New York Convention. Under Article V (1) (e) thereof the recognition and enforcement of an Award can be refused only if the party against whom it is invoked furnishes to the competent authority where the recognition and enforcement is sought, proof that "the Award has not yet become binding on the parties" under the law of the country in which the Award was made. Thus apart from the two innovations of the New York Convention viz., abandonment of the 'double *exequatur*' rule and shifting the burden of proving that the Award had not become final on the party resisting enforcement, the other change was that the concept of a "final Award" under the Geneva Convention was replaced by the concept of a "binding Award." In the commentary on '**International Commercial Arbitration**' by Mr. Gary B. Born (Kluwer Law International, 2009) this distinction is explained thus (Vol. II at p. 2720):

> "International Arbitration Conventions: 'Final' or 'Binding' Awards.
>
> Under international arbitration conventions that preceded the New York Convention, enforcement of foreign arbitral Awards was generally required only if those Awards were "final". That was true, for example, under the Geneva Convention, which only mandated enforcement of "final" arbitral Awards. Moreover, the Geneva Convention provided that the burden of establishing "finality" was on the party seeking enforcement, which was required to demonstrate that the Award was "not open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) [and that no] proceedings for the purpose of contesting the validity of the Award are pending."

> As a consequence, parties seeking to enforce foreign arbitral Awards under the Geneva Convention were effectively required to follow a so-called "double *exequatur*" process. This entailed obtaining judicial confirmation of the Awards in the local courts of the places where they were rendered (in order to prove their "finality"), and thereafter seeking judicial enforcement abroad.
>
> As reflected in the New York Convention's drafting history, one of the principal (and deliberate) innovations of the Convention was its abandonment of the "double *exequatur"* procedure which was widely perceived as cumbersome and ineffective. This purpose is uniformly confirmed by commentary and national court decisions. To accomplish this, the Convention shifted the burden of proof to the party resisting the Award (who is required to prove the existence of grounds for non-recognition of the Award, including that an Award is not binding).
>
> In addition, the Convention specifically abandoned the "finality" requirement, which had been contained in Article 1 of the Geneva Convention. Instead, Article III of the New York Convention requires that arbitral Awards shall be recognized, while Article V (1) (e) permits, but does not require, non-recognition of an Award if it has not become "binding" or has been set aside where it was made. Under these provisions of the Convention, once an Award becomes "binding" it is subject to recognition in any Contracting State – notwithstanding the fact that the Award has not been confirmed in the arbitral seat."

28. In the same commentary it is explained that given the language of the New York Convention "the possibility of ongoing judicial review of an Award in the arbitral seat should not prevent the Award from being binding (since this would effectively revive the double *exequatur* requirement by preventing an Award from being binding until avenues for local judicial review had been exhausted."

29. The Supreme Court of India in ***Oil and Natural Gas Commission v. Western Company of North America (1987) 1 SCC 496***, took note of the above change brought about by the New York Convention and extensively quoted from the aforementioned commentary of Van den Berg. However, the said decision was concerned with the enforcement of a domestic Award made under the Arbitration Act, 1940 ('1940 Act') and not a foreign Award. The later decisions in ***Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644***, ***Smita Conductors Ltd. v. Euro Alloys Ltd. (2001) 7 SCC 728*** and ***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705*** where the fact of the New York Convention dispensing with the rule of double *exequatur* was taken note of, were cases concerning challenge to a foreign Award on the ground of it being opposed to the public policy of India. In ***Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*** after discussing the 1940 Act, the Act, and the Foreign Awards (Recognition and Enforcement) Act, 1961 it was clarified that "for enforcement of a foreign Award there is no need to take separate proceedings, one for deciding the enforceability of the Award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding the court enforcing a foreign Award can deal with the entire matter." Thus it appears that the question whether an Indian court is precluded from enforcing a foreign Award which has not been recognised or declared enforceable in the Court of the country in which it was made has not directly arisen for consideration yet in the Supreme Court of India.

30. The question has however been considered in courts outside India. In ***Rosseel NV v. Oriental Commercial & Supply Co. (UK) Ltd [1991] 2 Lloyd's Law Rep 625***, it was held that "..the New York Convention eliminated the 'double *exequatur*' requirement under the earlier Geneva

Convention. Under the Geneva Convention a party who sought to enforce an Award, had to prove an *exequatur* (leave to enforce) issued in the country in which the Award was made as well as leave to enforce in the country in which he sought enforcement. The New York Convention abolished the need to obtain leave to enforce in the country where the Award was made." This was reiterated recently in ***Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2011] 1 A.C. 763*** by holding that: "The New York Convention does not require double *exequatur* and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive." In ***Dowans Holding SA, Dowans Tanzania Ltd. v. Tanzania Electric Supply Co. Ltd.***, ***[2011] EWHC 1957 (Comm)***, the High Court of Justice Queen's Bench Division Commercial Court, held that: "The New York Convention, upon which the UK Act is based, contained in almost identical wording the provisions of s103(2)(f) in Article V(1)(e) and s103(5) is in almost identical terms to Article VI. It is common ground that the intention of the New York Convention was to make enforcement of a Convention Award more straightforward, and in particular to remove the previous necessity for a double *exequatur* - i.e. the need, before a Convention Award could be enforced in any other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration…." In ***Karah Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F. 3d 357, (5th Circuit 2003)*** (at p. 366-67) it was observed: "When the Convention was drafted, one of the main purposes was to facilitate the enforcement of arbitration Awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such Awards or leave to enforce them from a court in the country of the arbitral *situs*."

