IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.04.2022

\+ **OMP (ENF.) (COMM.) 258/2018 & EA(OS) Nos. 1026/2019, 188/2020, 16240/2018 & 8918/2019**

M/S KARAM CHAND THAPAR & BROS. (COAL SALES) LTD. ..... Decree Holder

versus

MMTC LTD. ..... Judgment Debtor

Advocates who appeared in this case:

For the Decree Holder: Mr Rajeev K. Virmani, Senior Advocate with Mr Rishabh Bhargava and Ms Niharika, Advocates.

For the Judgment Debtor: Mr Sanat Kumar, Senior Advocate with Mr Abhishek Bhardwaj and Mr Manish K. Singh, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (Decree Holder) has filed the present petition under Section 36 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') seeking to enforce an Arbitral Award dated 07.01.2017 (hereafter the '**Arbitral Award**'). The Arbitral Award has been enforced to a substantial extent.

2. The only contentious issue that remains to be addressed is regarding the rate of conversion of foreign exchange to be applied for determining the amount required to satisfy the Arbitral Award to the extent of the amount awarded in foreign currency (US Dollars). The petitioner claims that the rate of conversion is to be determined with reference to the date on which the respondent's (Judgment Debtor's) Special Leave Petition (SLP) was dismissed by the Supreme Court and the Arbitral Award became final. The respondent (hereafter **'MMTC'**) contends that the rate of conversion is to be reckoned in reference to the date when the demand for the same was made by the petitioner for the first time (that is, on 15.05.2010).

3. Briefly stated the relevant facts necessary to address the aforesaid controversy are as under:

3.1 The petitioner is a company incorporated in India and is engaged in the business of stevedoring and handling, cleaning and forwarding, transportation and escorting etc. MMTC is a Public Sector Undertaking.

3.2 National Thermal Power Corporation Ltd. (hereafter '**NTPC Ltd.**'), a public sector undertaking, had placed an order with MMTC for import of coal and supply to its various power stations in the country. Accordingly, MMTC had entered into an Agreement dated 01.06.2005 with the petitioner, whereby the petitioner was engaged as a stevedoring and handling contractor for handling imported coal from foreign vessels at the port of discharge (Paradip Port) and, for its

transportation to NTPC Ltd's Thermal Power Station, Kaniha at Talcher, for the period June, 2005 to May, 2006.

3.3 Disputes arose between the parties in connection with the said contract. The same were referred to arbitration under the aegis of the Indian Council for Arbitration. The Arbitral Tribunal comprised of three former High Court Judges. The arbitral proceedings culminated in the Arbitral Award dated 07.01.2017, which is sought to be enforced in this petition.

3.4 The operative part of the Arbitral Award reads as under:

> "**AWARD**
>
> Accordingly, the Arbitral Tribunal proceeds to make this award holding the Claimant entitled to recover from the Respondent the following amounts:
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> 1. Rs.1,27,62,425/- under claim No.1 on account of service charges;
> 2. USD 2,42,445.03 under claim No.2 on account of despatch money;
> 3. Rs.17,46,576/- with Rs. 2,22,688.44 towards interest @10% per annum from 02.06.2009 till 09th September, 2010, the date of the filing of the statement of Claim, total Rs.19,69,264.44, under claim No. 3, on account of bank guarantee charges.
> 4. Under claim No.1 for an amount of Rs. 95,30,830.50 towards *pendente lite* interest from 09th September, 2010, the date of filing of the claim till the date of the award, at the rate of 12% per annum on Rs.1,27,62,425/- .
> 5. Under claim No.2 for an amount of USD 1,81,106.43 towards *pendente lite* interest from 09th September,

2010, the date of filing of the claim till the date of the award, at the rate of 12% per annum on USD 2,42,445/43.

6. Under claim No.3 for an amount of Rs. 13.04,692/27 towards *pendente lite* interest from 09th September, 2010, the date of filing of the claim till the date of the award, at the rate of 12% per annum on Rs.17,46,576/27.
7. Future interest at the rate of 12% per annum from the date of the award till the date of payment on the awarded amount of Rs. 2,53,44,523/77 and USD 4,23,551/46.
8. The Claimant is also held entitled to full costs of the arbitral proceedings. Award signed, published and delivered at New Delhin on 7th January, 2017."

