IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO. 1680 OF 2024
IN
COMMERCIAL EXECUTION APPLICATION NO. 23 OF 2024

Avitel Post Studioz Limited & Ors … Applicants

Versus

HSBC PI Holdings Mauritius Limited … Respondent

Mr. Gaurang Mehta alongwith Ms. Vidhi Dharia, Mr.Bharat Jadhav, Mr.Darshil Shah, Ms. Chahat Modi, Mr.Aryan Shah instructed by Enact Legal, Advocate for the Applicants.

Mr. Rohan Rajadhyaksha a/w Mr. Rajendra Barot, Ms.Priyanka Shetty, Mr.Sherna Doongaji, Mr. Ayush Chaddha, Mr. Dhaval Vora, Mr.Tejas Raghav instructed by AZB and Partners, Advocate for the Respondent.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 16th OCTOBER, 2024
PRONOUNCED ON : 9th JUNE, 2025

ORDER :

1. The present Interim Application has been preferred by the Original Award Debtors in the Execution Proceedings of a foreign award. The execution proceedings are filed for execution of a Foreign Award dated September 27, 2014 issued in Singapore International Arbitration Centre (SIAC) Arbitration which has been held to be enforceable against the Award Debtors in India. The present Interim

Application seeks conversion of the awarded dues denominated in foreign currency in the Award by applying exchange rate as fixed by the contract. The Award Holder is also referred to as the Respondent and the Award Debtor is also referred to as the Applicant.

2. The background facts are that, a Share Subscription Agreement dated April 21, 2011 was executed between the Applicant No.1 and the Respondent whereby the Respondent made an equity investment of about US 60 Million in exchange of 7.8% shareholding of Applicant No.1. The agreement was completed on May 6, 2011 and an amended/re-stated Shareholder's Agreement, also dated May 6, 2011 was executed. Pursuant to the disputes that ensued between the Parties, the Respondent invoked the Arbitration clause under the said Agreement, under the SIAC Rules and claimed US $ 60 Million for breach of warranties, damages for misrepresentation and indemnity for Losses from the Applicants. The Arbitration proceedings culminated in a Final Award passed on September 27, 2014 (the said Foreign Award) under which the Applicants were directed to pay to the Respondent an amount of US$ 60 million for breach of warranties, damages for misrepresentation and indemnity for Losses etc. The Applicants had filed an application under Section 34 of the Arbitration and

Conciliation Act, 1996 which was dismissed as non-maintainable by this Court. Subsequently, the appeal filed challenging the dismissal of the application under Section 34 of the Arbitration and Conciliation Act, 1996 was also dismissed by this Court.

3. During the pendency of the Arbitration, the Respondent had filed a Petition under Section 9 of the Arbitration and Conciliation Act,1996 (Arbitration Act). This Court by its Order dated 22nd January 2014 restrained the Applicants from withdrawing the amounts from their Bank Accounts with Corporation Bank to the extent of USD 60 Million. Aggrieved by the same the Applicants filed an appeal against the said Order before the Division Bench of this Court. The Learned Division Bench, by way of its judgment dated July 31, 2014 upheld the findings of the said Order but reduced the amount to be deposited from USD 60 million to USD 30 million. The Order of the Division Bench was assailed before the Hon'ble Supreme Court which came to be rejected on August 19, 2020 and the Hon'ble Supreme Court directed the Applicants to maintain a balance of USD 60 million in the Corporation Bank (presently Union Bank of India) as directed by the Order of the Learned Single Judge of this Court.

4. For enforcement of the said Foreign Award, the Respondent commenced enforcement proceedings in India by filing Arbitration Petition No. 833 of 2015 in this Hon'ble Court in April 2015. The said 2015 Petition came to be decided by an Order and Judgment dated April 25, 2023 (Coram: Manish Pitale, J.) whereby the Foreign Award was declared to be enforceable in India and deemed to be a Decree of the Court.

5. The Respondent thereafter filed the present Execution Application on June 13, 2023 stating the awarded dues aggregated to Rs. 817.76 Crores using the conversion rate prevailing as on **April 25, 2023** being the date when the enforcement of the Award was allowed.

6. The Respondent in the execution proceedings before this Court also filed Interim Application No. 3563 of 2023 seeking transfer of the monies maintained by the the Applicants towards and/or realisation of the outstanding amounts which are due and payable by the Applicants to the Respondent under the Final Award.