31. The position that emerges from the above discussion is that in order to seek enforcement of a foreign Award under Section 48 of the Act, it is not necessary for the party seeking enforcement to show that leave for enforcing the Award has been obtained in the court of the country in which such Award is made. On the other hand the party resisting enforcement has to show that the Award has not become binding on the parties. In the present case the enforcement of the Award in question cannot be refused only because the Award has not been declared enforceable by the WCSC. On the other hand there can be no presumption that the Award is not binding particularly since Escorts has not taken any steps to challenge the Award in the WCSC or any court in the U.S.A in accordance with law. In other words Escorts has been unable to show that the Award has by any order of a court been declared to be not binding on the parties. As pointed out by learned counsel for UTH, the question of UTH seeking leave to enforce the Award under the FAA would arise, if at all, if UTH were to seek to enforce the Award in the U.S.A. The objection of Escorts to the maintainability of the present petition is accordingly rejected. Issue (a) is answered accordingly.

Substitution of EAMI by Escorts

32. The substantial challenge by Escorts to the enforcement of the Award is that the order of the P&H High Court approving the merger of EAMI with Escorts was overlooked by the AT. It is pointed out that after the order dated 17th September 2009 was passed, a formal order was made by the High Court on 24th December 2009 in which in para 1 (c) the following sentence occurred:

> "That all proceedings now pending by or against the Transferor Company be continued by or against the Transferee Company and"

33. An application was filed on 5th April 2010 in the P&H High Court on behalf of Escorts pointing out that the above sentence in the formal order was a typographical mistake. The said application was allowed by the High Court by an order dated 8th April 2010.

34. The above correction to the formal order does not make any difference to the fact that the P&H High Court on 17th September 2009 approved the Scheme of Amalgamation including Clause 12.1 thereof. It provided that all proceedings pending by or against the Transferor Company (EAMI) be continued by or against the Transferee Company (Escorts) "except the legal proceedings initiated/to be initiated by Universal Tractor Holdings LLC (a Delaware Limited Liability Company), as mentioned in Clause 12.1 of the Scheme." Clause 12.1 stated that the proceedings filed by UTH "shall be dealt in accordance with Laws of the State of Delaware, USA" and that those proceedings shall not abate or be discontinued and "shall be continued and enforced by or against the transferee company in the manner and to the same extent as would or might have been continued and enforced by or against the Transferor company."

35. Insofar as the "General Corporation Law" of the State of Delaware is concerned, Section 259 (a) provides that "all and singular, the rights, privileges, powers and franchises" of the corporations which are merged "as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation" and "all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

Section 261 also provides for substitution of the merged corporation with the "surviving or resulting" corporation in the proceedings against such merged corporation. The above provisions have to be examined together with the Certificate of Merger dated 5th October 2009 filed with the Secretary of State of Delaware on 13th October 2009. The said certificate signed by Mr. G.B.Mathur of Escorts states, *inter alia*, in the seventh para as under:

> "Seventh: Escorts Ltd. hereby agrees, pursuant to Section 252(d) of the General Corporation Law, that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of any constituent corporation of the State of Delaware, as well as for enforcement of any obligation of the surviving or resulting corporation arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stakeholders as determined in appraisal proceedings pursuant to Section 262 of the General Corporation Law, and hereby irrevocably appoints the Secretary of State of Delaware as its agent to accept service of process in any such suit or other proceedings and that a copy of such process shall be mailed by the Secretary of State of Delaware at the address set forth in Article Fifth above."

36. There can be no manner of doubt that Escorts understood the legal position that it was the "surviving or resulting corporation" and that it had to assume all liabilities arising thereafter of EAMI. Clause 12.1 of the Scheme of Amalgamation, as approved by the P&H High Court by its order dated 19th September 2009, required that the proceedings instituted by UTH against EAMI "shall be dealt with in accordance with the Laws

of the State of Delaware." This required the AT to decide the said dispute in accordance with the Laws of Delaware which is also what was mandated by the Agreement in the first place. Section 259 (a) provided that the liabilities attaching to the constituent corporations to a merger shall attach to the "surviving or resulting corporation." The latter part of Section 261 of the Delaware General Corporation Law expressly provides that as an alternative to the action continuing against the original entity against whom the proceedings are pending, "the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding." Consequently, the AT was right in its conclusion that both in terms of the Scheme of Amalgamation approved by the P&H High Court and in terms of the relevant provisions of the General Corporation Law of the State of Delaware, Escorts was "liable for the contractual obligations of EAMI, including the duties owed by EAMI under the Agreement and under the Agreed Order." The Court finds no legal error in the above determination of the AT.