3.5 MMTC challenged the award under Section 34 of the A&C Act [**OMP(COMM) 193/2017** captioned ***MMTC Ltd. v. M/s Karam Chand Thapar & Bros. (Coal Sales) Ltd.***]. The said petition was disposed of by this Court by a judgment dated 31.10.2018. The Arbitral Award was not interfered with except to the extent of cost awarded by the Arbitral Tribunal.

3.6 MMTC appealed the judgment dated 31.10.2018 before the Division Bench of this Court [***FAO(OS)(COMM) 2/2019*** captioned ***MMTC Limited v. M/s Karam Chand Thapar and Bros. (Coal Sales) Ltd.***] which was dismissed by an order dated 25.02.2019.

3.7 MMTC sought to appeal against the said decision before the Supreme Court and filed a Special Leave Petition [SLP (C) No. 9877/2019], which was dismissed by the Supreme Court by an order dated 29.04.2019.

3.8 On 07.05.2019, MMTC deposited a sum of ₹6,97,47,541/- with the Registry of this Court. MMTC states that the aforesaid figure was computed by converting the amount awarded in US Dollars to Indian currency at the rate of ₹ 73.996/- which was the prevalent exchange rate at the material time.

3.9 Out of the aforesaid sum of ₹6,97,47,541/- a sum of ₹5,71,04,716/- was released to the petitioner. This comprised of the amount awarded in Indian currency along with interest till 07.05.2019 (that is, the date of deposit). And, the amount in INR equivalent to the amount awarded foreign currency (US$) converted at an exchange rate of ₹45.10 per USD – the exchange rate as applicable on 15.05.2010 – along with interest. This amount was admittedly payable to the petitioner. According to MMTC, the component of the Arbitral Award in foreign currency (US Dollars) was to be discharged in Indian currency computed at a conversion rate as applicable on 15.05.2010 – being the date on which the petitioner had demanded the amount for the first time.

4. In view of the above, the only contentious issue that requires to be addressed at this stage is regarding the conversion rate to be applied for discharge of the amount awarded in foreign currency in terms of the Arbitral Award.

5. According to MMTC, the foreign currency conversion rate as applicable on 15.05.2010 is required to be used for computing the Indian currency equivalent to the amount awarded in US Dollars.

MMTC claims that since the petitioner had articulated its demand for the first time on 15.05.2010, the said date is relevant for computation of the conversion rate. The petitioner, on the other hand, claims that the conversion rate as applicable on 29.04.2019 – the date on which MMTC's Special Leave Petition was dismissed by the Supreme Court of India – is relevant, as the Arbitral Award became final and enforceable on that date.

Submissions

6. Mr Virmani, learned senior counsel for the petitioner, had referred to the decisions of the Supreme Court in ***Forasol v. Oil and Natural Gas Commission: (1984) Supp SCC 263*** and the decision of this Court in ***Trammo AG v. MMTC Limited: 2019 SCC OnLine Del 7337*** in support of his contention.

7. Mr Sanat Kumar, learned senior counsel for MMTC, submitted that the decision in the case of ***Forasol v. Oil and Natural Gas Commission*** (*supra*) and ***Trammo AG v. MMTC Limited*** (*supra*) are inapplicable to the facts of the present case. He submitted that the said decisions were rendered where one of the parties to the dispute was a foreign entity. He submitted that the said decisions would have no bearing to disputes where both parties are Indian Nationals/Indian entities. He submitted that in such cases, there is no dispute that the arbitral award is required to be discharged in Indian currency, and therefore, the conversion rate as applicable on date of the first demand, would be the relevant date.