7. By an Order dated March 14, 2024, this Court, in Interim Application No. 3563 of 2023 directed the Ld. Prothonotary and Senior Master to issue warrants of attachment in respect of the bank accounts of the Applicants. On April 4, 2024 the Advocate for the Applicants submitted that an amount of Rs. 84,10,08,678/- be transferred to the account of the Respondent in part satisfaction of the award and after hearing the Counsel, this Court directed transfer of all amounts lying in the Applicant's Union Bank of India accounts to the Respondent's Bank Account in India.

8. The Applicants' Special Leave Petition challenging the Judgment dated April 25, 2023 in Arbitration Petition No. 833 of 2015 came to be dismissed by the Hon'ble Supreme Court on March 4, 2024.

9. The present Application filed by the Award-Debtor seeks conversion of the awarded dues denominated in foreign currency in the Foreign Award by applying exchange rate prevailing on the date of the claim being notified to the Company as provided in Clause 1.3.21 of the aforesaid Share Subscription Agreement between the parties which in the present case is **May 11, 2012.** It is submitted on behalf of the Award Debtor that the Award Holder has in the present Execution

Application converted the awarded dues using the exchange rate prevailing as on **April 25, 2023** being the date on which the High Court passed its judgment holding the Foreign Award to be enforceable against the Applicants.

10. The Respondent/Award Holder objects to the grant of any reliefs in the Application on the ground that Clause 1.3.21 of the Share Subscription Agreement is not applicable to the sum awarded under the Final Award as what has been awarded are damages in respect whereof there is no provision for conversion in the Share Subscription Agreement. Further it has been submitted that the issue regarding exchange rate has been unsuccessfully raised previously by the Applicants before this Court in enforcement proceedings and before the Apex Court in contempt proceedings as well as in the challenge to the Order of the High Court for enforcement of the Final Award and the same is a dilatory tactic. That in fact such a claim was not pressed by the Applicant before this Court in the enforcement proceedings.

11. The Respondent has submitted that as Clause 1.3.21 does not apply to the awarded sum, this Court ought to fix the exchange rate prevailing as on the date of the Final Award attaining finality, which

would in the present case be the date of the Final Judgment of the Hon'ble Supreme Court dismissing the challenge against the Order/Judgment holding the Award enforceable i.e. **March 4, 2024.**

12. In Rejoinder, the Applicants contend that no principle of estoppel can apply to the contention relating to currency conversion solely for the reason that the same has been previously not pressed during the enforcement proceedings. It is submitted on behalf of the Applicants that it remains the duty of the Executing Court to decide the date of currency conversion as per the law which in this case is stipulated in the Contract between the parties.

13. Mr. Gaurang Mehta, Learned Counsel appearing for the Applicants has submitted that it has always been the contention of the Applicants that the currency conversion of the awarded dues was required to be made in accordance with the contractual clause in the contract between the parties. Mr. Mehta, would emphasize that this contention of the Applicants is in accordance with the principle laid down by the Hon'ble Supreme Court in ***Forasol v. Oil and Natural Gas Commission***[1] and that only if there is absence of a contractual clause

1 AIR 1984 SC 241

that the Executing Court has to embark upon an inquiry as to which date ought to be selected for determining the conversion rate.

14. Mr. Mehta would submit that the issue of applicable date of currency conversion is a matter relating to execution, discharge and satisfaction of the Award requiring decision under Section 47 of the Civil Procedure Code, 1908 (CPC). That all issues and matter which remained to be decided in the enforcement proceedings have to be decided by the Executing Court in the execution proceedings. The Learned Counsel would rely upon the decision of the Supreme Court in ***Furest Day Lawson Ltd. V. Jindal Exports Ltd***[2] to contend that once the Court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same, and in the present case deciding the currency conversion rate in accordance with the Agreement is such a step.

15. Mr.Mehta submits that clause 1.3.21 of the Share Subscription Agreement provides for applying the exchange rate for conversion into INR as on the date on which the claim relating to breach of warranty or in respect of losses which is expressed in a currency other than INR is

2 AIR 2001 SC 2293

notified to the Company. Learned Counsel submits that by the Respondent's letter dated **May 11, 2022** invoking arbitration, the Respondent notified its claims against the Applicants citing *inter alia* breach of warranties and undertaking and representations on the part of the Applicants and asserted that on account of the same, the Respondent suffered losses and damages and invoked indemnity under the Share Subscription Agreement.