37. Consequently, the contention that Escorts cold not have been made a party to the arbitration proceedings must fail for the reason that after EAMI's merger with it, Escorts stepped into its shoes and was required both under the order of the P&H High Court approving the merger as well as the Laws of Delaware to undertake the liabilities attaching to EAMI both under the Agreement as well as the Agreed Order. The reasons for the AT allowing the application of UTH to substitute EAMI with Escorts cannot be said to be perverse or illegal or inconsistent with the order of the P&H High Court.

No violation of the principles of natural justice

38. The next issue to be considered is whether the arbitral proceedings can be said to be in violation of principles of natural justice. The procedural

history of the case has been set out in the arbitral Award dated 24th/26th August 2010. The 'Stipulation' dated 12th November 2008 clearly shows that Mr. Michael Ostrander represented both EAMI and Escorts in the suit. He did so even later on in the arbitration proceedings, even after Escorts was substituted for EAMI. This is evident from his emails dated 29th December 2009 and 30th April 2010 in which he talks of "my clients in India" which obviously refers to Escorts. By then EAMI was no longer in the picture. Mr. Ostrander's withdrawing from the arbitral proceedings on 19th May 2010 appears to be a desperate move to delay the final hearing in those proceedings, which attempt did not succeed.

39. Even prior to Mr. Ostrander's withdrawal other measures were resorted to stall the arbitral proceedings. The application by EAMI made on 15th March 2010 for stay of the arbitration proceedings pending resolution of a civil suit filed by Escorts against UTH in Faridabad was denied by the AT on 30th March 2010. With the consent of both the parties, the hearing was postponed from 24th May to 28th May 2010 and thereafter to the week of 26th July 2010. On 5th May 2010 the AT allowed the request of UTH and amended the cause title of the case. It was only thereafter that Mr. Ostrander advised AAA on 19th May 2010 that he did not represent Escorts in the arbitration.

40. The fact that Escorts was fully aware of the consequences of such a move is apparent from the numerous mails exchanged between Mr. G.B Mathur, Executive Vice President – Law and Company Secretary of Escorts and the AAA. Once Mr. Ostrander withdrew from the proceedings, Mr. Mathur continued to correspond with the AT on behalf of Escorts. It was therefore, not as if Escorts was unaware of the proceedings. The long email sent by Mr. Mathur on 22nd July 2010 with

copies to Mr. Rajan Nanda and Mr. Nikhil Nanda of Escorts was virtually a repetition of all the points urged earlier which had already been rejected by the AT. Mr. Mathur's email on 23rd July 2010 acknowledged receipt of the order dated 21st July 2010 of the arbitral panel and maintained that Escorts has been impleaded as a party even without sending his response. It was on this score Mr. Mathur stated that "we shall not be present for the hearing on 30th July 2010." On 28th July 2010 Mr. Rajan Nanda's email meant for Mr. Mathur appears to have been sent in fact to AAA's Case Manager by mistake. In it Mr. Nanda stated: "He has totally ignored your representation and is proceeding – can we protest and stall the Arbitration." Clearly therefore Mr. Mathur's remit was to do precisely that. Escorts was fully aware of the consequences of staying away from the pending arbitration proceedings. It chose to take a risk hoping that the proceedings would get adjourned. The refusal by the AT to do so cannot, in the circumstances, be said to be unreasonable. This was a situation that Escorts brought upon itself. It cannot be heard to complain of any violation of the principles of natural justice.

41. For all the aforesaid reasons, the objections by EAMI to enforcement of the foreign Award dated 24th/26th August 2010 are hereby rejected. It is declared that the said Award is enforceable as such under Section 49 of the Act. Further it is held that the Award is not opposed to the public policy of India. Issue (b) is answered by holding that none of the grounds under Section 48 of the Act for refusing enforcement of the Award are made out by the JD.

Consequential directions

42. With the objection of Escorts having been rejected, the Award is, in terms of Section 49 of the Act, deemed to be a decree of the Court by the

present judgment. This is also relevant for the purposes of calculation of the exchange rate for conversion of the claim in USD into INR as prayed for by the DH (UTH). Therefore, in accordance with the affidavit filed on 16th August 2011 by the Petitioner, the JD (Escorts) is directed to deposit in this Court within eight weeks the following sums after converting the USD to INR by applying the rate of exchange prevalent as of today:

(I) USD 125,000 + interest @ 11.25% from 30th May 2007 till 25th August 2011

(II) USD 350,000 + interest @ 11.25% from 10th August 2007 till 25th August 2011

(III) USD 51,030.37 + USD 25,388.15 + USD 19,347.47

43. List on 18th September 2012.

S. MURALIDHAR, J.

JULY 13, 2012
RK