8. He submitted that *a fortiori* in the present case, the contract in question was to be performed in India and all payments were required to be discharged in Indian currency. He submitted that the first Statement of Claims filed by the petitioner had also quantified the claimed amounts in Indian currency. However, subsequently, the petitioner had filed a second Statement of Claims claiming certain amounts in US Dollars. He submitted that the Arbitral Tribunal had also awarded interest in foreign currency at the same rate as applicable to the amounts awarded in Indian currency (at the rate of 12% per annum). According to him, this would not be sustainable if the conversion rate is accepted to be the rate on which the Arbitral Award became final. He referred to the decision in the case of ***Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd.: (2019) 11 SCC 465*** in support of his contention.

9. He also referred to the decision of the Supreme Court in ***Triveni Kodkany and Ors. v. Air India Ltd. and Ors.: 2020 SCC OnLine SC 876*** and on the strength of the said decision contended that since both parties were Indian, the decisions in the case of ***Forasol v. Oil and Natural Gas Commission*** (*supra*) and ***Trammo AG v. MMTC Limited*** (*supra*), are inapplicable.

Reasons and Conclusion

10. It is trite law that in execution proceedings, the Court is not required to go behind the decree. The decree must be accepted on its

own terms and shall be enforced. There is no room to revisit contentious issues, which have attained finality, at this stage.

11. In the present case, the petitioner had filed a Statement of Claim claiming certain amounts in foreign currency. The Arbitral Award was dispositive of the disputes between the parties and it is clear from the face of the Arbitral Award that an amount of USD 242,445.03 has been awarded against Claim No.2 along with pre-reference and *pendente lite* interest at the rate of 12% per annum quantified at USD 181,106.43

12. Admittedly, the Agreement between the parties does not contain any provision regarding conversion of the foreign currency component in Indian rupees. Thus, the Arbitral Award must be enforced on its own terms. However, the Arbitral Award does not indicate the conversion rate for computing the Indian currency equivalent to the amounts awarded in US Dollars.

13. Given the aforesaid circumstances, the question as to the exchange rate to be applied for computing in Indian currency equivalent of the amount awarded in foreign currency is no longer *res integra*. In ***Forasol v. Oil and Natural Gas Commission*** (*supra*), the Supreme Court had considered the aforesaid question and had held that the date on which the decree had become final would be the relevant date for determining the applicable exchange rate. The relevant extract of the decision is set out below:

> "23. The question which now remains to be considered in Forasol's appeal is the date to be selected by the Court for

converting into Indian rupees the French franc part of the said award in respect of which no rate of exchange has been fixed either by the said contract or the said award.

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 became due and payable;

(2) the date of the 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.

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41. The first of the five dates listed earlier by us, namely, the date when the amount became due and payable, does not have the effect of putting the plaintiff in the same position in which he would have been had the defendant discharged his obligation when he should have done because between that date and the date when the suit is decreed the rate of exchange may have fluctuated to the plaintiff's prejudice, resulting in the amount decreed in rupees representing only a fraction of what he was entitled to receive. Equally, the possibility of the plaintiff getting more than what he had bargained for in case the rate of exchange had fluctuated in his favour cannot be ruled out. To select, as the English courts had done earlier, the date when the amount became due or the "breach date", as the English courts have termed

it, is thus to expose the parties to the unforeseeable changes in the international monetary market. The selection of the "breach date" cannot, therefore, 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 subjected to a much greater burden than what he should be.

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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.

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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 [1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)] .

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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."

14. The aforesaid decision has been followed by the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co.: 1994 Supp (1) SCC 644***; ***Standard Chartered Bank Ltd. v. B.N. Raman (Dr.): (2006) 5 SCC 727***; and ***Meenakshi Saxena v. ECGC Ltd.: (2018) 7 SCC 479***.

15. It is important to note that during the course of the proceedings under Section 34 of the A&C Act filed by MMTC to impugn the Arbitral Award [OMP(COMM) 193/2017], the aspect of the applicable foreign exchange was raised during oral submissions. Mr Kumar,

learned senior counsel for MMTC, had earnestly contended that this Court had held that the question relating to the applicable exchange rate was left open for the Executing Court to decide. He also referred to the following passage from the said decision [*OMP(COMM) 193/2017 captioned : 'MMTC Ltd. v. M/s Karam Chand Thapar & Bros (Coal Sales) Ltd.'*]:

> "33.2 While on the issue at hand, I may also advert to one other aspect (which was, once again, put forth across the bar by Mr. Sanat Kumar) as to the applicable exchange rate. In my view, this is an aspect which the Executing Court will examine, if it reaches that stage having regard to the applicable law on the issue. As correctly contended by Mr. Virmani, the judgment debtor, if it happens to be the petitioner, could offer to pay the amount in Indian rupees and the conversion rate, which would apply would be the rate, which is prevalent on the date of the decree."