16. Mr Mehta further submits that these very claims notified by the Respondent on May 11, 2022 came to be granted by the Arbitral Tribunal by way of the Foreign Award under execution. The Learned Counsel submits that the Foreign Award held that the Applicants were guilty of fraudulent misrepresentation, tort for deceit, breach of warranty and held the Applicants bound and liable to indemnify the Respondent for the loss to its investment of USD 60 Million and against all these claims made by the Respondent awarded a sum of USD 60 Million as damages and held the Applicants No. 2 to 4 jointly and severally liable to indemnify the Respondent in accordance with clause 11 of the Share Subscription Agreement.

17. Mr. Mehta refers to the Foreign Award particularly the issues framed in paragraph no. 4.8, paragraph 17.4, 17.5 and Paragraph 21.1 to 21.21 of the Foreign Award to submit that from a perusal of the same it is evident that what was awarded to the Respondent, were the very claims which were notified to the Applicant and referred to Arbitration by way of Letter dated **May 11, 2022** and since such claims were made in US Dollars (USD) the same were required to be translated or converted into INR in accordance with clause 1.3.21 of the Share Subscription Agreement. The Learned Counsel would urge that the awarded amounts represent damages for breach of warranty and losses suffered by the Respondent which are clearly within the scope of clause 1.3.21 of the Share Subscription Agreement read with clause 11.1 of the Share Subscription Agreement.

18. It is therefore submitted that the reliefs as sought for in this application be granted.

19. On the other hand Mr. Rohan Rajadhyaksha, Learned Counsel for the Respondent has opposed the Application.

20. At the outset, Mr. Rajadhyaksha contends that the Applicants have already raised the same ground in the enforcement proceedings before this Court and in the Contempt Proceedings and the challenge to the enforcement before the Hon'ble Supreme Court, but did not press the said contention at any time before any of the Courts and are therefore barred from raising the said issue again before this Court in execution proceedings. To buttress his contention that if a party raises a contention in the pleadings but does not press the same during the arguments, then the same is deemed to have been waived/given up by the said party, Mr. Rajadhyaksha would place reliance on the following judgments:

(i) *Chhotabhai Jethabhai Patel and Company v. Karimkhan*[3]

(ii) *Mohd. Akram Ansari v. Chief Election Officer*[4]

21. Mr. Rajadhyaksha further submits that clause 1.3.21 of the Share Subscription Agreement applies only in case of claims for breach of warranties or Losses, and the Respondent's claims before the SIAC were in alternate to each other, namely:

(i) Damages for misrepresentation being USD 60 Million;

(ii) Damages for breach of warranty being USD 60 Million;

3 (1995)SCC OnLine Bom 64
4 (2008) 2 SCC 95

(iii) Indemnification by Applicant Nos. 2 to 4 for losses caused to the Award Holder.

22. The Learned Counsel submits that the issues arising out of the aforesaid claims of fraudulent misrepresentation and breach of warranty were framed and dealt with by the Arbitral Tribunal separately. Mr. Rajadhyaksha emphasizes that the Final Award awarded damages of USD 60 Million only with respect to the claim of fraudulent misrepresentation and the claim in tort for deceit and the claims for fraudulent misrepresentation and breach of warranty were independent and separate and therefore, Clause 1.3.21 of the Share Subscription Agreement is not applicable. Learned Counsel further submit that in any event, the said clause is not applicable to the legal costs and costs of Arbitration awarded in the Final Award.

23. Mr. Rajadhyaksha would submit that the Final Award has attained finality and the same is silent on the applicable rate of conversion from foreign currency to INR and it would be impermissible for this Court to go behind the decree in execution proceedings and interpret Clause 1.3.21 in the manner contended by the Applicants.

24. Mr. Rajadyaksha further referred to the judgment of the Supreme Court in the case of ***DLF Ltd. v Koncar Generators & Motors Ltd***[5]*.,* to contend that in the said case, Supreme Court has following the principle in *Forasol v. Oil Natural Gas Commission (supra)* held that, the date when the Arbitral award becomes enforceable shall be the date for conversion and this date is when the objections against the award are dismissed, and the award attains finality. This was submitted to buttress the contention that in the present case, as the Special Leave Petition filed challenging the Order of the High Court has been dismissed by the Apex Court on **March 4, 2024**, this date should be the appropriate date for calculating the rate of foreign exchange applicable to the Final Award and not May 11, 2012 as claimed by the Applicants.