16. This Court is of the view that the aforesaid observations do not support the contention advanced by Mr Kumar. On the contrary, it appears that the Court was of the view that the conversion rate on the date of the decree, would be applicable. The contention of Mr Virmani, learned senior counsel who appears for the petitioner (respondent in that proceedings) was accepted by the Court. The question regarding the applicable conversion rate was left open for the Executing Court to decide as at that stage, the Arbitral Award had not attained finality. Therefore, the Court had observed that if the petitioner happens to be the Judgment Debtor, it would pay the applicable rate prevalent on the date of the decree.

17. MMTC also understood the observations made by the Court as above and thus, specifically raised the same as a ground of appeal before the Division Bench of this Court. The relevant ground urged by MMTC before the Division Bench of this Court was articulated as under:

> "P. It is submitted that the Ld. Single Judge after having held that the executing Court would determine the exchange rate applicable in the present matter, further observed that the Appellant if it wanted to pay the claim No.2 in INR it could do so at the exchange rate as applicable on the date of the decree. These two findings are completely contrary to each other. Once the Ld. Single judge has found that the executing court shall have the power to decide as to what rate the USD is to be converted into INR, the Ld. Single Judge should not have gone further and observed on the said issue."

18. As noted above, the Division Bench of this Court dismissed the appeal [FAO(OS)(COMM) 2/2019] preferred by MMTC. MMTC carried the matter before the Supreme Court [SLP (C) No. 9877/2019]. Before the Supreme Court, MMTC sought to challenge the decision of the Co-ordinate Bench of this Court as well as the Division Bench of this court by urging that the Court had wrongly applied the judgment in the case ***Centravis Production Ukraine v. Gallium Industries Limited: (2014) SCC OnLine Del 6787*** as the said case was pertaining to a foreign award. It contended that the principles as applicable in the said judgment and ***Forasol v. Oil and Natural Gas Commission*** (*supra*) would not be applicable in the facts of the present case. The relevant ground urged before the Supreme Court are set out below:

"S. Because in the present matter the date on which the said amount would have to be converted into INR would be the first date on which the said amount was demanded by the Respondent which would be the date of the legal notice dated 15.05.2010 issued by the Respondent through its counsel demanding the said amount. The Ld. Single Judge has wrongly applied the principles which are given in the judgment of *Centravis Production Ukraine v. Gallium Industries Limited 2014 SCC Del 6787*. It is submitted that the judgment of Centravis Production Ukraine v. Gallium Industries Limited (*supra*) is in the context of a foreign award where a party can subject to the contract demand its claims to be awarded in a foreign currency. However, in the present case as mentioned above, the payment can never be made in USD. In domestic award the payment must necessarily be made in INR and that being the case the principles which are applicable in the cases such as Centravis Production Ukraine v. Gallium Industries Limited *supra* and Forasol v. Oil and Natural Gas Commission *2015 (1) ArbR 113 (Delhi)* etc would not be applicable to the facts of the present case.

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W. Because the Division Bench of the Hon'ble High Court failed to appreciate that the finding of the Ld. Single Judge that the claim No. 2 was rightly awarded in terms of USD, is completely contrary to the contract. Under the contract any payments which were to be made to the Respondent by the Petitioner were to be made in INR. Both the Petitioner and the Respondent are Indian companies and therefore there is no question of them entering into a contract where the payments are to be made in USD. In fact such a contract would not be legally permissible.

X. Because the Division Bench of the Hon'ble High Court failed to appreciate that the finding of the Ld. Single Judge that the Claim No. 2 could be awarded in USD because the calculations of demurrage/ despatch was in USD is erroneous. It is submitted that merely because the rate of demurrage/ despatch was in USD does not mean that the quantified demurrage/ despatch amount is also required to be paid in USD. The rate of demurrage/ despatch being given in USD does not entitle the Respondent to claim the said amount in USD instead of INR, especially in a domestic arbitration where both the parties are Indian.