25. Mr. Rajadhyaksha concluded by submitting that this Application is yet another dilatory tactic of the Applicants to protract the litigation and it would not only be grossly inequitable and unjust to the Respondent but would also amount to rewarding the Applicants' *ex facie* dishonest conduct if, in the year 2024, the date for calculating the foreign exchange applicable to the Final Award is taken to be May 11, 2012.

5 2024 SCC OnLine SC 1907

26. I have heard the Learned Counsel at length and also considered the rival contentions. The hearing of this Application was concluded on 16th October, 2024 and the order was reserved with liberty to the Counsel to place on record written submissions within a period of two weeks upon reopening after the break. Written submissions on behalf of the Applicant has been filed on 26th November, 2024 and on behalf of Respondent on 22nd November, 2024.

27. It is not in dispute that the Foreign Award dated September 21, 2014 has attained finality and is enforceable against the Applicants.

28. The Final Award dated September 21, 2014 was passed in favour of the Respondent and awarded the Respondent the following sum:

(a) USD 60 Million as damages and ordered the Applicants jointly and severally to pay such sum to the Award Holder.

(b) Interest on the sum of USD 60 Million from 6th May 2011 to the date of Award @4.25% per annum,

(c) Legal and other costs of the Claimant amounting to USD 1.652,890.14

(d) Costs of the Arbitration in total sum of SGD 827615.67.

29. The Respondent in the enforcement proceedings of the Final Award before this Court sought the following reliefs:-

> *(a) That this Hon'ble Court be pleased to enforce Arbitration Award in SIAC Arbitration No. 088 of 2012 dated September 21, 2024 as a decree of this Court;*
>
> *(b) ….*
>
> *(c) That this Hon'ble Court be pleased to pass an order appointing a Receiver of this Hon'ble Court, for the properties/assets as detailed in paragraph 15 above and further assets/properties disclosed by the Respondents in terms of prayer (b) above to the extent of approximately INR 4475624058 with all powers under Order 40 Rule 1 of the Civil Procedure Code, 1908 including the power to take possession and sell such properties/assets and deposit the sale proceeds in this Hon'ble Court/make payment of the sale proceeds to the Petitioner as per directions of this Hon'ble Court.*

30. That the conversion of the awarded amount under Final Award in the enforcement petition at prayer clause (c) was stated as on the date of institution of the enforcement proceedings which was **April 13, 2015**. The Learned Counsel for the Respondent has fairly submitted that the same was only for the convenience of this Court and to aid this Court in appointing receiver for the assets of the Applicants and has no other relevance.

31. Under the enforcement proceedings only prayer clause (a) as under was granted:

> *(a) That this Hon'ble Court be pleased to enforce Arbitration Award in SIAC Arbitration No. 088 of 2012 dated September 21, 2024 as a decree of this Court;*

The Order dated April 25, 2023 did not provide for any rate of conversion or amounts in INR.

32. The aforesaid Order the was assailed by the Applicants before the Supreme Court in SLP No.5741-5742 of 2024 which came to be dismissed on **March 4, 2024.**

33. In the meantime, as noted above, on June 13, 2023 the Respondent filed the Execution Application contending that the awarded dues aggregated to Rs. 817.76 Crores using the currency conversion rate prevailing as on **April 25, 2023** being the date the enforcement of the Foreign Award was allowed by this Court.

34. It is now before this Court that in this Application of the Applicants Respondent has raised a contention that as the Final Award has attained the finality on **March 4, 2024** the conversion rate on this date should be considered for conversion of the awarded dues.

35. Before examining the contentions of the parties, it would be apposite to refer to the position of law and the guiding principles, when execution is sought of an Arbitral Award where the awarded sum is expressed in a foreign currency.

36. In the case of *Forasol v. Oil and Natural Gas Commission (supra),* the Apex Court has held that execution can only be issued for the Rupee Equivalent specified in the decree, appellate decree or final order as the case may be. The Apex Court has also held that, Arbitrators should provide for the rate of exchange at which the sum is awarded in a foreign currency. The Supreme Court has held that if the decree is silent with regard to the conversion of the foreign currency into Indian Rupees the Court in order to give true effect to the Award, the Executing Court has to first rely on the contractual clause between the parties if any and thereafter follow the methodology laid down there under. In the case of *Forasol v. Oil and Natural Gas Commission (supra),* the contract provided for rate of exchange from Franc to Rupee, which the Court held as applied only to the 20% of the fees and charges based on the contractual interpretation. For the remaining 80% the contract nor the arbitral award provided the exchange rate, and therefore the Court determined the appropriate date for conversion of

the awarded sum which was not in Indian Currency. The relevant Para 53 of the Judgment is quoted as under:

> *"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 judgement, 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 judgement."*

37. The law laid down in *Forasol v. Oil and Natural Gas Commission (supra)* was subsequently affirmed by the Supreme Court 3-Judge bench in ***Renusagar Power Co. Ltd. V. General Electric Co***[6]. In the case of *Renusagar Power Co. Ltd. V. General Electric Co. (supra),* a foreign arbitral award in favour of an American company, was passed where the awarded sum was expressed in US dollars. The enforcement of the foreign award was allowed by the Single Judge and the Division Bench of this Court and Renusagar's objections against the enforcement were dismissed. The matter was thereafter challenged before the Hon'ble Supreme Court. During the pendency of the appeal, the Hon'ble Supreme Court stayed the operation of the High Court Order subject to deposit of one-half of the decretal amount calculated as on the date of the order. General Electric was permitted to withdraw the deposited

6 AIR 1994 SCC 860

amount by furnishing security by way of a bank guarantee for withdrawal of amount above 4 crores. Pursuant to this Order, Renusagar on 20.03.1990 deposited a sum of Rs. 9.69 crores which was withdrawn by the Respondent. In the subsequent order the Apex Court directed further deposit of Rs. 1 crore and a bank guarantee of Rs. 1.92 crore to be furnished by Renusagar. This deposit was made on 3rd December 1990 which was also withdrawn. The Apex Court while deciding the question of the conversion of the amount in Indian Rupees adjusted the amounts deposited during the pendency of the proceedings and against the security by converting them to US dollars as on the date of their being deposited, and applied the date of its own judgment only for converting the remaining portion of the award in accordance with the judgment of *Forasol v. Oil and Natural Gas Commission (supra)* ruling that the date of decree or judgment, after exhausting all remedies is the proper date.

38. No doubt, the purpose of Execution proceedings is to enforce the Award and the Executing Court cannot modify or alter the Award or even go behind or beyond it. The Executing Court while executing the decree is only concerned with the execution part of it and nothing else. But the difficulty arises when there is ambiguity in the Award to be

executed with regard to material aspects. Then it becomes the bounden duty of the court to interpret the decree in the process of giving a true effect to the decree.[7] At this juncture, the executing court has to be cautious of the fact that it cannot draw a new decree, and a fine balance has to be struck between the two while exercising this jurisdiction in the process of giving effect to the Award.

39. In light of the ratio laid down by the Apex Court in *Forasol v. Oil and Natural Gas Commission (supra)* and *Renusagar Power Co. Ltd. V. General Electric Co. (supra)* as the said Foreign Award is silent with regard to the date of conversion of foreign currency into Indian Rupees, the first procedure to be adopted by the Court is to decide the same in accordance with the terms of the contract; if such a clause is not available in the contract then the Court has to determine the best possible date as per the procedure laid down in the said Judgment.

40. This Court is thus under a duty to merely assess the nature of the claim as recognized by the Arbitral Tribunal and to determine the applicability of the clause 1.3.21 of the Share Subscription Agreement particularly in relation to the currency conversion of the awarded sum.

7 Meenakshi Saxena v. ECGC Ltd. AIR 2019 SC (Civil) 578

As per the principles laid down by the Supreme Court in *Forasol v. Oil and Natural Gas Commission (supra)* such an exercise is permissible and within the scope of the executing court.

41. For the purpose of the present case, the relevant clause of the said Share Subscription Agreement are quoted herein below:

> *"1.DEFINITIONS AND INTERPRETATION*
> *1.1. Definitions ……*
> *1.2. Other Definitions ……*
> *1.3 Interpretations*
> *In this Agreement (unless the context requires otherwise)..*
> *1.3.1 …*
> *1.3.21 Any monetary sum relating to a claim for breach of Warranty or in respect of Losses which is expressed in a currency other than INR shall be translated into INR at the closing mid-point INR spot rate quoted by HSBC Bank Holdings PIC at the close of business in Hong Kong on the date such claim is notified to the Company.*
>
> *11. INDEMNIFICATION*
> *11.1 Right of Indemnification*
> *Each of the Promoters hereby, jointly and severally agree to Indemnify and hold harmless each of the Investor, its officers, directors, employees, agents, Affiliates, and/or Representatives, promptly upon demand at any time and from time to time, from and against any and all losses, claims, damages, liabilities, costs (including reasonable attorney fees and disbursements) and expenses to which the investor and/or its Affiliates may become subject (collectively "Losses"), insofar as such Losses arise out of, in any way relate to, result from: (i.) any misrepresentation or any breach of any Warranty(ies); or (ii.) a breach of any covenant,*