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BB Because the Division Bench of the Hon'ble High Court failed to appreciate that the Ld. Single Judge after having held that the executing Court would determine the exchange rate applicable in the present matter, further observed that the Petitioner if it wanted to pay the claim No.2 in INR it could do so at the exchange rate as applicable on the date of the decree. These two findings are completely contrary to each other. Once the Ld. Single judge has found that the executing court shall have the power to decide as to what rate the USD is to be converted into INR, the Ld. Single Judge should not have gone further and observed on the said issue."

19. It is clear from the above, that MMTC had contested the observations of the Co-ordinate Bench of this Court to the effect that if MMTC was a Judgment Debtor then the rate of exchange to be applied would be as applicable on the date of the decree.

20. Having unsuccessfully raised this question at earlier stages, MMTC's attempt to re-agitate this question is not justified.

21. The decision in the case of ***Triveni Kodkany and Ors. v. Air India Ltd.*** (*supra*) is not applicable to the facts of this case. In that case, the NCDRC (National Consumer Disputes Redressal Commission) awarded compensation in Indian currency, *albeit* on the basis of applying the conversion rate as prevailing on the date of the complaint. NCDRC had computed the compensation payable at AED 58,81,135/- which was converted to Indian currency on the basis of the conversion rate as applicable on the date of the complaint. This was not a case where any amount was awarded in foreign currency.

22. It is also relevant to note that the complainants before the NCDRC were legal heirs of a person who had died in an air crash. They had claimed compensation in Indian currency for future income that would have accrued to the deceased and medical aid on account of negligence on the part of Air India. NCDRC had computed the compensation at AED 58,81,135/- which was equivalent to ₹7,35,14,187/-. A sum of ₹4 crores had already been received by the complainants and a sum of ₹40,00,000/- had been disbursed to the parents of the deceased. The remaining balance sum quantified at ₹2,95,14,187/- was awarded to the complainants along with interest at the rate of 9% per annum.

23. The appellants before the Supreme Court had challenged the amount decreed, and one of the questions, which fell for consideration before the Court, was whether the rate of conversion adopted by the Trial Court (NCDRC) was justified. It is in the aforesaid context, the Court had distinguished the applicability of the decisions in the case of

Renusagar Power Co. Ltd. v. General Electric Co (*supra*) and ***Forasol v. Oil and Natural Gas Commission*** (*supra*). The question now raised by MMTC is regarding the applicable exchange rate where the decree is in foreign currency.

24. The contention that the decision in ***Forasol v. Oil and Natural Gas Commission*** (*supra*) is required to be distinguished on the basis that in that case one of the parties was a foreign entity, is not persuasive. This Court finds it difficult to accept that an Executing Court would determine the exchange rate to be used for enforcing decrees based on whether both the parties are Indian entities or not. It is not necessary that the commercial transactions between Indian parties be confined to Indian territories alone. There may be transactions which may entail exposure in foreign currency. For the purposes of enforcement, no distinction can be made between decree/awards where amounts are decreed/awarded in foreign currencies on the basis of the nationality of the disputing parties.

25. In view of the above, the exchange rate to be applied for computing the amount due and payable under the awarded amount is the exchange rate as prevailing on 29.04.2019, being the date on which MMTC's SLP was dismissed by the Supreme Court and the Arbitral Award attained finality.

26. It is not disputed that the exchange rate on that date for one USD was ₹70.1445 which was less than the exchange rate as on 07.05.2019 (the date on which MMTC had made the deposit). The petitioner would

be entitled to the remaining amount – amount awarded in US$ computed at ₹ 35.045 (₹70.1445 less ₹45.10). The remaining amount is required to be refunded to MMTC.

27. The petition be listed before the Joint Registrar on 13.04.2022 for the remaining amount to be disbursed to the parties on the aforesaid basis.

28. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

APRIL 4, 2022
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