*obligation, undertaking, by the Promoters or the Company under this Agreement; or (iii) any claim or proceeding by any third party against the Company arising out of any breach of the terms of this Agreement by the Promoters. For this purpose, it is clarified that any losses, claims, damages, liabilities, costs (including reasonable attorneys' fees and disbursements) and expenses which are borne by the Company shall be deemed to have been incurred by the investor in the proportion that the Pro Rata Share of the Investor bears to all Equity Securities of the Company calculated on a Fully Diluted Basis."*

*(emphasis supplied)*

42. The Respondent vide their Notice to Arbitration dated **May 11, 2012** alleged that the Applicants No. 2 to 4 are in breach of warranties and undertakings in clause 6 of the Share Subscription Agreement and the Warranties in clauses 7, 8, 10, 11 and 16 of the Schedule 3 of the Share Subscription Agreement and have made false representations to the Respondent, where the Applicants did not have and could not have had reasonable grounds for believing their truth. Upon consideration of the Notice to Arbitration, it is evident that significant emphasis was placed on the warranties provided under the Share Subscription Agreement and the Respondent's corresponding claims for damages arising from the alleged breach of warranties. It is not in dispute that the date of May 11, 2012 is the date of the notification of the claim.

43. It is the case of the Respondent that the said clause is not applicable to the Final Awarded sum as the same is not for breach of warranty. However, in this context, it would also be appropriate to refer to the the Arbitral Award. The Arbitral Tribunal, in its award has framed the issues as follows:

> *"1. Have any of the Respondents made Representation and/or Warranties to the Claimant before the Claimant's investment in Avitel India and if so, what were these representation and/or warranties?*
>
> *2. If so, did the Respondents make the Representations and/or Warranties in Order to induce the Claimant to invest in Avitel India?*
>
> *3. If so, was the Claimant so induced and did it rely on the Respondents' Representations and Warranties?*
>
> *4. If so, were any of these Representation and/or warranties untrue?*
>
> *5. If so, have any of the Respondents made such Representation and/or Warranties knowing that these were false and/or without belief in their truth, or recklessly and without caring whether these representations and or warranties were true or false?*
>
> *6. If so, are any of the Respondents liable to the Claimant in tort for deceit?*
>
> *7. If so, are any of the Respondents liable to the Claimant for fraudulent misrepresentation pursuant to the relevant provisions of the Contract Act?*
>
> *8. If so, is the Claimant entitled to claim damages for fraudulent misrepresentation pursuant to the relevant provisions of the Contract Act?*

*9. If so, are any of these Respondents liable to the Claimant for breach of warranty?*

*10. If so, are any of the Respondents to indemnify the Claimant in respect of any of the Claimant's Claims?*

*11. If the Claimant is entitled to claim damages, what is the amount of damages the Claimant is entitled to?*

*12. Is the Claimant entitled to interest and if so, at what rate?*

*13. Is the Claimant entitled to the reliefs sought?*

*14. Costs."*

44. The relevant portion of the Arbitral Award, wherein the Tribunal has decided the aforesaid issues is reproduced as hereunder:

*"13.7 In light of the Tribunal's findings in respect of Issues 1,2,3,4, and 5 above the Tribunal accepts the Claimant's submission and finds that the Respondents have breached the warranties contained in Clauses 6.1 and 6.2 of the SSA and of Clauses 7.1, 7.3, 7.5, 8, 10 and 11 of Schedule 3 to the SSA and are accordingly jointly and severally liable for such breaches.*

*15.9. The Tribunal accordingly accepts the Claimant's submission and finds that in respect to its claim for fraudulent misrepresentation as well as in tort for deceit, the Claimant is entitled to damages representing the return of the Claimant's investment sum of USD 60 Million.*

*15.20. In respect of the Claimant's claim for breach of warranty, the Tribunal accepts Mr. Roger T. Best's evidence and finds that the Claimant's loss on account of breach of the contractual warranties by the Respondents to also equal USD 60 million.*

*19.4 In the Tribunal's view, the Claimant in seeking in essence*

*a return of its investment, it follows that in the event the Tribunal makes orders amounting in effect to a return of the Claimant's Investment, that the Claimant ought not to be able in addition to retain its shares in Avitel India.*

*21.7 Finds that the Respondents are jointly and severally liable to the Claimant in tort for deceit;*

*21.8 Finds that the Respondents are jointly and severally liable to the Claimant for fraudulent misrepresentation under the Contract Act;*

*21.9 Finds that the Respondents are jointly and severally liable to the Claimant for breach of warranty;*

*21.11 Finds that the Claimant in respect of its claim for fraudulent misrepresentation and its claim in tort for deceit is entitled to damages in the total amount of USD 60 million.*

*21.15 Awards to the Claimant and Orders the Respondents to pay damages in the amount of USD 60 million in respect of which award the First, Second, Third and Fourth Respondents are jointly and severally liable;"*

45. In the light of the above, Mr. Rajadyaksha's submissions that the amount awarded under the Award is specifically for damages in tort for deceit, and not for breach of warranties- and therefore not covered by the Clause 1.3.21 is in my view, not a tenable argument. The award shows that the Tribunal has held that the Applicants are liable for breach of contractual warranties and has further directed them to indemnify the Claimant for the loss of its investment. The findings and reasoning of the Tribunal are interwoven with the claims for fraudulent

misrepresentation, tort for deceit, breach of warranty and indemnity which have arisen from the cumulative effect of Applicant's breaches, including their failure to uphold contractual warranties. In the present case, the damages awarded under the Arbitral Award cannot be artificially compartmentalized thereby excluding them from the ambit of the Share Subscription Agreement. I, therefore, find substance in the argument of Mr. Mehta, that the claim, liability and relief granted under the Arbitral Award are fundamentally tied to the Applicants breach of warranty and their resulting obligation to indemnify the Respondent as per the Share Subscription Agreement.

46. From a reading of the Award as a whole, without undertaking a piecemeal approach as suggested by the Respondent herein, it is clear from paragraph 13.7 of the Arbitral Award that the sum awarded by the Tribunal is substantially attributable to breach of warranties under the Share Subscription Agreement, and consequently, the question regarding the date of conversion of the awarded sum would be covered under clause 1.3.21 of the Share Subscription Agreement. Even otherwise from a plain reading of clause 1.3 of the Share Subscription Agreement on Interpretations, which contains sub-clause 1.3.21 in its very opening clearly mentions, "In this Agreement *(unless the context*

*requires otherwise)".* Therefore, it is clear that only if the context otherwise requires or provides any monetary sum relating to claim for breach of warranty or in respect of losses which is expressed in a currency other than INR shall be translated into INR at the closing mid-point INR spot rate quoted by HSBC Bank Holdings PIC at the close of business in Hong Kong on the date such claim is notified to the Company. In any event no other provision for conversion has been set out in the entire agreement for the amounts awarded except under clause 1.3.21. In my view a reading of the Interpretation clause clearly provides for conversions of all amounts in foreign currency awarded pursuant to the Share Subscription Agreement, irrespective of their description.

47. It is very clear from the above that this Court will have to rely upon the terms of the Share Subscription Agreement particularly clause 1.3.21 for the purpose of deciding the question regarding the conversion, and only in the absence of the same, the Court would have to follow the procedure laid down under *Forasol v. Oil and Natural Gas Commission (supra).* As the clause 1.3.21 provides that any monetary sum relating to a claim for breach of Warranty or in respect of Losses which is expressed in a currency other than INR shall be translated into

INR at the closing mid-point INR spot rate quoted by HSBC Bank Holdings PIC at the close of business in Hong Kong on the date such claim is notified to the Company, date of conversion will have to be as per the date of the notice of invocation of the Arbitration which is May 11, 2012.

48. The Judgment of *DLF v. Koncar Generators & Motors Ltd. (supra)* and the Judgment of the Delhi High Court in ***Progetto Grano v. Shri Lala Mahal Limited***[8]*,* relied upon by the Respondent has considered the principle in *Forasol v. Oil and Natural Gas Commission (supra)* but due to the peculiar facts of those cases, held the date of the conversion to be date when the Award has attained finality. In both the cases, there was no discussion by the Courts of whether the Agreement provided for the date of conversion of claims from foreign currency to Indian Rupee. However, in this case, the Share Subscription Agreement between the parties is not silent for determining the date for conversion of claims, and clearly mentions that the date for conversion of the claim would be the date when such claims have been notified to the company. Therefore, the aforesaid two decisions are distinguishable on facts.

8 SCC OnLine Del 3348

49. Ergo, I do not think the Respondent has made out a case for defeating the clear provision in clause 1.3.21 of the Share Subscription Agreement and instead to apply the date of conversion when the award has attained finality. Once the contract between the parties clearly provides for conversion into Indian Currency INR, then the same would apply to the amounts awarded and there would be no necessity of determining or finding out any date of conversion of when the Award attains finality.

50. Even if we are to consider the argument on behalf of Mr.Rajadhyaksha, that as the Applicants have waived the submissions during the enforcement proceedings of the Award, the Executing Court is under a duty to give effect to the Award and has to take steps accordingly. Mr. Rajadhyakasha's reliance upon the decisions of *Chhotabhai Jethabhai Patel and Company v. Karimkhan (supra) and Mohd. Akram Ansari v. Chief Election Officer (supra)* does not seem to advance his case, as the said judgments were rendered in different factual situations. In the case of *Chhotabhai Jethabhai Patel and Company v. Karimkhan (supra)* this Court under its Writ Jurisdiction was deciding the challenge to a judgment of the Appellate Labour Authority. In the case of *Mohd. Akram Ansari v. Chief Election Officer*

*(supra)* the challenge was to two judgments of the Delhi High Court in Election Petitions. It is trite that in a challenge to legality and correctness of an Order, pleas not pressed during the appellate stage cannot be permitted to be raised at a later stage. However, in the present case which arises in the context of execution of the Final Award, such principle has no application. This Court is not sitting in appeal over the Arbitral Award. The aforesaid arguments of the Respondent cannot be countenanced and there is no question of waiver, as it is the duty of the Executing Court to consider the question of date and currency rate of conversion.

51. In view of the above discussion, I am of the opinion that the awarded dues denominated in foreign currency in the Foreign award be converted into Indian Rupees by exchange rate prevailing as on **May 11, 2012** being the date when the said claim has been notified to the Company as stipulated in the Share Subscription Agreement dated April 21, 2011.

52. In view of what has been held as above, it would not be necessary to deal with the other arguments made on behalf of the parties.

53. In the aforesaid cases of *Renusagar Power Co. Ltd. V. General Electric Co. (supra)* and *DLF Ltd. v Koncar Generators & Motors Ltd (supra) it* has been held that the date when the award debtor deposited an amount before the Court during the pendency of the objections and the award holder is permitted to withdraw the same, this deposited amount must be converted as on the date of the deposit, and after conversion of the deposited amount, it must be adjusted against the remaining amount of principal and interest pending under the arbitral award, and this remaining amount must be converted on the date when the award becomes enforceable i.e. when the objections against it are finally decided. However, the Court arrived at this principle for amounts which required to be converted for which no exchange rate was provided in the contract or the Arbitral Award. In the present case, since the exchange rate has clearly been provided in the Share Subscription Agreement, although an amount of Rs. 84,10,08,678/- has been transferred by the Applicants to the Respondent during pendency of the execution, I am of the view that since the exchange rate of the awarded sum is governed by the contractual terms between the parties, the Awarded Sum in total will have to be converted as per the contractual terms and there need not be any further bifurcation or determination of a different date of conversion for the sum already

deposited with the Court. Accordingly the amount of Rs. 84,10,08,678/- paid during the pendency of the Execution Application will have to be adjusted against the sum total of the awarded sum converted as per the conversion rate determined as prevailing on May 11, 2012.

54. The Interim Application is allowed in terms of prayer clause (a) which reads thus:

> *"(a) That this Hon'ble Court be pleased to Order, declare and direct :*
>
> *(i) that the awarded dues denominated in foreign currency in the Foreign Award [being subject matter of the above Execution Application [Ldg.] No.15723 of 2023] requires to be converted into Indian Rupees by applying the exchange rate prevailing as on 11th May, 2012 being the date of notification of claim by way of the Award Holder's Advocates' letter dated 11th May, 2012 [being Exhibit "A" hereto], and*
>
> *(ii) that it is only the amounts in Indian Rupees arrived in accordance with (i) above that can be claimed by the Award Holder in execution proceedings by way of Execution Application."*

55. The Interim Application accordingly stands disposed as above.

56. The Execution of the Award to proceed as per law.

(ABHAY AHUJA, J.)

57. After pronouncement of the order, Mr. Ayush Chaddha, learned Counsel appearing for the Award Holder seeks a stay on the order.

58. Mr. Gaurang Mehta, learned Counsel appearing for the Applicant opposes the same.

59. In view of what has been held by this Court in the order, the request for stay is rejected.

(ABHAY AHUJA, J.)